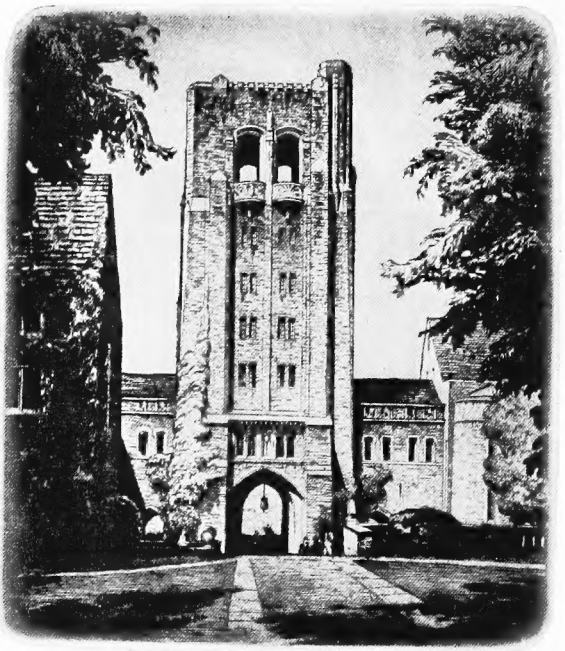
KF
2375
W58



Cornell Law School Library

Cornell University Library
KF 2375.W58
v.1
The law of personal injuries on railroad
3 1924 019 373 533
law



The original of this book is in
the Cornell University Library.

There are no known copyright restrictions in
the United States on the use of the text.

http://www.archive.org/details/cu31924019373533

THE LAW

OF

PERSONAL INJURIES ON RAILROADS

BY

EDW. J. WHITE

AUTHOR OF "MINES AND MINING REMEDIES," "PERSONAL INJURIES IN MINES," EDITOR THIRD EDITION "TIEDEMAN ON REAL PROPERTY," ETC.

IN TWO VOLUMES

VOL. I. INJURIES TO EMPLOYEES

VOL. II. INJURIES TO PASSENGERS, LICENSEES AND TRESPASSERS

VOL. I.

PUBLISHED BY
THE F. H. THOMAS LAW BOOK CO.
ST. LOUIS, MO.

INJURIES TO EMPLOYEES.

PREFACE.

The attitude of those attempting the application of the principles of the law to the abstract propositions dealt with in a text book, is entirely different from that occupied by the members of the profession, called upon, in concrete cases, to apply the precedents upon the live issues, to sustain or reject the rights of a litigant.

In the one case, the consideration of the subject lacks the suggestion which the facts of every concrete case present, and general discussions are alone attempted, because of the absence of the impetus, prompting the investigation of more minute details. In the other instance, the facts of a given case may present totally different issues from those generally considered — as it is a well-known fact that the circumstances and conditions going to make up the history of a law suit, like the physiognomy of individuals, are rarely the same — but the importance of considering all the precedents at hand, on every issue, in a law suit, results in an exhaustive consideration of propositions, perhaps never before adjudicated, in the same way that they are presented to the lawyer.

This circumstance, in some measure, accounts for the fact that practitioners, in referring to text books, often fail to find the exhaustive presentations, in every instance, of the legal proposition and precedents that happen to be of absorbing interest in a given case.

But were the labors of the collaborator of abstract rules and those of the practitioner more identical, time and space would forbid the same exhaustive treatment of the propositions of a given section, in a modern law book, that should be set forth in a lawyer's brief. This furnishes some excuse for what frequently may be thought too cursory examinations of important subjects in text books.

It was attempted to treat the subjects of the following pages in a way to make them useful to the practitioner.

It is hoped that a limited practice in the subject of per-

sonal injury cases on railroads may have assisted in giving some utility, from a practical standpoint, to this labor.

A discussion of the whole subject of personal injuries on railroads is attempted in the two volumes, the first treating of personal injuries to all character of railroad employees, arising from the use of the different appliances and received in the various phases of the service, while the second volume discusses personal injuries received on railroads, by all others, included within the terms, passengers, licensees and trespassers.

A reference to the table of contents will give the chapter and section headings of the two volumes and the index will be found sufficient to furnish a ready reference to the different subjects of sections and footnotes.

In the preparation of these volumes, Labatt, on Master & Servant; Bailey, on Master's Liability for Injuries to the Servant; Buswell, on Personal Injuries; Watson's Damages for Personal Injuries; Black's Accident Law; Patterson's Railway Accident Law; Dresser, on Employer's Liability; Elliott, on Railroads; Hutchinson, on Carriers, and Thompson, on Negligence, have all been freely consulted.

Reference in the notes in all cases cited, will be found, to the National Reporter System; The American and English Railway Cases; the Lawyers' Reports Annotated; the American State Reports; American Negligence Reports and American Railway Reports, all of which have been found most useful in the collection of the data used in both the text and notes. To all these authors and the Publishers of these reports, due acknowledgment is made.

The profession has the sincere appreciation of the author for the courteous manner in which it has received his other efforts and he trusts there may be found sufficient of merit in the present work, to justify the labor that it represents, when judged by its utility to the Bar.

THE AUTHOR.

AURORA, MO., 1909.

TABLE OF CONTENTS

VOLUME I.

INJURIES TO EMPLOYEES.

CHAPTER I.

GENERAL CONSIDERATIONS IN ACTIONS FOR PERSONAL INJURIES.

§ 1. Actions founded on negligence.
2. Duty owing plaintiff must be violated.
3. Rule the same, whether action by employee or third party.
4. Essentials of actionable negligence, further considered.
5. May arise from omission of duty, or commission of wrongful act.
6. When duty is imposed by statute.
7. Liability not affected by public character of business.
8. Legal status of railroad company.
9. Company must be sued in proper name.
10. Care required in general.
11. How affected by character and rise of business.
12. Ordinary care alone required of railroad companies.
13. Due care, reasonable care, and ordinary care, explained.
14. Willfulness, wantonness and recklessness.
15. Degrees of negligence.
16. Action may be based upon contract.
17. Remedies in contract and tort concurrent.
18. Authorities announcing a contrary doctrine.
19. Violated right and injury both essential.

CHAPTER II.

PROXIMATE CAUSE OF INJURY.

§ 20. Defendant's negligence must be proximate cause of injury.
21. Immediate cause alone considered.
22. Wrongful act must be the "efficient cause" of injury.
23. Tests for determining proximate cause.
24. Nearness of causation, not time, the controlling factor.

§ 25. Efficient intervening cause.
26. Negligent act concurring to produce injury.
27. Wrong need not directly cause injury.
28. Where injury or cause ought to be anticipated.
29. Aggravation of injury, without fault of defendant.
30. Injury in trying to avoid perilous position.
31. Instructions on proximate cause of injury.
32. No liability for injury from act of God.
33. No responsibility for injury due to inevitable accident.
34. Injuries from natural agencies.
35. No liability, if public enemy cause injury.
36. When question of law for court.
37. When a question of fact for the jury.
38. Injuries, where negligence was proximate cause.
39. Cases, where negligence held remote cause.

CHAPTER III.

JURISDICTION OF ACTION.

LAW OF PLACE.

§ 40. Actions both local and transitory.
41. When action existed at common law.
42. Statutory actions for death strictly construed.
43. Law of place of accident controls damages.
44. Death of foreigner — Administrator may sue for.
45. For injury or death in foreign State.
46. Negligence and injury in different States.
47. When remedy exists in either of two States.
48. Same — Statutes need not be identical.
49. Death statutes given no extraterritorial effect.
50. When statute given extraterritorial effect.
51. Subsequent repeal of statute does not effect.
52. Penal and compensatory statutes distinguished.
53. Pleading law of foreign State.
54. Proving statute of foreign State.
55. Special limitations applicable to such actions.

CHAPTER IV.

PARTIES TO ACTIONS FOR DEATH.

§ 56. Only those named by statute can sue.
57. Must have been right of recovery in deceased.

§ 58. Action by or for the widow of the deceased.
59. Same — Compromise or settlement with widow.
60. Same — Marriage, divorce or adultery of the widow.
61. Action by husband of deceased.
62. Action by father of deceased.
63. Recovery of penalty not affected by emancipation of child.
64. Suit by the mother of decedent.
65. Action by children and grandchildren.
66. Right of posthumous child to sue for death of parent.
67. Actions by brothers or sisters of decedent.
68. Action prosecuted by "heirs at law, or next of kin."
69. Actions by personal representatives or administrator.
70. Those dependent for support upon decedent.
71. Actions by nonresidents.

CHAPTER V.

EVIDENCE IN RAILWAY ACCIDENT CASES.

§ 72. Scope of chapter.
73. Injury must result from negligent act.
74. What presumptions are indulged in in such actions.
75. Rule of evidence — Conflict of laws.
76. When negligence of defendant presumed.
77. Defendant's ownership or control must be shown.
78. Relation of employer and employee must be shown.
79. Defendant's notice of defects must be shown.
80. Plaintiff's ignorance of the danger.
81. Reasonable safety of place or appliance sufficient.
82. Defective roadbed and track.
83. Same — Condition of track at other places.
84. Evidence of defective hand-holds.
85. Knowledge of incompetency of employees must be shown.
86. Evidence of employee's reputation for care.
87. Burden of establishing vice-principalship.
88. Ordinances as evidence of negligence.
89. Proving assumed risk and contributory negligence.
90. Enforcement and reasonableness of rules.
91. What declarations admissible as part of *res gestæ*.
92. Displaying injured member to jury.
93. Physical examination of plaintiff — When ordered.
94. Evidence of subsequent repairs inadmissible.
95. Prior or subsequent negligent acts or conditions.
96. Photographs of place or appliance.

§ 97. Evidence of prior accidents incompetent.
98. Expert testimony — What is.
99. Customs and opinions as to relative methods.
100. Opinions of medical experts as to permanency of injury.
101. When opinions based wholly on history of case.
102. Running of trains — Train sheets and time-tables as evidence of.
103. Reports of railway company's employees.
104. Speed of trains.
105. Mortality tables, competent when.
106. When negative evidence is admissible.
107. Evidence of settlement with other employees incompetent.
108. Evidence of employer's insurance incompetent.
109. Evidence must correspond with pleading.

CHAPTER VI.

DEMONSTRATIVE EVIDENCE OF NEGLIGENCE — RULE RES IPSA LOQUITUR.

§ 110. What is demonstrative evidence of negligence.
111. Need not be specially pleaded.
112. Pleading facts to bring case within rule.
113. Limitations of the doctrine.
114. Trespassers or licensees cannot invoke rule.
115. The rule applies to plaintiff's negligence.
116. Collisions between railroad trains.
117. Injuries to employees from collisions.
118. Rule cannot be invoked by employee, in federal court.
119. Rule can be invoked by employees in many State courts.
120. Does not apply to injuries to employees from collisions.
121. Injuries to passengers from street car collisions.
122. Displacement of cars or appliances.
123. Assaults on passengers by employees.
124. Injuries from sudden jerks or jolts.
125. Sudden starting of street car or other public conveyance.
126. Frightening horses by noise from engine.
127. Falling of machinery or other objects.
128. Injuries from caving banks or pits.
129. Injuries from nurses at hospital.

CHAPTER VII.

ISSUES FOR THE COURT ALONE.

§ 130. Scope of chapter.
131. Questions of law for the court.
132. Mixed questions of law and fact for court.
133. When there is total absence of negligence.
134. Court to decide whether duty owing or not.
135. Failure to prove negligence alleged.
136. Whether injury connected proximately with defendant's negligence.
137. Court should determine demurrer to evidence.
138. When undisputed evidence shows contributory negligence.
139. Injury due to neglect of coemployee.
140. Selecting more dangerous way to perform duty.
141. Jury cannot erect special standards for control of business.
142. When court should decide necessity for rule.
143. Reasonableness of rule a judicial determination.
144. Open, obvious risks assumed as matter of law.
145. When safety of place a question of law.
146. When competency of employee a question of law.
147. When injury from collision a question for the court.
148. Where evidence disputes physical facts.
149. Questions of variance for the court.

CHAPTER VIII.

JURY ISSUES IN RAILROAD ACCIDENTS.

§ 150. Should pass upon disputed issues of fact.
151. Weight of evidence determined by.
152. Question of defendant's negligence.
153. Specific issues in determining defendant's negligence.
154. Nature and cause of injury.
155. As to reasonable safety of appliances.
156. Reasonable safety of place.
157. When plaintiff's negligence a jury issue.
158. Whether injury due to negligence of vice-principal.
159. Capacity in which vice-principal acted.
160. Issue as to agent's competency.
161. Issues as to who are coemployees.
162. Assumption of risk jury issue, when.

§ 163. Promulgation and enforcement of rule.
164. Discretion in assessing damages.
165. Conclusiveness of verdict.

CHAPTER IX.

ELEMENTS AND COMPUTATION OF DAMAGES.

§ 166. Right to damages, generally.
167. Province of court and jury in assessing.
168. Duty to prevent or keep damages down.
169. Only damages proximately resulting are recoverable.
170. What damages are proximate.
171. Mental anguish alone not basis for damages.
172. When nominal and substantial damages recoverable.
173. Compensatory damages only allowed, when.
174. Elements included in compensatory damages.
175. Expenses resulting from injury.
176. Exemplary or punitive damages.
177. When exemplary damages are recoverable.
178. When punitive damages should not be allowed.
179. Pleading exemplary damages.
180. Evidence to establish exemplary damages.
181. Prospective damages for permanent injuries.
182. Permanent disability must be reasonably certain.
183. Damages for future pain and suffering.
184. Loss of earnings in the future.
185. Special damages must be specially pleaded.
186. Evidence of plaintiff's condition, circumstances and pursuit proper, when.
187. Evidence in mitigation of damages.
188. Damages for pecuniary loss to beneficiaries.
189. What evidence of pecuniary loss competent.
190. Necessity of dependence upon deceased, for support.
191. Competent to show habits, character and capacity of deceased.
192. Competency of mortality tables to show expectancy of life.
193. Ill health and habits competent in mitigation of damages.
194. Nothing allowed as a solatium.
195. Damages for death of parent.
196. Recovery for death of husband.
197. For death of wife.
198. For death of child.
199. Medical and funeral expenses.
200. Exemplary damages for death.

§ 201. When nominal damages only recovered for death.
202. Excessive damages in death actions.
203. Same — For death of father.
204. Same — Death of husband.
205. Same — For death of wife.
206. Same — For death of child.

CHAPTER X.

GENERALLY OF EMPLOYER AND EMPLOYEE, IN PERSONAL INJURY ACTIONS.

§ 207. Terms applicable to what class.
208. Pleading relationship of employer and employee.
209. Injury should result from acts of employees charged.
210. Person causing injury must be employee of company.
211. Who generally regarded as an employee.
212. When relation of employer and employee a jury question.
213. Generally, no liability for neglect or malpractice of physician or surgeon.
214. Same — The rule in the federal court.
215. Same — The rule in Florida.
216. The Indiana rule.
217. The law in Iowa.
218. No liability, in Kansas.
219. Rule the same in Maryland.
220. No liability, in Nebraska.
221. Tennessee rule the same.
222. Washington rule.
223. Status of volunteers and substituted employees.
224. Postal clerks and express messengers not employees.
225. News agents and others carried under contract.
226. Substituted employer — Train and crew controlled by another.
227. Injury must occur in course of employment.
228. When one deemed employee of two or more companies.
229. Different companies using same track or train.
230. Joint or several liability of companies jointly operating road.
231. Liability of connecting and joining roads.
232. Liability under joint-traffic arrangement.
233. Agent causing injury and company both liable.
234. Employer not liable when negligent employee discharged.
235. Lessor's liability for injuries to employees of lessee.
236. Mortgagor not liable for negligence of mortgagee.
237. Negligence of trustees for bondholders.

§ 238. Road operated by receiver.
239. Liability of reorganized company.
240. Liability of consolidated company.
241. Purchasing company not generally liable.
242. Holding companies liable for negligence of companies held.

CHAPTER XI.

THE VARIOUS DUTIES OF THE EMPLOYER.

§ 243. Created by law as incidents to relation.
244. Liability based upon breach of duty.
245. General duties of the employer.
246. None of these duties can be delegated.
247. Same — Protection of employees and charter powers.
248. Employer held to no greater degree of care than employee.
249. Reasonable and ordinary care alone required.
250. Jury cannot set up higher standard than that of ordinary use.
251. Employer not an insurer of his employees.
252. Reasonably safe machinery and appliances should be furnished.
253. Newest and safest appliances not essential.
254. Same — Engines and cars.
255. Same — Scaffolds, lights and ladders.
256. Injuries from hidden defects in appliances.
257. Must provide reasonably safe place.
258. Same — Railroad tracks, bridges and similar structures.
259. Injuries from defective bridges.
260. Obstructions on or near track.
261. Fit and competent employees must be employed.
262. Duty to employ a sufficient number of employees.
263. Duty to promulgate rules.
264. What railway duties require rules and what do not.
265. Effect of violation of rule by employee.
266. Duty of inspection.
267. Same — Hidden defects — Ordinary tools.
268. Inspection of foreign cars.
269. Warning to inexperienced employees.
270. Warnings of cars and tracks to be given, when.
271. Obligation to repair appliances.
272. Duty to provide a reasonably safe system.
273. Necessity for some system to prevent collisions.
274. Duty to protect employee from weather.
275. Duty as to employment of infants.

CHAPTER XII.

NEGLIGENCE OF INDEPENDENT CONTRACTORS.

§ 276. Who considered independent contractor.
277. Contractors distinguished from employees.
278. Owner not liable for negligence of contractor.
279. Acts of contractor's employees.
280. How existence of relation determined.
281. Franchise cannot be devolved upon contractor.
282. Where contractor performs nondelegable duty.
283. Railway company retaining control or supervision of work.
284. Where work is inherently dangerous.
285. Contract for performance of unlawful acts.
286. Where injury is caused by defective plans.
287. Acceptance of defective work by contractee.
288. Appliances furnished by railroad company.
289. Joint undertaking renders either party liable.
290. Status of contractor and subcontractor.
291. Tortious acts of contractor, generally.
292. Contract between construction company and railroad company.
293. Management of trains by construction company.
294. Injuries from frightening teams.
295. Injuries to passengers by independent contractor.
296. Injuries to travelers in streets.
297. Injuries to employees of contractor.
298. Negligence of railway surgeons.
299. Railroad hospital — Physicians company agents, when.
300. Contracts exempting railroad company from liability.

CHAPTER XIII.

INJURIES TO INFANT EMPLOYEES.

§ 301. How minority affects right of recovery.
302. Infant representing himself of age.
303. Employment in violation of parent's instruction.
304. Damages for death of infant.
305. Measure of parent's recovery for injury or death of.
306. Infant's recovery for death of parent.
307. Employment about dangerous machinery.

§ 308. When warning is required.
309. What warning sufficient.
310. What risks are assumed by infants.
311. Same — Risks beyond scope of employment.
312. Injuries from negligence of coemployees.
313. Contributory negligence of infants.
314. Releases by infant employees.

CHAPTER XIV.

RISKS ASSUMED BY EMPLOYEES.

§ 315. Basis of rule of assumption of risks.
316. Volunteers generally held to assume risks.
317. Dangers from employer's negligence assumed in some States.
318. Risks assumed by minors.
319. Risks from destructive natural sources assumed.
320. Where work changes the place.
321. Risks incident to employment are assumed.
322. Scope and extent of rule.
323. Illustrations of incidental risks assumed.
324. Injuries from low bridges, when assumed.
325. Injuries from properly constructed tracks, switches and cattle guards.
326. Risks from structures near track, assumed, when.
327. Risks from handling machinery, assumed, when.
328. Risks from movement of trains in company yards assumed.
329. Risks from excessive speed assumed, in some States.
330. Flying switch — Shunting cars.
331. Jerks from taking up slack assumed.
332. Risks from improperly loaded cars.
333. Collisions with cattle or teams.
334. Injuries from use of snow plows — Bucking snow.
335. Dangers in coupling cars.
336. Known and obvious risks.
337. Presumed to know what could be observed.
338. Risks from open defects in cars assumed, when.
339. Injuries from lifting cars, rails, etc., assumed.
340. Working after notice of defect and knowledge of danger.
341. Notice with dangers connected with place of work, assumed, when.
342. Dangers from open culverts assumed, when.
343. Notice of defects in machinery and appliances, assumed, when.
344. Employee with equal knowledge assumes risks.

§ 345. Extra risks assumed, when.
346. Extra risks from defective bridges, assumed, when.
347. Extra risks from operation of cars, assumed, when.
348. Extra dangers in use of defective cars, assumed, when.
349. Dangers outside scope of employment, assumed, when.
350. Dangers from obeying orders of coemployees, assumed, when.
351. Risks assumed, notwithstanding promise of repair.
352. Risks assumed by car and track repairers.
353. Various injuries due to caving earth banks assumed.
354. Risks from negligence of coemployees, assumed, at common law.
355. Additional risks from inclement weather assumed.
356. Obvious dangers from violation of statutes, assumed, in some States.
357. Risks of accidents are assumed.
358. Selecting more dangerous way.

CHAPTER XV.

RISKS NOT ASSUMED BY EMPLOYEES.

§ 359. Limitations and exceptions to rule.
360. Risks from negligence not assumed.
361. Injury in negligent collision not assumed.
362. Section man working in cut does not assume risks, when.
363. Injury to brakeman from wild engine, not assumed, when.
364. Injuries to brakemen and others, handling cars, not assumed, when.
365. Dangerous working place — Caving earth bank.
366. When risk of injury from low bridges not assumed.
367. Injury from defective track, not assumed, when.
368. Injuries from running into open switches.
369. Injuries from obstructions near track, not assumed, when.
370. Risks from defective cars, not assumed, when.
371. Risks from too great speed, not assumed.
372. Danger must be appreciated, before risk assumed.
373. Dangers not appreciated or understood, generally not assumed.
374. Injuries from latent, unknown defects, not generally assumed.
375. Risks not assumed after promise to repair, when.
376. Various risks not assumed, after promise to repair.
377. Extra risks not generally assumed.
378. Risks outside scope of employment, not generally assumed.
379. Dangers from orders of vice-principal not assumed.
380. Risks not assumed by car and track repairers.

§ 381. Risks of injuries due to incompetency of employees not assumed.
382. Statutes denying defense of assumed risk.
383. Statutes regulating defense of assumed risk.
384. Injuries from flying particles of brittle substances not assumed, when.
385. Federal statutes exempting employees of inter-state carriers from defense of assumed risks.
386. Statutes exempting employees from risks of negligence of coemployees.
387. Assumption of risk jury issue, when.

CHAPTER XVI.

CONTRIBUTORY NEGLIGENCE OF EMPLOYEES.

§ 388. Explanation of the defense.
389. Not confined to parties occupying special relations.
390. Mutual negligence bars recovery.
391. Reason for rule denying recovery in such case.
392. Limits and exceptions to the rule.
393. Concurrent causes never relieve negligent party.
394. Ordinary care the test.
395. Any negligence, contributing to injury, bars recovery.
396. Negligence must contribute proximately to injury.
397. Illustration of proximate and remote negligence.
398. Doctrine of last clear chance.
399. Employee must use ordinary prudence.
400. Voluntarily selecting more dangerous way.
401. Effect of employee's negligence.
402. Contributory negligence of volunteer.
403. Effect of plaintiff's lack of skill.
404. As a defense to statutory negligence.
405. When intoxication bars recovery.
406. Remaining in service involving danger.
407. Employee may assume employer's performance of duty.
408. Duty to look and listen for trains.
409. Failure to guard against known dangers.
410. Voluntarily assuming position of peril.
411. Crossing track in front of train.
412. Standing or walking upon track.
413. Walking or standing near the track.
414. Climbing over stationary cars.
415. Under cars or locomotives.

§ 416. Crossing bridge in front of train.
417. Sleeping upon or near railroad track.
418. Walking in dangerous place in dark.
419. Failure to discover defects in appliances.
420. Failure to keep appliances under employee's car, in repair.
421. Unauthorized use of appliances.
422. Acts in emergencies or situations of peril.
423. Collisions due to engineer's negligence.
424. Injuries from obstructions near the track.
425. Striking overhead bridge.
426. Running at immoderate rate of speed.
427. Injuries from observance or nonobservance of signals.
428. Riding in dangerous places.
429. Boarding moving cars or engines.
430. Jumping from moving car or engine.
431. Injuries from loading and unloading cars.
432. Negligence in operation of hand cars or tricycles.
433. Negligence in coupling and uncoupling cars.
434. Violation of rules in coupling cars.
435. Injuries in making couplings, while violating orders.
436. Employee falling from moving car or engine.
437. Negligence in disobedience of rules, generally.
438. Violation of particular rules.
439. Disobedience of special orders.
440. Contributory negligence of infant employees.
441. Pleading contributory negligence.
442. Contributory negligence as question of law or fact.

CHAPTER XVII.

COMPARATIVE NEGLIGENCE.

§ 443. Doctrine not generally recognized.
444. The rule stated.
445. Origin of the doctrine.
446. Rule generally denied in the United States.
447. Burden of proof on the plaintiff.
448. Act of Congress establishing, as to interstate carriers.
449. Conflicting decisions concerning, by federal courts.
450. Held unconstitutional by the Supreme Court.
451. The rule in Georgia, Illinois, Tennessee and other States.
452. Doctrine limited by late case, in Georgia.
453. Plaintiff must have exercised ordinary care, in Illinois.
454. Rule formerly obtained in Kansas.

§ 455. Plaintiff's negligence "slight" and defendant's "gross."
456. When both parties equally negligent.
457. In case of injuries to passengers.
458. Injuries at highway crossings.
459. Instructions on comparative negligence.
460. Comparative negligence generally a jury issue.

CHAPTER XVIII.

COEMPLOYEES AT COMMON LAW.

§ 461. Rule of nonliability for negligence of.
462. Reason for the rule.
463. Conflict of laws regarding.
464. Negligence of coemployee an assumed risk.
465. Scope and extent of the rule.
466. Volunteer subject to rule.
467. Illustrations of rule — Erecting scaffolds, repairing bridges, etc.
468. Negligent operation of engine.
469. Collisions between trains and cars.
470. Limitations upon rule of nonliability for coemployee's neglect.
471. Company's negligence concurring to produce injury.
472. Vice-principal's negligence not assumed.
473. Character of act determines employer's liability.
474. Promises or assurances of vice-principal.
475. Notice to vice-principal, notice to employer.
476. Dual capacity doctrine.
477. The department doctrine.
478. Objections to the department doctrine.
479. Employees in separate departments.
480. Employees in same department.
481. Employees of different companies.
482. Injuries due to incompetency of employees.
483. Liability for retention of incompetent or intemperate employees.
484. Who generally deemed coemployees.
485. Nature of service the proper test.
486. Division superintendent, road-master and other division officers.
487. Employees upon different railroad trains.
488. Train despatcher and other employees.
489. Local telegraph operator and other trainmen.
490. Switchmen, track repairers and trainmen.
491. Conductors and other employees.
492. Engineer and other employees on same train.

§ 493. Yardmen, switchmen and other employees.
494. Status of car inspectors and repairers.
495. Section foreman and section men.
496. Flagman and trainmen.
497. Pullman conductor and porter.
498. Track repairers and trainmen.
499. Station agent and other railway employees.
500. Status of various other employees, in different departments.

CHAPTER XIX.

STATUTES ABOLISHING THE COMMON LAW.

§ 501. Objects and reasons for legislation affecting employers and employees.
502. Objections to such legislation.
503. History of legislation regarding.
504. Constitutionality of such statutes.
505. Extraterritorial effect of such statutes.
506. Contracts in contravention of statutes.
507. Actions for death, due to coemployee's negligence.
508. Injuries received while obeying employer's rules.
509. Injuries due to negligence of superintendent.
510. Person controlling car, train, or locomotive.
511. Negligence of employee controlling any signal, point, or switch.
512. Liability for defects in "ways, works, machinery, or plant."
513. Statute of Alabama.
514. The statute of Arkansas.
515. The civil code of California.
516. Colorado laws.
517. Statute of Connecticut.
518. Florida statute.
519. The Georgia code.
520. The safety appliance act of Illinois.
521. The Indiana statute.
522. The statute of Iowa.
523. The general statutes of Kansas.
524. Kentucky statutes.
525. The code of Louisiana.
526. The revised laws of Massachusetts.
527. Laws of Minnesota.
528. Laws of Mississippi.
529. The statute of Missouri.

§ 530. The Montana code and constitution.
531. The statute in Nebraska.
532. The legislation in Nevada.
533. The laws of New Mexico.
534. The New York statute.
535. The North Carolina laws.
536. The North Dakota code.
537. The annotated statutes of Ohio.
538. Constitution of Oklahoma.
539. Legislation of Oregon.
540. Legislation of Pennsylvania.
541. The Constitution of South Carolina.
542. South Dakota legislation.
543. The laws of Texas.
544. The Federal Employer's Liability Act.
545. The United States Safety Appliance Act.
546. The law of Vermont.
547. The Virginia Constitution.
548. The statute of Washington.
549. The statute of Wisconsin.
550. The Constitution of Wyoming.

VOLUME II.

INJURIES TO PASSENGERS, LICENSEES, AND TRESPASSERS.

CHAPTER XX.

THE RELATION OF CARRIER AND PASSENGER, GENERALLY.

§ 551. Who considered passenger carrier.
552. Who deemed passenger, in law.
553. Presumption that one is a passenger.
554. How the relation is created.
555. Payment of fare, or purchase of ticket.
556. When relation of passenger begins.
557. When the relation terminates.
558. Passenger reaching first destination, remaining on train.
559. Children riding without payment of fare.
560. Persons riding on wrong train.
561. Employees' permission to enter train.

§ 562. Persons riding freight trains or hand cars.
563. Mail agents held to be passengers.
564. Express messengers.
565. Employees of sleeping car company.
566. News agents and fruit venders.
567. Drover traveling with stock.
568. Employees riding to and from work.
569. Passenger assisting carrier's employees.
570. Persons accompanying passengers on train.
571. Persons obtaining transportation by fraud.

CHAPTER XXI.

DUTIES AND LIABILITIES OF PASSENGER CARRIERS.

§ 572. Obligations arising by implication of law.
573. Carrier not liable as insurer.
574. Negligence essential to liability.
575. What constitutes negligence toward passenger.
576. Presumptions of negligence, in actions by passengers.
577. Negligence must be proximate cause of injury.
578. Highest degree of care exacted.
579. Exceptions to the rule of extraordinary care.
580. More than ordinary care required.
581. Liable for slight negligence.
582. Care such as used by prudent persons.
583. Care proportionate to mode of conveyance adopted.
584. When ordinary care sufficient.
585. Carrier only held to ordinary care, in England.
586. Duty toward sick, or insane passengers.
587. Care toward women and children.
588. Care toward intoxicated passengers.
598. Duty to employ competent employees.
590. Negligence of employees.
591. Negligence of strangers — Missile thrown through window.
592. Inevitable accident, or act of God.

CHAPTER XXII.

THE ROADBED AND TRACK.

§ 593. Duty regarding generally.
594. Degree of care required.
595. Inspection of track.

§ 596. Care such as used by cautious persons.
597. Care in selecting materials.
598. Liability for injuries caused by defective track.
599. Negligence presumed from defective roadway.
600. Condition of rails and cross-ties.
601. Care of embankments and cuts.
602. Failure to fence track.
603. Duty to provide against ordinary rainfall.
604. Extraordinary floods.
605. Duty as to bridges and trestles.
606. Inspection of bridges.
607. Care of switches.
608. Derailment establishes *prima facie* case.
609. Landslide raises no presumption of negligence.
610. Landslide, due to ordinary rainfall.
611. Obstructions on or near the track.
612. Rock falling on track.
613. Collisions due to slippery rails.
614. Broken rail — When evidence of negligence.
615. Spread or bent rail, causing derailment.
616. Duty to keep track in repair.
617. Care of double track roads.
618. Acts of public enemy.

CHAPTER XXIII.

STATIONS AND APPROACHES.

§ 619. Duty regarding generally.
620. Degree of care required.
621. Waiting room for passengers.
622. Failure to heat waiting room.
623. Duty regarding toilet rooms.
624. Station blown down by storm.
625. Failure to light station and platform.
626. Defective platforms, generally.
627. Collisions with baggage trucks.
628. Passenger struck by mail sacks.
629. Defects in premises near station.
630. Approaches and passageways.
631. Placing cars across approach to station.
632. Running engine or cars between passenger train and station.
633. Injuries by falling into cattle guards.

CHAPTER XXIV.

CARS, ENGINES AND APPLIANCES.

§ 634. Care to provide.
635. Rule applied by Supreme Court.
636. Duty may be enforced by mandamus.
637. Inspection of cars and engines.
638. Obligation assumed by company furnishing motive power.
639. Duty to adopt new improvements.
640. Liability for defective cars or appliances.
641. Injury from defect in, establishes *prima facie* case.
642. Latent defects in.
643. Carrier's responsibility for negligence of manufacturer.
644. No liability, on principle, without personal negligence of carrier.
645. Vehicles or cars owned by others.
646. Must provide safe place for passenger to ride.
647. Duty to heat coach — Other accommodations.
648. Injury from failure to light coaches.
649. Car windows and doors.
650. Defective baggage-racks, chandeliers, etc.
651. Platforms and steps to cars.
652. Condition of car wheels.
653. Insufficient car axles.
654. Defective brakes.
655. Injury due to defective couplings.
656. Duty to provide spark arresters.

CHAPTER XXV.

NEGLIGENCE IN THE EQUIPMENT AND OPERATION OF TRAINS.

§ 657. Care in the equipment and operation of trains, generally.
658. Rules and regulations governing passengers.
659. Passengers' notice and violation of rules.
660. Duty to employ competent employees.
661. Excessive rate of speed.
662. Injury from negligent delay in transportation.
663. Injuries from exposure to weather.
664. Unusual jerks or jars in starting or stopping passenger trains.
665. Same — Injury from, establishes *prima facie* case.
666. Same — Injury to feeble passenger by jerks or jolts.

§ 667. Same —Jerks and jolts during transit.
668. Formation of mixed trains — Statutes controlling.
669. Care toward passengers on freight trains.
670. No negligence inferred from jerks or jolts on freight trains.
671. Duty to give signals.
672. Running trains too close together.
673. Operating trains out of time.
674. Collisions of trains on same track.
675. Collisions at intersections of two railroads.
676. Injury from projection on passing train.
677. Injuries by articles thrown from train.
678. Care to avoid obstructions.
679. Injuries from collisions with cattle.
680. Injury due to overloaded coach.
681. Injuries from snow and ice on car platforms.
682. Shutting door on passenger's hand.
683. Passengers injured while on roads of other companies.

CHAPTER XXVI.

INJURIES IN BOARDING TRAINS.

§ 684. Degree of care required.
685. Reasonable time to enter train.
686. Failure to stop train at station.
687. Law exacts reasonable delay only.
688. Appliances for boarding trains.
689. Approach and ingress to train.
690. Duty to furnish seat for passenger.
691. Moving train while passenger is getting on.
692. Boarding a moving train.
693. Same — Negligence in boarding train, when on direction of conductor.
694. No duty to assist passenger to board train, when.
695. Same — In case of feeble or disabled passenger.
696. Negligence in assisting passenger.
697. Announcement or direction to enter train.
698. Same — Authority of employee of freight train, must be shown.
699. Invitation to enter cars — Calling "All aboard."
700. Signals and warnings to passengers boarding trains.
701. Same — Signals by third persons.
702. Accidental injuries in boarding cars, assumed.

CHAPTER XXVII.

INJURIES IN ALIGHTING FROM TRAINS.

§ 703. Duty to carry to destination.
704. Duty to announce stations.
705. No duty to awaken sleeping passengers.
706. Duty to stop train at station platform.
707. Train should be entirely stopped.
708. Reasonable time to alight.
709. Sick, young or disabled passengers.
710. Place of egress.
711. Safe platforms and appliances for alighting.
712. Same — At flag stations.
713. Assisting passengers to alight.
714. Warning or instructing passengers of dangers in alighting.
715. Alighting from moving train.
716. Alighting from moving train presumptively negligent.
717. Same — To avoid being carried by station.
718. Same — Rate of speed as determining negligence of act.
719. Compelling passenger to alight from train in motion.
720. Same — In front of train on parallel track.
721. Starting train while passenger is alighting.
722. Jerking train while passenger is alighting.
723. Starting train after reasonable time.
724. Putting passenger off away from station.
725. Care toward passengers alighting from freight trains.
726. Passengers pushed from trains by fellow passengers.

CHAPTER XXVIII.

INJURIES TO PASSENGERS BY EMPLOYEES.

§ 727. Ground of carrier's liability for.
728. Liability for torts of employees, generally.
729. Wrongful ejection of passenger.
730. Ejection of sick or disorderly passengers.
731. Injury from ejection at dangerous place.
732. Ejecting passenger from moving train.
733. Injury from excessive force in ejecting passenger.
734. Injury must be direct result of wrongful ejection.
735. Acts within and beyond scope of employment.
736. What acts of employees within scope of employment.

§ 737. Liability for assaults generally.
738. Assaults on female passengers.
739. Punitive damages for insults or assaults.
740. Sportive acts of employees.
741. Communication of contagious disease.

CHAPTER XXIX.

INJURIES BY FELLOW PASSENGERS.

§ 742. Protection from, generally.
743. Basis of carrier's liability in such cases.
744. Degree of care required.
745. Turbulent or violent passengers should be removed.
746. Acts of drunken or disorderly passengers.
747. Discharge of firearms.
748. Acts of insane passengers.
749. Liability for assaults by fellow passengers.
750. Rape committed by fellow passenger.
751. Altercations between employees and passengers.
752. Missile thrown by fellow passenger.
753. Carrier's knowledge of threatened danger.
754. Duty of injured passenger to claim carrier's protection.
755. Passenger with contagious disease.
756. Right of colored passenger to protection.

CHAPTER XXX.

WRONGFUL ACTS OF STRANGERS.

§ 757. Liability for, generally.
758. Degree of care to prevent.
759. No presumption of negligence.
760. Wrong must have been anticipated.
761. Assaults that could have been prevented.
762. Assaults that were not anticipated.
763. Injuries from stones or missiles.
764. Throwing switch — Derailment of train.
765. Obstructions on track.
766. Violence of intruders at railway stations.
767. Acts of mob.

CHAPTER XXXI.

CONTRIBUTORY NEGLIGENCE OF PASSENGERS.

§ 768. The rule, generally.
769. Care demanded of passenger.
770. Passengers under disability.
771. Must directly contribute to injury.
772. Boarding wrong car or train.
773. Disobedience of carrier's rules.
774. Passing from one car to another.
775. Crossing track in front of approaching car.
776. Passengers crossing steam and street railroad tracks.
777. Riding on freight trains.
778. Care in boarding cars.
779. Boarding train in improper manner.
780. Entering train from wrong side.
781. Boarding train at improper time.
782. Boarding train away from station.
783. Boarding moving trains.
784. Train moving slowly.
785. Care in alighting from train.
786. Alighting on wrong side of train.
787. Alighting away from station platform.
788. Alighting from moving train.
789. Speed of train as affecting negligence in alighting.
790. Alighting from moving train at improper time.
791. Alighting on command of employees.
792. Jumping to avoid imminent peril.
793. Care in or about station.
794. Use of premises not intended for passengers' use.
795. Standing or walking on or near track.
796. Selecting unsafe place to ride.
797. Riding on car or engine.
798. Riding in cupola of caboose.
799. Standing up in car.
800. Standing in car while switching is being done.
801. Riding on platform of car.
802. Riding with limbs projecting from window.
803. Riding in baggage or express car.
804. Passing between or over stationary cars.
805. When intoxication a defense.
806. Conduct in emergencies.
807. Obeying directions of employees.
808. Recovery notwithstanding contributory negligence.

CHAPTER XXXII.

LIABILITY OF CONNECTING CARRIERS.

§ 809. Liability of one carrier for injury on line of another.
810. Liability of initial carrier.
811. Carrier using another carrier's facilities or employees.
812. Injury in car on side track of connecting road.
813. Liability of carrier having running powers.
814. Employing another to carry out contract with carrier.
815. Liability of owner of road or premises.
816. Liability of company using another's road.
817. Liability of lessee.
818. Companies guilty of concurrent negligence.
819. Stipulations limiting liability of carrier.

CHAPTER XXXIII.

PLEADING ACTIONS FOR INJURIES TO PASSENGERS.

§ 820. Relation of passenger must be alleged.
821. Carrier's negligence must be alleged.
822. Setting out negligence of railroad company.
823. General and specific allegations of negligence.
824. That plaintiff was rightfully on train.
825. Negligence in assisting passenger to board train.
826. Injury due to bad track.
827. Negligence in management of train.
828. Failure to heat train.
829. In actions for assaults.
830. Failure to provide facilities for alighting.
831. Jerking train while passenger alighting.
832. Failure to stop train at proper place.
833. Negativing contributory negligence.
834. Setting up limitations on liability.

CHAPTER XXXIV.

INSTRUCTIONS IN ACTIONS BY PASSENGERS.

§ 835. On degree of care on carrier's part.
836. Presumption of negligence from accident.
837. On burden of proof.

§ 838. Defining the term "negligence."
839. That carrier is not an insurer.
840. Duty toward passenger alighting.
841. Safety of appliances for alighting from cars.
842. On contributory negligence of passenger.
843. Assuming notice of danger of person injured.
844. On violation of rules.
845. Confusing recoveries under different statutes.
846. Inconsistent instructions.

CHAPTER XXXV.

LIMITATIONS OF CARRIERS' LIABILITY.

§ 847. Liability may be confined to own line.
848. Consideration for limitation of liability.
849. Limitations must be reasonable.
850. Contracts limiting liability for negligence.
851. Duty and liability toward pass-holder.
852. Limitations in gratuitous passes.
853. By printed notices.
854. Risks of riding on freight trains.
855. Contracts of express messengers.
856. Drovers' passes.
857. Contracts of mail agents.
858. Conflict of laws.

CHAPTER XXXVI.

INJURIES TO LICENSEES.

§ 859. Who are licensees, generally.
860. Duty toward licensees, generally.
861. Duty toward, further considered.
862. Duty to maintain premises in safe condition.
863. Risks assumed by licensees.
864. Persons working on premises of company.
865. Persons using premises by invitation.
866. Persons loading or unloading cars.
867. Persons accompanying passengers.
868. Passengers visiting portion of premises not open to public.
869. Persons on trains.
870. No invitation implied in absence of mutual interest.

§ 871. Persons having business with the carrier's employees.
872. Persons using premises for their own convenience.
873. Persons habitually using railroad premises.
874. People crossing track.
875. Using railroad track as footway.
876. Contributory negligence of licensee.

CHAPTER XXXVII.

INJURIES AT GRADE CROSSINGS.

§ 877. Care to be observed by railroad company.
878. Reciprocal care imposed upon company and traveling public.
879. What constitutes a public crossing.
880. Care required in cities.
881. Private or farm crossings.
882. When railroad entitled to right of way.
883. Employees may assume that person will leave track, when.
884. Collisions with teams, generally.
885. Striking teams that are stalled.
886. Frightening horses at crossings.
887. Injuries due to improper appliances on cars.
888. Two trains operated close together across highway.
889. When negligence of railroad company a jury issue.

CHAPTER XXXVIII.

INJURIES AT OVERHEAD CROSSINGS AND SUBWAYS.

§ 890. Liability for defective under-crossings.
891. No warning necessary at overhead crossing — Massachusetts rule.
892. No duty to give warning at overhead crossing, in Wisconsin.
893. The reason for the distinction considered.
894. Same — The rule in Pennsylvania.
895. A contrary doctrine recognized in Pennsylvania.
896. The contrary view — Cases holding warning at overhead crossing necessary.
897. Signals required at overhead crossings, in California.
898. Warnings necessary in New York.
899. Warning required in Kentucky.
900. Warning required, under Ohio statute.
901. The rule followed in Tennessee.
902. Failure to stop, look or listen in approaching.

CHAPTER XXXIX.

INJURIES AT DEFECTIVE CROSSINGS.

§ 903. Duty of railroad company in maintenance of crossings.
904. Obligation extends to approaches.
905. Liability to municipality for failure to maintain.
906. When turnpike company liable for.
907. Defective under-crossing — When company not liable.
908. Duty as to private crossings.
909. Liability for defective or obstructed crossings.
910. Neglect of statutory duty regarding.
911. Raising track above street.
912. Failure to light obstructed crossing at night.
913. Failure to restore crossing.
914. Changing or diverting highway crossings.
915. When company's negligence a jury issue.

CHAPTER XL.

MAINTENANCE OF GATES AND SIGNS.

§ 916. No duty to erect gates at common law.
917. Signs should be maintained, independent of statute.
918. City ordinances requiring maintenance of gates.
919. Open gate an invitation to cross track.
920. Traveler may rely upon gate, when.
921. Care exacted of traveler where gates are maintained.
922. Open gate will not excuse traveler's negligence.
923. Gates should be closed, when trains passing.
924. Negligence of gate-keeper — Motioning traveler to cross.
925. Striking traveler with gate.
926. Gate opened by third party.
927. Liability of different companies, maintaining gate.
928. One company using track of another company.
929. Crossing gates at private ways.
930. Jury issues in actions regarding.

CHAPTER XLI.

MAINTENANCE OF FLAGMEN AND WATCHMEN.

§ 931. Duty to employ generally.
932. Not required at common law.

§ 933. Duty to maintain may exist, independent of statute.
934. Ordinances requiring.
935. Absence of, competent on issue of negligence, when.
936. At country road crossings.
937. At crossing of city streets.
938. Where crossing is unusually dangerous.
939. When custom binds company to maintain.
940. Negligence of flagman, generally.
941. Absence of flagman invitation to cross.
942. Backing trains across street, in absence of flagman.
943. When traveler may assume track is clear.
944. One company using another company's track.
945. Duty to maintain, as jury issue.

CHAPTER XLII.

USE OF SIGNALS AND LOOKOUTS.

§ 946. At common law.
947. General duty to keep lookout.
948. Ordinances requiring.
949. Constitutionality of statutes requiring.
950. Effect of violating such statutes.
951. General object of such statutes.
952. What trains required to give signals, generally.
953. Failure to signal at crossing, negligence.
954. Failure to signal — When traveler may assume track is clear.
955. Kind of signals to be given.
956. When statute is in the alternative.
957. When view of track is obstructed.
958. Giving signals at improper place.
959. When other precautions required.
960. Statutes apply to what roads.
961. What are public highways, generally.
962. Signals not required at private crossings, generally.
963. Mutual care required of traveler and railroad company.
964. Who may complain of failure to give signals.
965. Persons walking on or along track.
966. Persons who know train approaching, not entitled to.
967. Trespassers and others on railroad track.
968. Injuries near crossings.
969. Frightening horses by failure to give signals.
970. No duty to check speed, after giving signals.

§ 971. Burden of proof.
972. Negative and positive evidence to establish.
973. Instructions concerning duty of.
974. Jury issues regarding.

CHAPTER XLIII.

EXCESSIVE SPEED AT CROSSINGS.

§ 975. Common law duty regarding.
976. Constitutionality of statutes regulating.
977. Ordinances regulating.
978. General observations concerning.
979. Ordinary care required.
980. When excessive speed evidence of negligence.
981. When speed so great as to render signals useless.
982. What speed, generally, will be held to be excessive.
983. When special circumstances require slower trains.
984. When persons using crossings, may assume speed lawful.
985. Speed in cities.
986. Speed in towns and villages.
987. Speed of trains at country road crossings.
988. At dangerous crossings.
989. Jury issues regarding.

CHAPTER XLIV.

CONTRIBUTORY NEGLIGENCE OF TRAVELER ON HIGHWAY.

§ 990. General rules underlying.
991. Care required from traveler in going on track.
992. Care required of persons under disability.
993. Where traveler is partially blind.
994. Traveler's negligence, contributing to injury, bars recovery.
995. Mutual care to be observed.
996. Traveler's negligence must proximately contribute to injury.
997. How far traveler may assume train will be properly operated.
998. Place of crossing track.
999. Failure to observe or heed signals.
1000. How far traveler may presume that signals will be given.
1001. Absence of flagman evidence of negligence.
1002. Open gate an invitation to cross track.

§ 1003. The duty to stop, look and listen.
1004. Care to be observed in looking and listening.
1005. Traveler should look in both directions.
1006. Failure to look and listen is negligence, when.
1007. Looking for special trains, or those out of time.
1008. Failure to look and listen not affected by company's negligence.
1009. Duty to look and listen not affected by failure to give signals.
1010. Failure to maintain flagman does not affect duty to look and listen.
1011. Speed of train does not affect duty to look and listen.
1012. Duty of deaf persons, or those with ears covered, to look for trains.
1013. Duty to stop, when noise affects hearing or crossing obstructed.
1014. Proper place to stop, look and listen.
1015. Driving rapidly upon crossing without looking.
1016. Duty to listen, when track obstructed.
1017. Driving rapidly on obstructed crossing.
1018. When track obstructed by steam or smoke.
1019. When track obstructed by buildings or piles of lumber.
1020. When track obstructed by passing trains or standing cars.
1021. Track obstructed by cuts, curves or embankments.
1022. Track obstructed by weeds, brush or trees.
1023. When track obscured by dust, fog or snow.
1024. View of track obscured by umbrella.
1025. Approaching crossing in covered conveyance.
1026. Driving upon crossing on dangerously loaded wagon.
1027. Colliding with train on parallel track.
1028. Passing under or between stationary cars.
1029. Crossing track in front of approaching train.
1030. Crossing in front of train, a jury issue, when.
1031. Intoxicated person going on track.
1032. Burden of proof on plaintiff.
1033. Traveler's duty not affected by company's negligence.
1034. Injury avoidable by ordinary care.
1035. When traveler's negligence a question of law for the court.
1036. When issue of, should be submitted to jury.

CHAPTER XLV.

THE DOCTRINE OF IMPUTED NEGLIGENCE.

§ 1037. What the term implies.
1038. Basis of the doctrine.

§ 1039. Imputed negligence and personal negligence distinguished.
1040. When cause derived from negligent person.
1041. Concurrent negligence of another no defense.
1042. Imputation of negligence of drivers of vehicles, generally.
1043. Negligence of drivers of public conveyances.
1044. Persons traveling on railroad cars.
1045. Occupants of street cars.
1046. Persons riding in stage coaches.
1047. Persons riding in hired vehicles.
1048. Negligence of excursionists.
1049. Persons jointly engaged in common enterprise.
1050. Negligence of coemployees not imputed.
1051. Employee's negligence imputed to employer.
1052. Employee's negligence not imputed to employer's guest.
1053. Persons riding in private vehicles.
1054. Injured person in position to control driver.
1055. Guest riding in private vehicle.
1056. When negligence of husband imputed to wife.
1057. Negligence of relatives, imputed, when.
1058. Rule as to infants *non sui juris*.
1059. When negligence imputed to children *sui juris*.

CHAPTER XLVI.

WHO DEEMED TRESPASSERS GENERALLY.

§ 1060. Persons going upon railroad property.
1061. Company entitled to clear track.
1062. Persons crossing track, away from crossings.
1063. Persons walking on tracks.
1064. Use of track by pedestrians at nighttime.
1065. When company consents to general use of track.
1066. License to use track not established by occasional user.
1067. Persons walking on bridge or trestle.
1068. Persons on right of way.
1069. Persons frequenting depot grounds or yards.
1070. Persons wrongfully upon train.
1071. Persons wrongfully riding on freight trains.
1072. Persons wrongfully riding on special trains, cars or engines.
1073. Whether children, playing upon turntables, are trespassers.

CHAPTER XLVII.

DUTIES AND LIABILITIES TOWARD TRESPASSERS.

§ 1074. Risks assumed by trespassers generally.
1075. Company's duty toward trespassers generally.
1076. Distinguished from duty owing passengers or licensees.
1077. Degree of care required toward trespassers.
1078. Liable for wanton or willful injury to trespassers.
1079. Excessive speed as evidence of willful injury to trespasser.
1080. Trespassers not entitled to signals.
1081. Trespassers cannot complain of absence of flagman.
1082. Lookout should be kept for trespassers, when.
1083. Duty of employees, after discovery of trespasser.
1084. Duty toward children, drunken persons and persons under disability.
1085. Duty toward deaf persons on the track.
1086. No duty to keep premises in safe condition.
1087. Duty toward trespassers on trains.
1088. Ejection of trespassers from trains.

CHAPTER XLVIII.

CONTRIBUTORY NEGLIGENCE OF TRESPASSERS.

§ 1089. The subject generally.
1090. Care required of trespasser.
1091. Negligence must be proximate cause of injury.
1092. Failure to look and listen for trains.
1093. Failure to heed warnings or signals.
1094. Standing on or near track.
1095. Walking on or near track.
1096. Walking on railroad bridge or trestle.
1097. Walking on railroad track in nighttime.
1098. Deaf person walking on track.
1099. Lying or sitting on railroad track.
1100. Falling asleep on railroad track.
1101. Climbing upon cars.
1102. Infants climbing upon cars.
1103. When trespasser can recover, notwithstanding his own negligence.
1104. When a question of law for the court.
1105. When a question of fact for jury.

TABLE OF CASES CITED.

[*References are to sections.*]

A

Abbott *v.* Chicago, etc., R. Co. (30 Minn. 482; 16 N. W. Rep. 266), 1006.
Abbott *v.* Dwinnell (74 Wis. 514; 43 N. W. Rep. 496), 935–1016.
Abbott *v.* Johnstown, etc., R. Co. (80 N. Y. 27), 17.
Abbott *v.* Lake Erie, etc., R. Co. (150 Ind. 498; 50 N. E. Rep. 729), 1050.
Abbot *v.* Marion Min. Co. (112 Mo. App. 550), 79.
Abby *v.* Wood (Wash., 86 Pac. Rep. 558), 206.
Abel *v.* Delaware, etc., R. Co. (103 N. Y. 581; 4 N. Y. S. R. 269), 142.
Abelson *v.* St. Louis, etc., Ry. Co. (105 S. W. Rep. 81), 799.
Abend *v.* Terre Haute, etc., R. Co. (Ill., 17 Am. & Eng. R. Cas. 614), 568.
Abrahamón *v.* General Supply, etc., Co. (98 N. Y. S. 596; 112 App. Div. 318), 534.
Ackerson *v.* Chicago, etc., R. Co. (75 N. W. Rep. 676), 504.
Acme, etc., Co. *v.* McIleer (5 Colo. App. 267), 358.
Adams *v.* Coal Co. (85 Mo. App. 320), 388.
Adams *v.* Hannibal, etc., R. Co. (74 Mo. 553; 7. Am. & Eng. R. Cas. 414), 92.
Adams *v.* Iron Cliff Co. (78 Mich. 271; 44 N. W. Rep. 270; 41 Am. & Eng. R. Cas. 414), 879.
Adams *v.* Kansas, etc., Co. (85 Mo. App. 486), 356.
Adams *v.* Louisville, etc., R. Co. (82 Ky. 603; 21 Am. & Eng. R. Cas. 380), 787.
Adams *v.* Missouri Pacific Ry. Co. (100 Mo. 555; 12 S. W. Rep. 637; 41 Am. & Eng. R. Cas. 105), 724.
Adams *v.* New York, etc., R. Co. (49 N. Y. S. R. 854; 66 Hun 634; 21 N. Y. Supp. 681), 998.
Adams *v.* St. Louis, I. M. & S. Ry. Co. (103 S. W. Rep. 725; 83 Ark. 300), 398, 416, 1067.
Adams *v.* Union Ry. Co. (80 N. Y. S. 264; 80 App. Div. 136), 122.
Adams *v.* University Hospital (99 S. W. Rep. 453), 129.
Adkisson's Adm'r *v.* Louisville, N. & St. L. Ry. Co. (110 S. W. Rep. 284), 988.
Adolff *v.* Columbia, etc., Co. (100 Mo. App. 199), 311.
Aerkfetz *v.* Humphries (145 U. S. 418; 12 Sup. Ct. Rep. 835; 53 Am. & Eng. R. Cas. 459), 412, 408.
Aguline *v.* New York, etc., R. Co. (21 R. I. 263; 43 Atl. Rep. 63; 14 Am. & Eng. R. Cas. (N. S.), 199), 39.
Ahern *v.* Chicago & E. R. Co. (124 Ill. App. 36), 861, 1070.
Ahern *v.* Minneapolis Ry. Co. (113 N. W. 1019), 560.
Ahnefeld *v.* Wabash R. Co. (111 S. W. Rep. 95), 1065.
Aiken *v.* Holyoke, etc., R. Co. (184 Mass. 269), 398.
Aiken *v.* Pennsylvania R. Co. (130 Pa. St. 380; 18 Atl. Rep. 619; 41 Am. & Eng. R. Cas. 571), 1003.
Aiken *v.* Smith (54 Fed. Rep. 896), 145.
Akers *v.* Chicago, etc., R. Co. (58 Minn. 540; 60 Am. & Eng. R. Cas. 30), 859.
Alabama R. Co. *v.* Arnold (84 Ala. 159; 4 So. Rep. 359; 5 Am. St. Rep. 179, 354; 80 Ala. 600; 35 Am. & Eng. R. Cas. 466), 25, 374.
Alabama, etc., R. Co. *v.* Bates (43 So. Rep. 98), 684.
Alabama, etc., R. Co. *v.* Bonner (39 So. Rep. 619), 78.
Alabama, etc., R. Co. *v.* Carmichael (90 Ala. 19; 8 So. Rep. 87; 44 Am. & Eng. R. Cas. 286), 724.
Alabama, etc., R. Co. *v.* Carroll (97 Ala. 126; 11 So. Rep. 803), 461, 505.
Alabama, etc., *v.* Chapman (80 Ala. 615; 2 So. Rep. 738; 31 Am. & Eng. R. Cas. 394), 1095.
Alabama, etc., R. Co. *v.* Crocker (131 Ala. 584; 31 So. Rep. 561), 1073.
Alabama, etc., R. Co. *v.* Davis (69 Miss. 444; 13 So. Rep. 693, 1055.
Alabama, etc., R. Co. *v.* Drummond (73 Miss. 813; 20 So. Rep. 7), 729.
Alabama, etc., R. Co. *v.* Frazier (93 Ala. 45; 9 So. Rep. 303), 91, 186.
Alabama, etc., R. Co. *v.* Hawk (72 Ala. 112; 47 Am. Rep. 403; 18 Am. & Eng. R. Cas. 194), 671, 801.
Alabama, etc., R. Co. *v.* Hill (93 Ala. 514; 9 So. Rep. 722; 47 Am. & Eng. R. Cas. 500), 608, 835.
Alabama, etc., R. Co. *v.* Holmes (75 Miss. 371; 23 So. Rep. 187; 10 Am. & Eng. R. Cas. [N. S.] 270), 810.
Alabama, etc., R. Co. *v.* Jones (71 Ala. 487; 15 Am. & Eng. R. Cas. 549), 152.
Alabama, etc., Co. *v.* Marcus (115 Ala. 319), 357.
Alabama, etc., R. Co. *v.* Overstreet (85 Miss. 78; 37 So. Rep. 819), 99.
Alabama, etc., R. Co. *v.* Stacey (68 Miss. 463; 9 So. Rep. 349), 712.

[*References are to sections.*]

Alabama, etc., R. Co. *v.* Summers (68 Miss. 566; 10 So. Rep. 63), 876.
Alabama, etc., R. Co. *v.* Vail (Ala. 38 So. Rep. 124), 109.
Alabama, etc., R. Co. *v.* Waller (48 Ala. 459), 470.
Alabama, etc., R. Co. *v.* Williams (78 Miss. 209; 28 So. Rep. 853; 51 L. R. A. 836; 84 Am. St. Rep. 624), 64, 281.
Alabama, etc., R. Co. *v.* Yarbrough (83 Ala. 238; 3 So. Rep. 447; 3 Am. St. Rep. 715), 777, 1071.
Alabama, Collinsville, etc., Co. *v.* Pitts (13 So. Rep. 135), 309.
Alabama Great Southern R. Co. *v.* Guest (Ala., 39 So. Rep. 654), 14.
Alabama Great Southern R. Co. *v.* Hardy (61 S. E. Rep. 71), 973.
Alabama Great Southern R. Co. *v.* Williams (37 So. Rep. 255), 513.
Alabama Steel & Wire Co. *v.* Griffin (42 So. Rep. 1034), 513.
Alaska Treadwell Gold M., etc., Co. *v.* Whelen (168 U. S. 85), 210.
Alberti *v.* New York, etc., R. Co. (N. Y., 9 Am. Neg. Cas. 664), 649.
Albertson *v.* Keokuk, etc., R. Co. (48 Iowa 492), 1058.
Albion, etc., Co. *v.* Denobra (72 Fed. Rep. 739; 44 U. S. App. 347; 19 C. C. A. 168; 3 Am. & Eng. R. Cas. [N. S.] 564), 608.
Albion *v.* Hetrick (90 Ind. 545; 46 Am. Rep. 230), 1051.
Albrecht *v.* Chicago & N. W. R. Co. (108 Wis. 530; 84 N. W. Rep. 882), 338.
Albrecht *v.* Milwaukee, etc., R. Co. (94 Wis. 397; 69 N. W. Rep. 63), 511.
Alcorn *v.* Chicago, etc., R. Co. (108 Mo. 81; 18 S. W. Rep. 188; 53 Am. & Eng. R. Cas. 87), 263, 379.
Alden *v.* New York, etc., R. Co. (26 N. Y. 102), 653.
Aldrich *v.* Concord, etc., R. Co. (67 N. H. 380; 36 Atl. Rep. 252), 38.
Aldrich *v.* Furnace Co. (78 Mo. 559), 128, 353, 387.
Alecson *v.* Erie R. Co. (91 N. Y. S. 1029; 101 App. Div. 395), 273.
Alexander *v.* Louisville, etc., R. Co. (83 Ky. 589; 25 Am. & Eng. R. Cas. 458), 589, 844.
Alexander *v.* Pennsylvania R. Co. (201 Pa. 252; 50 Atl. Rep. 991; 48 Ohio St. 623; 30 N. E. Rep. 69), 267, 463.
Alexander *v.* Railway Co. (83 Ky. 589), 269.
Alexander *v.* Richmond, etc., R. Co. (112 No. Car. 720; 16 S. E. Rep. 896), 1013.
Alexander *v.* Toronto, etc., Ry. Co. (35 U. C. L. B. 453), 567.
Alexandria, etc., R. Co. *v.* Herndon (87 Va. 193; 12 S. E. Rep. 289), 625, 711.
Allan *v.* Logan (Utah, 37 Pac. Rep. 496), 320, 353.
Allan *v.* State, etc., R. Co. (132 N. Y. 99; 15 L. R. A. 166), 29.
Allen *v.* Hayward (7 Q. B. 960), 278.
Allen *v.* Maine Central R. Co. (82 Me. 114; 19 Atl. Rep. 105), 395.
Allen *v.* Railroad Co. (69 N. H. 271), 368.
Allen *v.* Transit Co. (183 Mo. 141; 81 S. W. Rep. 1142), 98.
Allender *v.* Chicago, etc., R. Co. (43 Iowa 276; 14 Am. Ry. Rep. 443), 688.
Allender *v.* Chicago, etc., R. Co. (37 Iowa 264; 8 Am. Ry. Rep. 115), 394.
Allerton *v.* Boston, etc., R. Co. (146 Mass. 241; 15 N. E. Rep. 621; 34 Am. & Eng. R. Cas. 563), 557, 1027.
Allison *v.* Chicago, etc., R. Co. (42 Iowa 274), 83.
Allison *v.* Southern Ry. Co. (129 N. C. 336; 40 S. E. Rep. 91), 379, 495.
Allison *v.* Tap Rock, etc., Co. (78 N. Y. S. 69; 75 App. Div. 267); 154.
Allyn *v.* Boston, etc., R. Co. (105 Mass. 77), 1047.
Alston *v.* Cleveland, etc., R. Co. (1 Ohio C. D. 353), 55.
Alton *v.* Midland Ry. Co. (19 C. B. N. S. 213), 18.
Alves *v.* New York, N. H. & H. R. Co. (65 Atl. Rep. 261; 27 R. I. 581), 267.
American Bridge Co. *v.* Seeds (144 Fed. Rep. 605), 354, 467.
American Car Co. *v.* Clark (32 Ind. App. 644; 70 N. E. Rep. 828), 377, 379.
Amato *v.* Northern Pacific R. Co. (46 Fed. Rep. 561), 416.
Ames *v.* Union, etc., Co. (117 Mass. 541), 17.
Ames *v.* Waterloo Transit Co. (Iowa, 95 N. W. Rep. 161), 115.
Ames *v.* Union, etc., R. Co. (117 Mass. 509), 62.
Anderson *v.* Bennett (16 Oregon 515; 19 Pac. Rep. 765; 8 Am. St. Rep. 311; 38 Am. & Eng. R. Cas. 87), 475, 485.
Anderson *v.* Chicago, etc., Ry. Co. (110 S. W. Rep. 650), 721.
Anderson *v.* Clark (155 Mass. 368; 29 N. E. Rep. 589), 372.
Anderson *v.* Duckworth (162 Mass. 251), 108.
Anderson *v.* Fielding (Minn., 99 N. W. Rep. 357), 99, 375.
Anderson *v.* Michigan, etc., R. Co. (107 Mich. 591; 65 N. W. Rep. 585), 498.
Anderson *v.* Milwaukee, etc., R. Co. (37 Wis. 321), 45, 505.
Anderson *v.* Minneapolis, St. P. & S. S. M. Ry. Co. (114 N. W. Rep. 1123), 1094.
Anderson *v.* Minnesota, etc., R. Co. (39 Minn. 523; 41 N. W. Rep. 104; 38 Am. & Eng. R. Cas. 206), 327.
Anderson *v.* Missouri Pacific Ry. Co. (196 Mo. 442; 93 S. W. Rep. 394), 553.
Anderson *v.* Morrison (22 Minn. 274), 275.
Anderson *v.* New York, etc., R. Co. (53 Hun 633; 125 N. Y. 701; 34 N. Y. S. R. 1012), 957.
Anderson *v.* Northern Pac. R. Co. (Mont., 65 Pac. Rep., 834; 85 Pac. Rep. 884), 258, 341.
Anderson *v.* Seropian (147 Cal. 201; 81 Pac. Rep. 521), 92.
Anderson *v.* Southern Ry. Co. (70 S. C. 490; 50 S. E. Rep. 202), 20, 381.

[*References are to sections.*]

Anderson *v.* Winston (31 Fed Rep. 528), 349.
Andrews *v.* Central, etc., R. Co. (86 Ga. 192; 12 S. E. Rep. 213; 45 Am. & Eng. R. Cas. 171), 1028.
Andrews *v.* Chicago, etc., R. Co. (86 Iowa 677; 53 N. W. Rep. 399; 52 Am. & Eng. R. Cas. 252), 608, 184, 495.
Andrews *v.* New York, etc., R. Co. (60 Conn. 293; 22 Atl. Rep. 566), 877.
Andrews *v.* Railroad Co. (34 Conn. 57), 55.
Andrist *v.* Union Pacific R. Co. (30 Fed. Rep. 345), 577.
Annaker *v.* Chicago, etc., R. Co. (81 Iowa 267; 47 N. W. Rep. 68), 937.
Annapolis, etc., R. Co. *v.* Pumphrey (72 Md. 82; 19 Atl. Rep. 8; 42 Am. & Eng. R. Cas. 599), 962.
Annapolis, W. & B. Ry. Co. *v.* State (65 Atl. Rep. 434), 962.
Annas *v.* Milwaukee, etc., R. Co. (67 Wis. 46; 27 Am. & Eng. R. Cas. 102; 30 N. W. Rep. 282; 58 Am. Rep. 848), 150, 202.
Appel *v.* Buffalo, etc., R. Co. (111 N. Y. 550; 19 N. E. Rep. 93; 20 N. Y. Supp. 90; 40 Hun 632), 325.
Arasmith *v.* Temple (11 Ill. App. 39), 277.
Archer *v.* New York, etc., R. Co. (106 N. Y. 589; 13 N. E. Rep. 318), 619.
Ardesco Oil Co. *v.* Gilson (63 Pa. St. 150), 266.
Arenschield *v.* Chicago, etc., R. Co. (128 Iowa 677; 105 N. W. Rep. 200), 80, 317.
Arkansas, etc., R. Co. *v.* Griffith (63 Ark. 491, 39 S. W. Rep. 550), 608.
Arkansas, etc., R. Co. *v.* Timmonds (51 Ark. 459; 40 Am. & Eng. R. Cas. 698), 599.
Arkansas Central R. Co. *v.* Bennett (102 S. W. Rep. 198), 562.
Arkansas Central R. Co. *v.* Jackson (70 Ark. 295; 67 S. W. Rep. 757), 367.
Arkansas Midland R. Co. *v.* Canman (52 Ark. 517; 13 S. W. Rep. 280), 654.
Armil *v.* Chicago, etc., R. Co. (70 Iowa 130; 30 N. W. Rep. 42; 28 Am. & Eng. R. Cas. 467), 92.
Armour *v.* Hahn (111 U. S. 313; 28 L. Ed. 440), 252.
Armour *v.* Golkewska (95 Ill. App. 494), 244.
Armstrong *v.* Lancashire, etc., R. Co. (33 L. T. 228; L. R. 10 Ex. 47; 44 L. J. Ex. 89; 23 W. R. 295), 1044.
Armstrong *v.* Montgomery St. R. Co. (Ala., 26 So. Rep. 349), 29.
Armstrong *v.* New York, etc., R. Co. (66 Barb. 437; 64 N. Y. 635), 632.
Armstrong *v.* Oregon, etc., R. Co. (8 Utah 420; 32 Pac. Rep. 693), 479.
Armsworth *v.* Southwestern R. Co. (11 Jur. 758), 57.
Arnold *v.* Delaware, etc., Co. (125 N. P. 15; 25 N. E. Rep. 1064), 352.
Arnold *v.* Illinois, etc., R. Co. (83 Ill. 273), 854.
Arnold *v.* Louisville, etc., R. Co. (22 Ky. L. R. 511; 58 S. W. Rep. 370), 352.
Arnold *v.* Pennsylvania R. Co., 115 Pa. St. 135, 970.
Arrowsmith *v.* Nashville, etc., R. Co. (57 Fed. Rep. 165), 563, 817.
Artusy *v.* Missouri Pacific Ry. Co. (73 Texas, 191; 11 S. W. Rep. 177; 37 Am. & Eng. R. Cas. 288), 1085, 1098.
Artz *v.* Chicago, etc., R. Co. (44 Iowa 284; 38 Iowa 293; 5 Am. Ry. Rep. 469), 661, 446, 969.
Ash *v.* Baltimore, etc., R. Co. (72 Md. 144; 44 Am. & Eng. R. Cas. 676), 47.
Ash *v.* Verlenden (154 Pa. 246; 26 Atl. Rep. 374), 119.
Ash *v.* Wilmington, etc., R. Co. (148 Pa. St. 133; 23 Atl. Rep. 898), 1003.
Ashbrook *v.* Frederick Avenue R. Co. (18 Mo. App. 290), 796.
Ashmore *v.* Charleston, etc., Co. (99 Ill. App. 262), 139.
Ashworth *v.* Southern R. Co. (116 Ga. 635), 398.
Atchison, etc., Ry. Co. *v.* Allen (88 Pac. Rep. 966), 567.
Atchison, etc., Ry. Co. *v.* Bancord (71 Pac. Rep. 253), 316.
Atchison, etc., R. Co. *v.* Betts (10 Colo. 431; 31 Am. & Eng. R. Cas. 563; 15 Pac. Rep. 821), 50.
Atchison, etc., R. Co. *v.* Brown (26 Kansas 443; 6 Am. & Eng. R. Cas. 228), 206.
Atchison, etc., R. Co. *v.* Brown (2 Kansas App. 604; 42 Pac. Rep. 588; 2 Am. & Eng. R. Cas. [N. S.] 113), 1070.
Atchison, etc., Ry. Co. *v.* Calhoun (89 Pac. Rep. 207), 706, 1058.
Atchison, etc., R. Co. *v.* Davis (34 Kansas 202; 25 Am. & Eng. R. Cas. 305), 292, 811.
Atchison, etc., Ry. Co. *v.* Dickens (103 S. W. Rep. 750), 500.
Atlantic, etc., R. Co. *v.* Dunn (19 Ohio St. 162), 177.
Atchison, etc., R. Co. *v.* Elder (57 Kansas 312; 46 Pac. Rep. 310), 608.
Atchison, etc., R. Co. *v.* Fajardo (86 Pac. Rep. 301), 69.
Atchison, etc., R. Co. *v.* Farrow (6 Colo. 498), 507.
Atchison, etc., R. Co. *v.* Feehan (47 Ill. App. 66), 980.
Atchison, etc., Ry. Co. *v.* Fronk (87 Pac. Rep. 698), 243.
Atchison, etc., R. Co. *v.* Gantz (38 Kansas 608; 17 Pac. Rep. 54; 34 Am. & Eng. R. Cas. 290), 1087.
Atchison, etc., R. Co. *v.* Headland (18 Colo. 477; 33 Pac. Rep. 185; 58 Am. & Eng. R. Cas. 4), 553.
Atchison, etc., R. Co. *v.* Henry (57 Kansas 154; 45 Pac. Rep. 576), 446.
Atchison, etc., R. Co. *v.* Holt (29 Kansas 149; 11 Am. & Eng. R. Cas. 206), 471.
Atchison, etc., R. Co. *v.* Hughes (55 Kansas 491; 40 Pac. Rep. 919), 789.
Atchison, etc., R. Co. *v.* Kingscott (65 Kan. 131; 69 Pac. Rep. 184), 245.

[*References are to sections.*]

Atchison, etc., R. Co. *v.* Koehler (37 Kan. 463; 15 Pac. Rep. 567; 31 Am. & Eng. R. Cas. 312), 504.
Atchison, etc., Ry. Co. *v.* Lindsey (Kan. 41 Am. & Eng. R. Cas. 72), 567.
Atchison, etc., R. Co. *v.* Martin (7 N. M. 158; 34 Pac. Rep. 536), 490.
Atchison, etc., R. Co. *v.* McElroy (91 Pac. Rep. 785; 13 L. R. A. [N. S.] 620), 632.
Atchison, etc., R. Co. *v.* McGinnis (46 Kan. 109; 26 Pac. Rep. 453), 173.
Atchison, etc., R. Co. *v.* McKee (37 Kan. 592; 15 Pac. Rep. 484), 485.
Atchison, etc., R. Co. *v.* Moore (29 Kan. 632; 31 Kan. 197; 11 Am. & Eng. R. Cas. 243), 505, 486.
Atchison, etc., R. Co. *v.* Morgen (31 Kan. 77; 13 Am. & Eng. R. Cas. 499), 950.
Atchison, etc., R. Co. *v.* Parry (Kan., 73 Pac. Rep. 105), 28.
Atchison, etc., R. Co. *v.* Parsons (42 Ill. App. 93), 881.
Atchison, etc., Ry. Co. *v.* Pitts (123 Ill. App. 607), 414.
Atchison, etc., R. Co. *v.* Plunkett (25 Kan. 188; 2 Am. & Eng. R. Cas. 127), 332, 349.
Atchison, etc., R. Co. *v.* Reesman (60 Fed. Rep. 370; 19 U. S. App. 596; 9 C. C. A. 20; 23 L. R. A. 768), 602.
Atchison, etc., R. Co. *v.* Ringle (80 Pac. Rep. 43), 176.
Atchison, etc., R. Co. *v.* Roach (35 Kan. 740; 12 Pac. Rep. 93; 27 Am. & Eng. R. Cas. 257), 810.
Atchison, etc., R. Co. *v.* Ryan (62 Kan. 682; 64 Pac. Rep. 603), 68.
Atchison, etc., R. Co. *v.* Salmon (11 Kan. 83), 117.
Atchison, etc., R. Co. *v.* Schroeder (47 Kan. 315; 27 Pac. Rep. 965), 340.
Atchison, etc., R. Co. *v.* Seeley (54 Kan. 21; 37 Pac. Rep. 104), 499.
Atchison, etc., R. Co. *v.* Shean (18 Colo. 368; 20 L. R. A. 729; 33 Pac. Rep. 108; 58 Am. & Eng. R. Cas. 360), 557, 632.
Atchison, etc., Ry. Co. *v.* Sledge (Kan. 74 Pac. Rep. 1111), 375.
Atchison, T. & S. F. Ry. Co. *v.* Sowers (Tex. Civ. App. 99 S. W. Rep. 190), 100.
Atchison, etc., R. Co. *v.* Stanford (12 Kan. 354), 25.
Atchison, etc., R. Co. *v.* State (22 Kan. 1), 949.
Atchison, etc., R. Co. *v.* Thul (29 Kan. 466; 44 Am. Rep. 659; 10 Am. & Eng. R. Cas. 783), 93.
Atchison, etc., R. Co. *v.* Townsend (39 Kan. 115; 99 N. W. Rep. 433; 81 Pac. Rep. 205; 17 Pac. Rep. 804; 35 Am. & Eng. R. Cas. 352), 1016.
Atchison, etc., R. Co. *v.* Vincent (56 Kan. 344; 43 Pac. Rep. 251), 495.
Atchison, etc., R. Co. *v.* Wagner (33 Kan. 660; 7 Pac. Rep. 204; 21 Am. & Eng. R. Cas. 637), 374.
Atchison, etc., R. Co. *v.* Walz (40 Kan. 433; 19 Pac. Rep. 787), 966.
Atchison, etc., R. Co. *v.* Washburn (5 Neb. 117), 849.
Atchison, etc., R. Co. *v.* Weber (33 Kan. 543; 6 Pac. Rep. 877; 21 Am. & Eng. R. Cas. 418), 586, 805.
Atchison, etc., R. Co. *v.* Weikal (Kan. 84 Pac. Rep. 720), 269.
Atchison, etc., R. Co. *v.* Wilkie (90 Pac. Rep. 775), 886.
Atchison, etc., R. Co. *v.* Wilson (48 Fed. Rep. 57), 471.
Atchison, etc., R. Co. *v.* Winston (56 Kan. 456; 43 Pac. Rep. 777), 251.
Atchison, etc., Ry. Co. *v.* Zeiler (54 Kan. 340; 38 Pac. Rep. 282), 218.
Atkinson *v.* Goodrich, etc., Co. (60 Wis. 141; 18 N. W. Rep. 764), 393.
Atkyn *v.* Wabash R. Co. (22 Ohio L. J. 151; 41 Fed. Rep. 193), 194, 341.
Atlanta, etc., R. Co. *v.* Ayers (53 Ga. 12), 519.
Atlanta, etc., R. Co. *v.* Dickerson (89 Ga. 455; 15 S. E. Rep. 534), 790.
Atlanta, etc., R. Co. *v.* Gravitt (93 Ga. 369; 20 S. E. Rep. 550; 44 Am. St. Rep. 145; 26 L. R. A. 553), 1058.
Atlanta, etc., R. Co. *v.* Johnson (66 Ga. 259), 183.
Atlanta, etc., R. Co. *v.* Kimberly (87 Ga. 161; 13 S. E. Rep. 277; 47 Am. & Eng. R. Cas. 307), 285.
Atlanta, etc., R. Co. *v.* McDilda (125 Ga. 468; 54 S. E. Rep. 140), 55.
Atlanta, etc., R. Co. *v.* Newton (85 Ga. 517; 11 S. E. Rep. 776), 191.
Atlanta, etc., R. Co. *v.* Ray (70 Ga. 674; 22 Am. & Eng. R. Cas. 281), 419.
Atlanta, etc., R. Co. *v.* Tanner (68 Ga. 384), 463.
Atlanta, etc., R. Co. *v.* Venable (65 Ga. 55; 7 Am. & Eng. R. Cas. 35), 65, 195.
Atlanta, etc., Ry. Co. *v.* West (121 Ga. 641; 49 S. E. Rep. 711; 67 L. R. A. 701), 301.
Atlanta, etc., R. Co. *v.* Wyly (65 Ga. 120; 8 Am. & Eng. R. Cas. 262), 973.
Atlantic City R. Co. *v.* Goodin (45 L. R. A. 673; 62 N. J. L. 397; 42 Atl. Rep. 333; 72 Am. St. Rep. 652), 632.
Atlantic City R. Co. *v.* Kiefer (66 Atl. Rep. 930), 557.
Atlantic Coast Line R. Co. *v.* Crosby (43 So. Rep. 318), 801.
Atlantic Coast Line R. Co. *v.* O'Neill (56 S. E. Rep. 986; 127 Ga. 685), 400.
Atlantic Coast Line R. Co. *v.* Powell (127 Ga. 805; 56 S. E. Rep. 1006), 828.
Atlantic Coast, etc., R. Co. *v.* Ryland (Fla. 40 So. Rep. 24), 254.
Au *v.* New York, etc., R. Co. (29 Fed. Rep. 72), 194.
Augusta R. Co. *v.* Glover (58 Am. & Eng. R. Cas. 269; 18 S. E. Rep. 406), 71, 190.
Augusta Ry., etc., Co. *v.* Lyle (60 S. E. Rep. 1075), 831.
Augusta, etc., R. Co. *v.* McElmurry (24 Ga. 75), 451, 978.
Augusta, etc., R. Co. *v.* Randall (85 Ga. 297; 11 S. E. Rep. 706), 164.
Augusta, etc., R. Co. *v.* Rentz (55 Ga. 126), 94.
Aurelius *v.* Lake Erie, etc., R. Co. (19

[*References are to sections.*]

Ind. App. 584; 49 N. E. Rep. 857), 1039.
Austin, etc., R. Co. *v.* Anderson (85 Texas 88; 19 S. W. Rep. 1025), 168.
Austin *v.* Chicago, etc., R. Co. (93 Iowa 236; 61 N. W. Rep. 849), 272.
Austin *v.* Great Western R. Co. (L. R. 2 Q. B. 442; 8 B. & S. 327; 36 L. J. Q. B. 201; 15 W. R. 863; 16 L. T. 320), 559.
Austin *v.* New Jersey, etc., Co. (43 N. Y. 75), 393.
Austin *v.* St. Louis, etc., P. Co. (15 Mo. App. 197), 74.
Autletz *v.* Smith (97 Minn. 217), 109.
Avery *v.* Dordyke, etc., Co. (70 N. E. Rep. 888), 99.
Avery *v.* New York, etc., R. Co. (121 N. Y. 31; 24 N. E. Rep. 20), 658.
Axline *v.* Toledo, W. & V. O. R. Co. (138 Fed. Rep. 169), 235.
Aycock *v.* Railway Co. (89 N. C. 321), 229.
Ayers *v.* New York, etc., R. Co. (158 N. Y. 254; 53 N. E. Rep. 22), 677.
Ayers *v.* Richmond, etc., R. Co. (84 Va. 679; 5 S. E. Rep. 582; 33 Am. & Eng. R. Cas. 269), 491.
Ayylon *v.* Boston, etc., R. Co. (105 Mass. 77), 1039.

B

Babb *v.* Oxford, etc., Co. (99 Me. 298; 59 Atl. Rep. 290), 318.
Babcock *v.* Old Colony R. Co. (150 Mass. 467; 23 N. E. Rep. 325), 495.
Bacon *v.* Delaware, etc., R. Co. (143 Pa. St. 14; 21 Atl. Rep. 1002), 783.
Baer *v.* Erie R. R. Co. (95 N. Y. S. 486), 239.
Bahr *v.* Northern Pacific R. Co. (112 N. W. Rep. 267), 171.
Bahrenburgh *v.* Brooklyn City R. Co. (56 N. Y. 652), 1058.
Bailey *v.* Delaware, etc., R. Co. (27 App. Div. [N. Y.] 305; 50 N. Y. Supp. 87), 500.
Bailey *v.* Hartford, etc., R. Co. (56 Conn. 444; 16 Atl. Rep. 234; 37 Am. & Eng. R. Cas. 483), 877.
Bailey *v.* Kansas City (189 Mo. 503; 87 S. W. Rep. 1182), 94.
Bailey *v.* Lehigh Valley R. Co. (69 Atl. Rep. 998; 220 Pa. St. 516), 1061.
Bailey *v.* New Haven, etc., R. Co. (107 Mass. 497), 877.
Bailey *v.* Rome, etc., R. Co. (19 N. Y. S. R. 656; 49 Hun 377; 3 N. Y. Supp. 585), 133.
Bailey *v.* Troy, etc., R. Co. (57 Vt. 252), 285.
Bain *v.* Northern Pac. Ry. Co. (98 N. W. Rep. 241), 549.
Baird *v.* Citizens R. Co. (146 Mo. 265; 48 S. W. Rep. 78), 304.
Baird *v.* Daly (68 N. Y. 547), 95.
Baker *v.* Balkam (1 Camp. 493), 42.
Baker *v.* Boston, etc., R. Co. (65 Atl. Rep. 386), 850.
Baker *v.* Kansas City, etc., R. Co. (147 Mo. 140; 48 S. W. Rep. 838), 942.
Baker *v.* Manhattan R. Co. (118 N. Y. 533; 23 N. E. Rep. 885), 172.
Baker *v.* Norfolk & S. R. Co. (56 S. E. Rep. 553), 889.
Baker *v.* Pennsylvania R. Co. (142 Pa. St. 503; 21 Atl. Rep. 979), 175.
Baker *v.* Philadelphia & Ry. Co. (149 Fed. Rep. 882), 480.
Baker *v.* Railroad Co. (95 Pa. St. 211), 271.
Baker *v.* Western, etc., R. Co. (68 Ga. 699), 343.
Baker's Admr. *v.* Lexington, etc., R. Co. (28 Ky. L. R. 140; 89 S. W. Rep. 149), 78.
Balch *v.* Grand Rapids R. Co. (67 Mich. 394; 11 West. Rep. 476; 34 N. W. Rep. 884), 202.
Baldwin *v.* Chicago, etc., R. Co. (50 Iowa 680), 370.
Baldwin *v.* Railway Co. (68 Iowa 37; 25 N. W. Rep. 918), 266.
Baldwin *v.* St. Louis, etc., R. Co. (63 Iowa 210; 18 N. W. Rep. 884; 15 Am. & Eng. R. Cas. 166; 75 Iowa 297; 39 N. W. Rep. 507), 485.
Baldwin *v.* Seaboard Air Line R. Co. (128 Ga. 567; 58 S. E. Rep. 35; 13 L. R. A. [N. S.] 360), 730.
Ball *v.* Chesapeake, etc., R. Co. (93 Va. 44; 24 S. E. Rep. 467; 57 Am. St. Rep. 786; 32 L. R. A. 792), 760.
Ball *v.* Megrath (86 Pac. Rep. 382), 257.
Ballard *v.* Chicago, etc., R. Co. (51 Mo. App. 453), 378.
Ballard *v.* Mississippi Oil Co. (81 Miss. 507; 34 So. Rep. 533; 95 Am. St. Rep. 476; 62 L. R. A. 407), 504.
Ballou *v.* Chicago, etc., R. Co. (54 Wis. 257; 11 N. W. Rep. 559; 41 Am. Rep. 31; 5 Am. & Eng. R. Cas. 480), 343.
Balsley *v.* St. Louis, etc., R. Co. (119 Ill. 68; 8 N. E. Rep. 859; 59 Am. Rep. 784), 235.
Baltimore, etc., R. Co. *v.* Abbegglen (84 N. E. Rep. 566), 1029.
Baltimore, etc., R. Co. *v.* Adams (10 App. D. C. 97), 1051.
Baltimore, etc., R. Co. *v.* Anderson (85 Fed. Rep. 413; 29 C. C. A. 235), 37.
Baltimore, etc., R. Co. *v.* Andrews (50 Fed. Rep. 728; 53 Am. & Eng. R. Cas. 523), 93.
Baltimore, etc., R. Co. *v.* Baldwin (144 Fed. Rep. 53), 47.
Baltimore, etc., R. Co. *v.* Baugh (149 U. S. 368; 13 Sup. Ct. Rep. 914; 37 L. Ed. 772), 461.
Baltimore, etc., R. Co. *v.* Blocher (27 Md. 277), 590.
Baltimore, etc., R. Co. *v.* Botelar (38 Md. 568; 10 Am. Ry. Rep. 506), 187.
Baltimore, etc., R. Co. *v.* Breinig (25 Md. 378), 572.
Baltimore, etc., Co. *v.* Brown (146 Fed. Rep. 24), 473.
Baltimore & O. Ry. *v.* Campbell (28 Ohio Cir. Ct. R. 662), 1065.
Baltimore, etc., R. Co. *v.* Camp (65 Fed. Rep. 952; 13 C. C. A. 233), 489.
Baltimore & Ohio R. Co. *v.* Chambers (Ohio, 76 N. E. Rep. 91), 50.

[*References are to sections.*]

Baltimore, etc., R. Co. *v.* Cumberland (176 U. S. 232; 20 Sup. Ct. Rep. 280; 44 L. Ed. 447), 1062.
Baltimore, etc., R. Co. *v.* Depew (40 Ohio St. 121; 12 Am. & Eng. R. Cas. 64), 1092.
Baltimore & O. Ry. Co. *v.* Evans (82 N. E. Rep. 773), 834.
Baltimore, etc., R. Co. *v.* Fitzpatrick (35 Md. 32), 1028.
Baltimore & O. R. Co. *v.* Gettle (3 W. Va. 376), 68.
Baltimore & Ohio R. Co. *v.* Gillard (Ind. 71 N. E. Rep. 58). 65.
Baltimore, etc., R. Co. *v.* Herold (74 Md. 510; 22 Atl. Rep. 323; 14 L. R. A. 75), 598.
Baltimore, etc., R. Co. *v.* Hobbs (Md. 19 Am. & Eng. R. Cas. 337), 1016.
Baltimore, etc., R. Co. *v.* Hottman (25 Ohio Cir. Ct. R. 140), 504.
Baltimore & Ohio R. Co. *v.* Hunsucker (Ind. 70 N. E. Rep. 556), 257.
Baltimore & Pot. R. Co. *v.* Jones (95 U. S. 439; 24 L. Ed. 506), 4.
Baltimore, etc., R. Co. *v.* Jones (158 Ind. 87; 62 N. E. Rep. 994), 505.
Baltimore, etc., R. Co. *v.* Kane (69 Md. 11; 13 Atl. Rep. 387; 12 Cent. Rep. 95), 718, 784.
Baltimore, etc., R. Co. *v.* Kean (65 Md. 394; 5 Atl. Rep. 325; 28 Am. & Eng. R. Cas. 580), 392.
Baltimore, etc., R. Co. *v.* Kemp (61 Md. 619; 48 Am. Rep. 134), 170.
Baltimore, etc., R. Co. *v.* Leapley (65 Md. 571; 4 Atl. Rep. 891; 27 Am. & Eng. R. Cas. 167), 791.
Baltimore, etc., R. Co. *v.* Leonhardt (66 Md. 70; 5 Atl. Rep. 346; 27 Am. & Eng. R. Cas. 194), 773.
Baltimore, etc., R. Co. *v.* Little (149 Ind. 167; 48 N. E. Rep. 862; 9 Am. & Eng. R. Cas. [N. S.] 427), 511.
Baltimore, etc., R. Co. *v.* Maili (66 Md. 53; 5 Atl. Rep. 87; 28 Am. & Eng. R. Cas. 628), 1029.
Baltimore, etc., R. Co. *v.* McCarney (12 Ohio C. C. 543), 564.
Baltimore, etc., R. Co. *v.* McKenzie (81 Va. 71; 24 Am. & Eng. R. Cas. 395), 152.
Baltimore, etc., R. Co. *v.* Mullen (120 Ill. App. 88; 75 N. E. Rep. 474; 217 Ill. 203), 706.
Baltimore, etc., R. Co. *v.* Mulligan (45 Md. 486), 398.
Baltimore, etc., Co. *v.* Neall (65 Md. 438; 5 Atl. Rep. 338), 261.
Baltimore, etc., R. Co. *v.* Noell (32 Gratt. [Va.] 394), 594.
Baltimore City R. Co. *v.* Nugent (86 Md. 349; 38 Atl. Rep. 779; 39 L. R. A. 161), 2.
Baltimore, etc., R. Co. *v.* Owings (65 Md. 502; 5 Atl. Rep. 329; 28 Am. & Eng. R. Cas. 639), 881.
Baltimore, etc., R. Co. *v.* Read (158 Ind. 25; 62 N. E. Rep. 488), 505.
Baltimore, etc., R. Co. *v.* Reaney (42 Md. 117), 393.
Baltimore, etc., R. Co. *v.* Rifowitz (89 Md. 338), 398.
Baltimore, etc., Ry. Co. *v.* Rowan (104 Ind. 88; 3 N. E. Rep. 627), 258.
Baltimore, etc., R. Co. *v.* School District (96 Pa. St. 65; 2 Am. & Eng. R. Cas. 166), 32.
Baltimore, etc., R. Co. *v.* State (75 Md. 152; 23 Atl. Rep. 310; 53 Am. & Eng. R. Cas. 379), 340.
Baltimore, etc., R. Co. *v.* State (63 Md. 135; 21 Am. & Eng. R. Cas. 202), 194.
Baltimore, etc., R. Co. *v.* State (60 Md. 449; 12 Am. & Eng. R. Cas. 149), 774.
Baltimore, etc., R. Co. *v.* State (33 Md. 542), 21.
Baltimore, etc., Co. *v.* State (41 Md. 268), 219.
Baltimore, etc., R. Co. *v.* State (79 Md. 335; 29 Atl. Rep. 518; 47 Am. St. Rep. 415), 1057.
Baltimore Traction Co. *v.* State (78 Md. 409; 28 Atl. Rep. 397), 696.
Baltimore, etc., R. Co. *v.* Strickler (51 Md. 47), 258.
Baltimore & A. Ry. Co. *v.* Trader (68 Atl. Rep. 12), 681.
Baltimore & Ohio R. Co. *v.* Voigt (176 U. S. 498; 44 L. Ed. 560; 20 Sup. Ct. Rep. 385), 855.
Baltimore, etc., R. Co. *v.* Walborn (127 Ind. 142; 26 N. E. Rep. 207), 953.
Baltimore, etc., R. Co. *v.* Whitacre (35 Ohio St. 627), 917.
Baltimore, etc., R. Co. *v.* Whittington (30 Gratt. [Va.] 805), 412.
Baltimore, etc., R. Co. *v.* Wightman (29 Gratt. [Va.] 431; 17 Am. Ry. Rep. 351), 189.
Baltzer *v.* Chicago, etc., R. Co. (83 Wis. 459; 53 N. W. Rep. 885), 136.
Bamberg *v.* International, etc., R. Co. (103 N. Y. Supp. 297), 1045.
Banchor *v.* Mansel (47 Me. 58), 858.
Bancroft *v.* Boston, etc., R. Co. (97 Mass. 275), 795.
Bandekow *v.* Chicago, B. & Q. Ry. Co. (117 N. W. Rep. 812), 1094.
Banderob *v.* Wisconsin Cent. Ry. Co. (113 N. W. Rep. 738), 862.
Bane *v.* Irwin (172 Mo. 306; 62 S. W. Rep. 522), 476.
Banks *v.* Wabash R. Co. (40 Mo. App. 458), 495.
Bannon *v.* New York, etc., R. Co. (98 N. Y. S. 770; 112 App. Div. 552), 534.
Bard *v.* Yohn (26 Pa. St. 482), 209.
Barden *v.* Boston, etc., R. Co. (121 Mass. 426), 799.
Bardwell *v.* Mobile, etc., R. Co. (63 Miss. 574), 791.
Barkdall *v.* Pennsylvania R. Co. (Pa. 13 Atl. Rep. 82), 348.
Barker *v.* Hannibal, etc., R. Co. (37 Am. & Eng. R. Cas. 292; 98 Mo. 50; 11 S. W. Rep. 254), 1060.
Barker *v.* Perry (67 Iowa 146; 25 N. W. Rep. 100), 92.
Barkley *v.* Missouri Pacific Ry. Co. (96 Mo. 367; 9 S. W. Rep. 793), 1091.

[*References are to sections.*]

Barkman *v.* Pennsylvania R. Co. (89 Fed. Rep. 453), 811.
Barksdale *v.* Seaboard Air Line Ry. (S. Car. 56 S. E. Rep. 906), 63.
Barnes *v.* Rumford (96 Me. 315; 52 Atl. Rep. 844), 1046.
Barnett *v.* East Tennessee, etc., R. Co. (87 Ga. 766; 13 S. E. Rep. 904), 833.
Barney *v.* Hannibal, etc., Ry. Co. (126 Mo. 392; 28 S. W. Rep. 1069; 26 L. R. A. 847), 711.
Barnical *v.* Connor (110 Iowa 240), 158.
Barr *v.* Hannibal R. Co. (30 Mo. App. 248), 956.
Barrett *v.* Bonham Oil Co. (Texas, 57 S. W. Rep. 602), 108.
Barrett *v.* Midland R. Co. (1 F. & F. 361), 881.
Barrett *v.* Pennsylvania R. Co. (4 N. Y. S. 127; 21 N. Y. S. R. 109; 121 N. Y. 697), 106.
Barrett *v.* Southern Pacific R. Co. (91 Cal. 296; 27 Pac. Rep. 666; 25 Am. St. Rep. 186), 1073.
Barrett *v.* Third Avenue R. Co. (45 N. Y. 628; 8 Abb. Pr. [N. S.] 205; 1 Sweeny, 568), 578.
Barringer *v.* New York, etc., R. Co. (18 Hun [N. Y.] 398), 884.
Barron *v.* Illinois Central R. Co. (1 Biss. [U. S.] 412), 70.
Barron *v.* Wisconsin, etc., R. Co. (89 Wis. 79; 61 N. W. Rep. 303), 892.
Barry *v.* Hannibal, etc., Ry. Co. (98 Mo. 62; 11 S. W. Rep. 308), 263.
Barry *v.* New York, etc., R. Co. (92 N. Y. 289; 28 Hun 441; 13 Am. & Eng. R. Cas. 613), 874.
Barstow *v.* Old Colony R. Co. (143 Kan. 535; 10 N. E. Rep. 255; 28 Am. & Eng. R. Cas. 473), 466.
Barth *v.* Kansas City, etc., R. Co. (142 Mo. 535; 44 S. W. Rep. 778; 10 Am. & Eng. R. Cas. [N. S.] 28), 685.
Bartholomew *v.* New York, etc., R. Co. (102 N. Y. 716; 7 N. E. Rep.), 799.
Bartle *v.* Houghton Co. R. Co. (Mich. 93 N. W. Rep. 620), 125.
Bartlett *v.* Boston, etc., Co. (117 Mass. 536), 393.
Bartlett *v.* R. R. Co. (148 Mo. L. C. 139), 109.
Bartley *v.* Metropolitan, etc., R. Co. (148 Mo. 140; 49 S. W. Rep. 840), 135.
Barton *v.* New York, etc., R. Co. (56 N. Y. 660; 1 T. & C. 297), 876.
Barton *v.* Odessa (82 S. W. Rep. 1119), 131.
Bartram *v.* Sharron (71 Conn. 686; 46 L. R. A. 144; 43 Atl. Rep. 143; 71 Am. St. Rep. 225), 1041.
Baskett *v.* Metropolitan St. Ry. Co. (101 S. W. Rep. 138), 801.
Bass *v.* Chicago, etc., R. Co. (36 Wis. 450; 9 Am. Ry. Rep. 101), 658.
Bateman *v.* New York, etc., R. Co. (47 Hun 429; 14 N. Y. S. R. 454), 153.
Bates *v.* Nashville, etc., R. Co. (90 Tenn. 36; 15 S. W. Rep. 1069; 25 Am. St. Rep. 665), 1073.
Bates *v.* New York, etc., R. Co. (60 Conn. 259; 22 Atl. Rep. 538), 958.
Bates *v.* Old Colony R. Co. (147 Mass. 255; 17 N. E. Rep. 633; 34 Am. & Eng. R. Cas. 355), 848.
Battan *v.* Alabama, etc., R. Co. (77 Ala. 591; 54 Am. Rep. 80; 23 Am. & Eng. R. Cas. 514), 738.
Batterson *v.* Chicago, etc., R. Co. (49 Mich. 184; 13 N. W. Rep. 508; 8 Am. & Eng. R. Cas. 133), 173.
Battis *v.* Chicago, etc., R. Co. (124 Iowa 483; 103 N. W. Rep. 481), 91.
Battishill *v.* Humphreys (64 Mich. 494; 31 N. W. Rep. 894; 28 Am. & Eng. R. Cas. 597), 942.
Batton *v.* South, etc., R. Co. (77 Ala. 591; 54 Am. Rep. 80; 23 Am. & Eng. R. Cas. 514), 761.
Bay Shore R. Co. *v.* Harris (67 Ala. 6), 182.
Bayley *v.* Eastern R. Co. (125 Mass. 62), 924.
Bayley *v.* Manchester, etc., R. Co. (L. R. 7 C. P. 415; L. R. 8 C. P. 148), 736.
Baylor *v.* Railroad Co. (40 N. J. L. 23), 258.
Bauer *v.* Kansas, etc., R. Co. (69 Mo. 219), 962.
Bauer *v.* St. Louis, etc., R. Co. (46 Ark. 388), 408.
Baumstein *v.* New York City Ry. Co. (107 N. Y. S. 23), 728.
Baxter *v.* Chicago, etc., R. Co. (104 Wis. 307; 80 N. W. Rep. 644), 272.
Baxter *v.* St. Louis Transit Co. (103 Mo. App. 597; 78 S. W. Rep. 70), 1054.
Beach *v.* Bay St. Co. (30 Barb. 433; 10 Abb. Pr. 71; 18 How. Pr. 335), 50.
Beach *v.* Southern Ry. Co. (61 S. E. Rep. 664, 669), 1092.
Bean *v.* Western, etc., R. Co. (107 N. Car. 731; 12 S. E. Rep. 600), 369.
Beasley *v.* Transfer Co. (148 Mo. 413; 50 S. W. Rep. 87), 357.
Beauchamp *v.* International & G. N. R. Co. (56 Texas 239; 9 Am. & Eng. R. Cas. 307), 102.
Beaumont *v.* Northern Pacific R. Co. (109 Fed. Rep. 532; 48 C. C. A. 529), 487.
Beaumont Traction Co. *v.* Dilworth (94 S. W. Rep. 352), 70.
Beaustrom *v.* Northern Pacific R. Co. (46 Minn. 193; 48 N. W. Rep. 778), 986.
Becht *v.* Corbin (92 N. Y. 658), 971.
Beck *v.* Quincy, etc., R. Co. (10 S. W. Rep. 132), 733.
Becke *v.* Missouri Pacific Ry. Co. (102 Mo. 544; 13 S. W. Rep. 1053), 1043.
Becker *v.* Baltimore, etc., R. Co. (57 Fed. Rep. 188), 469.
Beckwith *v.* Cheshire, etc., Ry. Co. (143 Mass. 68; 8 N. E. Rep. 875; 27 Am. & Eng. R. Cas. 192), 559.
Beckwith *v.* New York, etc., R. Co. (54 Hun N. Y. 446; 125 N. Y. 759), 974.
Bedford, etc., R. Co. *v.* Rainbolt (99 Ind. 551; 21 Am. & Eng. R. Cas. 466), 605.
Bedford Quarries Co. *v.* Baugh (80 N. E. Rep. 529), 504.
Beehler *v.* Daniels & Co. (27 L. R. A. 512), 872.

[*References are to sections.*]

Beers *v.* Housatonic R. Co. (19 Conn. 566), 614.
Beeson *v.* Green Mountain R. Co. (57 Cal. 20), 196.
Behen *v.* Transit Co. (186 Mo. 430; 85 S. W. Rep. 346), 125.
Beiseigel *v.* New York, etc., R. Co. (34 N. Y. 622; 40 N. Y. 9), 937.
Beiser *v.* Chesapeake, etc., R. Co. (29 Ky. L. R. 249; 92 S. W. Rep. 928), 1096.
Beker's Admr. *v.* Lexington, etc., R. Co. (Ky. 89 S. W. Rep. 149), 819.
Belding *v.* Black Hills, etc., R. Co. (S. Dak., 53 N. W. Rep. 750; 52 Am. & Eng. R. Cas. 624), 65.
Beleal *v.* Northern Pacific R. Co. (108 N. W. Rep. 33), 536.
Belknap *v.* Boston, etc., R. Co. (49 N. H. 358), 180.
Bell *v.* Central Electric Ry. Co. (103 S. W. Rep. 144), 183.
Bell *v.* Gulf, etc., R. Co. (Texas, 81 S. W. Rep. 134), 89.
Bell *v.* Hannibal, etc., R. Co. (72 Mo. 50; 4 Am. & Eng. R. Cas. 580), 1083.
Bell *v.* Western, etc., R. Co. (70 Ga. 566), 349.
Bellamy *v.* Whitesell (Mo., 100 S. W. Rep. 514), 63.
Bellefontaine R. Co. *v.* Hunter (33 Ind. 335), 1029.
Bellefontaine, etc., R. Co. *v.* Snyder (18 Ohio St. 399; 24 Ohio St. 670), 1058.
Belles *v.* Jackson (4 Pa. Dist. R. 194), 275.
Bellman *v.* New York, etc., R. Co. (5 N. Y. S. R. 153; 42 Hun 130; 122 N. Y. 671; 34 N. Y. S. R. 1015), 556.
Belt Ry. Co. *v.* Confrey (209 Ill. 344; 70 N. E. Rep. 773), 109.
Belten *v.* Baxter (54 N. Y. 245), 1029.
Beltz *v.* Baltimore & Ohio R. Co. (137 Fed. Rep. 1016), 235.
Benage *v.* Lake Shore, etc., R. Co. (102 Mich. 72; 60 N. W. Rep. 286), 39.
Bender *v.* New York, etc., Co. (N. J. 61 Atl. Rep. 388), 318.
Bender *v.* St. Louis, etc., R. Co. (137 Mo. 240; 37 S. W. Rep. 132), 150.
Benedick *v.* Potts (88 Md. 52; 40 Atl. Rep. 1067; 34 L. R. A. 478), 118.
Benedict *v.* Chicago Great Western Ry. Co. (104 Mo. App. 218; 78 S. W. Rep. 60). 43.
Bengston *v.* Chicago, etc., R. Co. (47 Minn. 486; 50 N. W. Rep. 531), 336.
Benignia *v.* Pennsylvania R. Co. (197 Pa. St. 384; 47 Atl. Rep. 359), 354.
Benn *v.* Null (65 Iowa 407), 255.
Bennett *v.* Butterfield (70 N. W. Rep. 410), 872.
Bennett *v.* Grand Trunk R. Co. (3 Ont. 446; 13 Am. & Eng. R. Cas. 627), 962.
Bennett *v.* Long Island R. Co. (21 App. Div. 25; 47 N. Y. Supp. 258; 163 N. Y. 1; 57 N. E. Rep. 79), 210.
Bennett *v.* Louisville, etc., R. Co. (102 U. S. 577; 26 L. Ed. 235), 870.
Bennett *v.* New Jersey, etc., R. Co. (36 N. J. L. 225; 13 Am. Rep. 435), 1045.
Bennett *v.* New York, etc., R. Co. (57 Conn. 422; 18 Atl. Rep. 668; 41 Am. & Eng. R. Cas. 184; 40 N. Y. S. R. 948; 16 N. Y. Supp. 765; 133 N. Y. 563; 30 N. E. Rep. 1149), 1059.
Bennett *v.* Northern Pacific R. Co. (2 N. Dak. 112), 348.
Benson *v.* Central Pacific R. Co. (98 Cal. 45; 32 Pac. Rep. 809; 54 Am. & Eng. R. Cas. 126), 577.
Benson *v.* Baltimore, etc., R. Co. (77 Md. 535; 26 Atl. Rep. 973), 870.
Bentlet *v.* Georgia Pacific R. Co. (86 Ala. 484; 6 So. Rep. 37), 1096.
Bentley *v.* Loverock (102 Ill. App. 166), 872.
Benton *v.* Chicago, etc., R. Co. (55 Iowa 496; 8 N. W. Rep. 330), 198.
Bequette *v.* People's Transportation Co. (2 Oregon 200), 451.
Bequette *v.* St. Louis, etc., R. Co. (86 Mo. App. 601), 529.
Berberich *v.* Ebach (131 Pa. St. 165; 18 Atl. Rep. 1008), 287.
Berg *v.* Great Northern R. Co. (70 Minn. 272; 73 N. W. Rep. 648), 29.
Berg *v.* Parsons (156 N. Y. 109; 50 N. E. Rep. 957; 41 L. R. A. 391; 66 Am. St. Rep. 542), 285.
Berg *v.* Seattle, R. & S. Ry. Co. (87 Pac. Rep. 34), 273.
Bergman *v.* Altman (127 Iowa 693; 104 N. W. Rep. 280), 127.
Berkson *v.* Kansas City, etc., R. Co. (144 Mo. 211; 45 S. W. Rep. 1119), 234.
Berns *v.* Gaston G. C. Co. (27 W. Va. 285; 55 Am. Rep. 304), 248.
Berrigan *v.* New York, etc., R. R. Co. (131 N. Y. 582; 30 N. E. Rep. 57), 263.
Berry *v.* Boston & M. R. Co. (66 Atl. Rep. 386), 884.
Berry *v.* Central, etc., R. Co. (40 Iowa 564), 414.
Berry *v.* Louisville, etc., R. Co. (128 Ind. 484; 28 N. E. Rep. 182), 62.
Berry *v.* Missouri, etc., R. Co. (124 Mo. 223; 25 S. W. Rep. 229), 1071.
Berry *v.* Northeastern R. Co. (72 Ga. 137; 28 Am. & Eng. R. Cas. 575), 908.
Berry *v.* Pennsylvania R. Co. (N. J., 26 Am. & Eng. R. Cas. 396; 4 Atl. Rep. 303), 1001.
Berryman *v.* Cox (73 Mo. App. 67), 739.
Bertleson *v.* Chicago, etc., R. Co. (5 Dakota 313; 40 N. W. Rep. 531), 408.
Bertram *v.* People's Ry. Co. (154 Mo. 639; 55 S. W. Rep. 1040), 685.
Bertram *v.* Sharon (71 Conn. 686; 43 Atl. Rep. 143; 71 Am. St. Rep. 225; 46 L. R. A. 144), 1056.
Besel *v.* New York, etc., R. Co. (70 N. Y. 171), 469.
Bessex *v.* Railway Co. (45 Wis. 482), 258.
Betchman *v.* Seaboard Air Line Ry. (55 S. E. Rep. 140), 398.
Bethany *v.* Lee (124 Ill. App. 397), 168.
Bethmann *v.* Old Colony R. Co. (155 Mass. 352; 29 N. E. Rep. 587), 631.
Beuhring *v.* Chesapeake, etc., R. Co. (37 W. Va. 502; 16 S. E. Rep. 435), 461.
Beuneman *v.* Railroad Co. (20 N. W. Rep. 379), 625.

[*References are to sections.*]

Bevis *v.* Vanceburg, etc., Co. (Ky., 89 S. W. Rep. 126), 1055.
Beyel *v.* Newport, etc., Co. (34 W. Va. 538; 12 S. E. Rep. 532), 953.
Beyer *v.* Railroad Co. (114 Ala. 424; 21 So. Rep. 952), 349.
Bibb *v.* Norfolk, etc., R. Co. (87 Va. 711; 14 S. E. Rep. 163; 47 Am. & Eng. R. Cas. 651), 267.
Bibb *v.* Taylor (95 Ga. 615; 23 S. E. Rep. 188), 309.
Bickel *v.* Pennsylvania R. Co. (66 Atl. Rep. 756; 217 Pa. St. 456), 959.
Bier *v.* Hosford (35 Wash. 544; 77 Pac. Rep. 867), 89.
Bierbauer *v.* New York, etc., R. Co. (15 Hun 559; 77 N. Y. 588), 202.
Bigler *v.* Charlotte, etc., R. Co. (94 N. Car. 604; 26 Am. & Eng. R. Cas. 386), 395.
Bigelow *v.* Danielson (102 Wis. 470; 78 N. W. Rep. 599), 358.
Bigelow *v.* Metropolitan, etc., R. Co. (48 Mo. App. 367), 164.
Bigelow *v.* Reed (51 Me. 325), 33.
Bilbee *v.* London, etc., R. Co. (18 C. B. [N. S.] 584; 11 Jur. [N. S.] 745; 34 L. J. C. P. 182; 13 W. R. 779; 13 L. T. 146), 931.
Biles *v.* Seaboard Air Line Ry. Co. (139 N. C. 528; 52 S. E. Rep. 129), 263.
Billman *v.* Indianapolis, etc., R. Co. (76 Ind. 166; 40 Am. Rep. 230; 6 Am. & Eng. R. Cas. 41), 170.
Birch *v.* Benton (26 Mo. 153), 49.
Bird *v.* Flint, etc., R. Co. (86 Mich. 79; 48 N. W. Rep. 691), 1028.
Bird *v.* Great Northern R. Co. (By Pollock, C. B.; 28 L. J. [Exch.] 3), 585.
Birkett *v.* Knickerbocker R. Co. (110 N. Y. 504; 18 N. E. Rep. 108), 198.
Birmingham, etc., R. Co. *v.* Alexander (93 Ala. 133; 9 So. Rep. 525), 97.
Birmingham, etc., R. Co. *v.* Baker (132 Ala. 507; 31 So. Rep. 618), 1050.
Birmingham, etc., R. Co. *v.* Baylor (101 Ala. 488; 13 So. Rep. 793), 511.
Birmingham, etc., R. Co. *v.* Chesapeake, etc., R. Co. (98 Va. 548; 37 S. E. Rep. 17), 55.
Birmingham, etc., R. Co. *v.* Clay (108 Ala. 233; 19 So. Rep. 309), 783.
Birmingham, etc., Ry. Co. *v.* Dickerson (45 So. Rep. 659), 718.
Birmingham, etc., R. Co. *v.* Enslen (Ala., 39 So. Rep. 74), 100.
Birmingham, etc., R. Co. *v.* Hinton (Ala., 37 So. Rep. 635), 27.
Birmingham, etc., R. Co. *v.* Jacobs (Ala., 13 So. Rep. 408; 55 Am. & Eng. R. Cas. 299), 446.
Birmingham Ry. Co. *v.* Jones (45 So. Rep. 177), 1062.
Birmingham Southern R. Co. *v.* Kendrick (46 So. Rep. 588), 964.
Birmingham Ry. Light & Power Co. *v.* Ryan (41 So. Rep. 616), 451.
Birmingham *v.* Rochester City, etc., R. Co. (137 N. Y. 13; 32 N. E. Rep. 995; 58 Am. & Eng. R. Cas. 134), 605.
Birmingham Ry. Co. *v.* Wright (44 So. Rep. 1037), 822.
Bischoff *v.* People's, etc., R. Co. (121 Mo. 216; 25 S. W. Rep. 908), 37.
Bishop *v.* St. Paul, etc., R. Co. (48 Minn. 26; 50 N. W. Rep. 927), 170.
Bissell *v.* New York, etc., R. Co. (29 Barb. 602; 25 N. Y. 442), 856.
Bitner *v.* Utah, etc., R. Co. (4 Utah 502; 11 Pac. Rep. 620), 953.
Black *v.* Burlington, etc., R. Co. (38 Iowa 515), 978.
Black *v.* Carrollton, etc., R. Co. (10 La. Ann. 33), 661.
Black *v.* D. & R. Canal Co. (22 N. J. Eq. 130), 235.
Black *v.* Michigan Cent. R. Co. (Mich., 109 N. W. Rep. 1052; 13 Detroit Leg. N. 863), 206.
Black *v.* New York & R. Co. (79 N. E. Rep. 797), 401.
Blackstone *v.* Co. (Mass., 49 N. E. Rep. 635), 872.
Blackwell *v.* Lynchburg, etc., R. Co. (111 No. Car. 151; 16 S. E. Rep. 12), 962.
Blair *v.* Chicago, etc., R. Co. (43 Iowa 662; 14 Am. Ry. Rep. 575), 375.
Blair *v.* Erie R. Co. (66 N. Y. 313; 23 Am. Rep. 55), 564.
Blair *v.* Grand Rapids R. Co. (60 Mich. 124; 26 N. W. Rep. 855), 784.
Blair *v.* Heible (Mo., 77 S. W. Rep. 1017), 269.
Blair *v.* Milwaukee, etc., R. Co. (20 Wis. 254), 602.
Blair *v.* St. Louis, etc., R. Co. (27 Fed. Rep. 176), 74.
Blake *v.* Maine Cent. Ry. Co. (70 Me. 63), 261.
Blaker *v.* New Jersey, etc., R. Co. (30 N. J. Eq. 240; 18 Am. Ry. Rep. 81), 1033.
Blamires *v.* Lancashire, etc., R. Co. (42 L. J. Ex. 182; L. R. Ex. 283), 652.
Blanchard *v.* Lake Shore, etc., R. Co. (126 Ill. 416; 18 N. E. Rep. 799), 1033.
Blank *v.* Illinois, etc., R. Co. (182 Ill. 332; 55 N. E. Rep. 332; 80 Ill. App. 475), 564.—
Blanton *v.* Dold (109 Mo. 74), 111.
Blessing *v.* St. Louis, etc., R. Co. (77 Mo. 410; 7 Mo. App. 594; 15 Am. & Eng. R. Cas. 298), 488.
Bleyle *v.* New York, etc., R. Co. (46 Hun 675; 113 N. Y. 626; 20 N. E. Rep. 877; 22 N. Y. S. R. 993), 957.
Blodgett *v.* Bartlett (50 Ga. 353), 707.
Blomsness *v.* Puget Sound Ry. Co. (92 Pac. Rep. 414), 557.
Bloom *v.* Manhattan R. Co. (43 N. Y. S. R. 378; Hun 629; 17 N. Y. Supp. 812), 183.
Bluedorn *v.* Missouri Pacific Ry. Co. (108 Mo. 439; 18 S. W. Rep. 1103; 32 Am. St. Rep. 615), 1050.
Blundell *v.* Miller, etc., Co. (189 Mo. 552; 88 S. W. Rep. 103), 360.
Boatright *v.* Northeastern R. Co. (25 So. Car. 128), 492.
Bodie *v.* Charleston, etc., R. Co. (66 S. C. 302; 44 S. E. Rep. 943), 99.
Boering *v.* Chesapeake, etc., R. Co. (193 U. S. 442; 48 L. Ed. 742), 848.

[*References are to sections.*]

Bogan *v.* Carolina Central R. Co. (129 N. C. 154), 398.
Bogard *v.* Louisville, etc., R. Co. (100 Ind. 491), 461.
Boggess *v.* Chesapeake, etc., R. Co. (37 W. Va. 297; 16 S. E. Rep. 525), 791.
Bohan *v.* Milwaukee, etc., R. Co. (61 Wis. 391; 21 N. W. Rep. 241; 19 Am. & Eng. R. Cas. 276), 972.
Bohn *v.* Chicago, etc., R. Co. (106 Mo. 429; 17 S. W. Rep. 580), 327.
Bokamp *v.* Chicago & A. Ry. Co. (100 S. W. Rep. 689), 262.
Boland *v.* Missouri Pacific Ry. Co. (36 Mo. 484), 1040.
Boldt *v.* New York, etc., R. Co. (18 N. Y. 432), 469.
Bolinger *v.* St. Paul, etc., R. Co. (36 Minn. 418; 31 N. W. Rep. 856; 29 Am. & Eng. R. Cas. 408), 197.
Boll *v.* Adirondack R. Co. (22 N. Y. S. R. 365; 52 Hun 610; N. Y. Supp. 769), 1022.
Bomar *v.* Louisiana, etc., R. Co. (42 La. Ann. 983; 8 So. Rep. 478), 388.
Bond *v.* Chicago, etc., R. Co. (122 Mo. App. 207; 99 S. W. Rep. 80; 110 Mo. App. 131; 84 S. W. Rep. 124), 570.
Bond *v.* New York, etc., R. Co. (52 N. Y. S. R. 637; 23 N. Y. Supp. 450; 69 Hun 476), 1020.
Bonnea *v.* North Shore R. Co. (93 Pac. Rep. 106), 578.
Bonner *v.* Whitcomb (80 Texas 178; 15 S. W. Rep. 899), 483.
Bonner *v.* Wingate (78 Texas 333; 14 S. W. Rep. 790), 603.
Bookman *v.* Seaboard Air Line Ry. Co. (152 Fed. Rep. 686), 1094.
Bookrum *v.* Galveston, etc., R. Co. (57 S. W. Rep. 919), 246.
Boone County *v.* Mutchler (137 Ind. 140; 36 N. E. Rep. 534), 1057.
Booth *v.* Boston, etc., R. Co. (73 N. Y. 38; 67 N. Y. 593), 471.
Booth *v.* Union, etc., R. Co. (126 Iowa 13; 101 N. W. Rep. 147), 1062.
Bordeau *v.* Valley Falls Co. (16 R. I. 448; 17 Atl. Rep. 54), 354.
Borough of Metuchen *v.* Pennsylvania R. Co. (64 Atl. Rep. 484), 890.
Boss *v.* Northern Pac. R. Co. (5 Dak. 308; 40 N. W. Rep. 590), 568.
Boss *v.* Providence, etc., R. Co. (15 R. I. 149; 1 Atl. Rep. 9; 21 Am. & Eng. R. Cas. 364), 786.
Boster *v.* Chesapeake, etc., R. Co. (36 W. Va. 318; 15 S. E. Rep. 158; 52 Am. & Eng. R. Cas. 357), 658.
Bostick *v.* Baltimore, etc., R. Co. (45 N. Y. 712), 35.
Boston, etc., R. Co. *v.* Hurd (108 Fed. Rep. 116; 47 C. C. A. 615), 47.
Boswell *v.* Laird (8. Cal. 469; 68 Am. Dec. 345), 278.
Boucher *v.* New York & R. Co. (82 N. E. Rep. 15), 284.
Boulden *v.* Pennsylvania R. Co. (205 Pa. St. 264; 54 Atl. Rep. 906), 69.
Boulfrois *v.* United Traction Co. (210 Pa. St. 263; 2 Am. & Eng. Ann. Cas. 938), 715.
Bourgeaulf *v.* Grand Trunk R. Co. (5 Mont. Super. 249), 325.
Bourke *v.* Cork M. R. Co. (4 Ir. L. R. 682), 188.
Bouwmeester *v.* Grand Rapids, etc., R. Co. (63 Mich. 557; 30 N. W. Rep. 337; 28 Am. & Eng. R. Cas. 476), 1083.
Bowden *v.* Jacksonville, etc., R. Co. (41 So. Rep. 400), 69.
Bowen *v.* Chicago, etc., R. Co. (117 Ill. App. 9; 95 Mo. 268; 8 S. W. Rep. 230), 351, 467.
Bowen *v.* New York, etc., R. Co. (18 N. Y. 408), 579.
Bower *v.* Chicago, etc., R. Co. (61 Wis. 457; 21 N. W. Rep. 536; 19 Am. & Eng. R. Cas. 301), 1021.
Bower *v.* Peate (16 Moak's Eng. R. 374), 284.
Bowers *v.* Connecticut River R. Co. (162 Mass. 312; 38 N. E. Rep. 508), 512.
Bowers *v.* Union Pacific R. Co. (4 Utah 215; 7 Pac. Rep. 251), 394.
Bowes *v.* New York, etc., R. Co. (Mass., 62 N. E. Rep. 949), 380.
Bowles *v.* Chesapeake & O. R. Co. (57 S. E. Rep. 131), 947.
Bowles *v.* Indiana R. Co. (27 Ind. App. 672; 62 N. E. Rep. 94), 228.
Bowles *v.* Rome, etc., R. Co. (46 Hun 324; 113 N. Y. 643; 21 N. E. Rep. 414), 198.
Bowlin *v.* Union Pacific R. Co. (102 S. W. Rep. 631), 576.
Boyce *v.* Chicago & A. Ry. Co. (96 S. W. Rep. 670), 942.
Boyce *v.* Wabash, etc., Co. (63 Iowa 70; 23 Am. & Eng. R. Cas. 172; 50 Am. Rep. 730), 47.
Boyd *v.* Brazil, etc., Co. (22 Ind. App. 329; 50 N. E. Rep. 368), 42.
Boyd *v.* Chicago, etc., R. Co. (217 Ill. 332; 75 N. E. Rep. 496; 108 Am. St. Rep. 253), 281.
Boyd *v.* Coal Co. (50 N. E. Rep. 368), 506.
Boyd *v.* St. Louis Southwestern Ry. Co. (108 S. W. Rep. 713), 1032.
Boyd *v.* Wabash R. Co. (105 Mo. 371; 16 S. W. Rep. 909), 883.
Boyd *v.* West Chicago R. Co. (112 Ill. App. 50), 91.
Boyden *v.* Fitchburg, etc., R. Co. (72 Vt. 89; 47 Atl. Rep. 409), 1049.
Boyer *v.* Eastern Ry. Co. (87 Minn. 367; 92 N. W. Rep. 326), 381.
Boyle *v.* New York, etc., R. Co. (151 Mass. 102; 23 N. E. Rep. 827), 335.
Braceville, etc., Co. *v.* People (147 Ill. 66), 382.
Bracken *v.* Pennsylvania R. Co. (32 Pa. Super. Ct. 22), 930.
Bradburn *v.* Wabash R. Co. (Mich., 96 N. W. Rep. 929), 270.
Bradbury *v.* Kingston, etc., Co. (157 Pa. St. 231; 27 Atl. Rep. 400), 322.
Bradford Construction Co. *v.* Heflin (88 Miss. 314; 42 So. Rep. 174; Miss., 12 L. R. A. [N. S.] 1040), 504.
Bradley *v.* Chicago, etc., R. Co. (138 Mo. 293; 39 S. W. Rep. 763), 128.
Bradley *v.* Milwaukee, etc., R. Co. (138

[References are to sections.]

Mo. 293; 39 S. W. Rep. 763), 365.
Bradley *v.* Nashville, etc., R. Co. (14 Lea [Tenn.] 374), 350.
Bradwell *v.* Pittsburg, etc., R. Co. (139 Pa. St. 404; 20 Atl. Rep. 1046), 167.
Brady *v.* Chicago, etc., R. Co. (114 Fed. Rep. 100; 52 C. C. A. 48; 57 L. R. A. 712), 229.
Brady *v.* New York, etc., R. Co. (184 Mass. 225; 68 N. E. Rep. 227), 526.
Brady *v.* Toledo, etc., R. Co. (81 Mich. 616; 45 N. W. Rep. 1110), 1016.
Bragg *v.* Metropolitan R. Co. (192 Mo. l. c. 354; 91 S. W. Rep. 527), 1011.
Braisted *v.* Brooklyn, etc., R. Co. (46 N. Y. App. Div. 204; 61 N. Y. S. R. 674), 285.
Branco *v.* Illinois Central R. Co. (Iowa, 93 N. W. Rep. 97), 323.
Brann *v.* Chicago, etc., R. Co. (53 Iowa 595; 6 N. W. Rep. 5), 475.
Braunen *v.* Kohomo, etc., R. Co. (115 Ind. 115; 17 N. E. Rep. 202; 7 Am. St. Rep. 411), 1039.
Brannock *v.* Elmore (114 Mo. 55; 21 S. W. Rep. 451), 298.
Brassell *v.* New York, etc., R. Co. (84 N. Y. 241; 3 Am. & Eng. R. Cas. 380), 795.
Braun *v.* Union Ry. Co. (100 N. Y. S. 1012), 608.
Braverman *v.* Hart (105 N. Y. S. 107), 1038.
Braxton *v.* Hannibal, etc., R. Co. (77 Mo. 455), 948.
Brazil Coal Co. *v.* Gibson (66 N. E. Rep. 882), 95.
Breckenfelder *v.* Lake Shore, etc., R. Co. 79 Mich. 560; 44 N. W. Rep. 957), 1027.
Breen *v.* New York, etc., R. Co. (109 N. Y. 297), 608.
Breen *v.* St. Louis, etc., Co. (50 Mo. App. 202), 272.
Brehm *v.* Great Western R. Co. (34 Barb. N. Y. 256), 91.
Brennan *v.* Fairhaven, etc., R. Co. (45 Conn. 284; 29 Am. Rep. 679), 567.
Brennan *v.* Merchant, etc., Co. (205 Pa. 258; 54 Atl. Rep. 891), 280.
Bresse *v.* Los Angeles Traction Co. (Cal. 85 Pac. Rep. 152; 5 L. R. A. [N. S.] 1059), 1039.
Bretherton *v.* Wood (6 Moore 141; 3 Brod. & B. 54), 17.
Brewer *v.* Flint, etc., R. Co. (56 Mich. 620; 23 N. W. Rep. 440), 335.
Brewer *v.* New York, etc., R. Co. (124 N. Y. 59; 26 N. E. Rep. 324; 11 L. R. A. 483), 564.
Brewer *v.* Tenn., etc., Co. (97 Tenn. 615; 37 S. W. Rep. 549), 311.
Brewster *v.* Chicago, etc., R. Co. (114 Iowa 144; 86 N. W. Rep. 221; 89 Am. St. Rep. 348), 463.
Brice *v.* Louisville, etc., R. Co. (Ky., 9 S. W. Rep. 288; 38 Am. & Eng. R. Cas. 38), 332.
Brick *v.* Rochester, etc., R. Co. (98 N. Y. 211; 31 Hun 453; 21 Am. & Eng. R. Cas. 605), 352.
Brickman *v.* South Carolina R. Co. (8 So. Car. 173), 69.
Bricknell *v.* New York, etc., R. Co. (120 N. Y. 290; 24 N. E. Rep. 449; 30 N. Y. S. R. 932; 46 Hun 678; 42 Am. & Eng. R. Cas. 107), 1042.
Brickner *v.* New York, etc., R. Co. (2 Lans. N. Y. 506), 471.
Bridge *v.* Grand Junction R. Co. (3 M. K. W. 244), 1043.
Bridger *v.* Ashville, etc., R. Co. (27 So. Car. 456; 3 S. E. Rep. 860), 97.
Bridges *v.* North London R. Co. (43 L. J. Q. B. 157; L. R. 7 Q. B. 213; 23 W. R. 62; 30 L. T. 844), 629.
Bridges *v.* R. R. Co. (62 B. 377), 33.
Bridges *v.* St. Louis, etc., R. Co. (6 Mo. App. 389), 377.
Briggs *v.* Boston, etc., R. Co. (188 Mass. 463; 74 N. E. Rep. 667), 88.
Briggs *v.* Chicago & N. W. R. Co. (125 Fed. Rep. 745; 60 C. C. A. 513), 254.
Briggs *v.* Grand Trunk R. Co. (24 U. C. Q. B. 510), 102.
Briggs *v.* Minneapolis, etc., R. Co. (52 Minn. 36; 53 N. W. Rep. 1019), 734.
Brightman *v.* Union, etc., R. Co. (167 Mass. 113), 39.
Brinkmeier *v.* Missouri Pac. R. Co. (69 Kan. 738; 77 Pac. Rep. 586), 79.
Britt *v.* Carolina Northern R. Co. (56 S. E. Rep. 910), 500.
Britton *v.* Atlanta, etc., R. Co. (88 No. Car. 536; 43 Am. Rep. 749), 743.
Brocksmidt *v.* St. Louis, etc., R. Co. (Mo. 103 S. W. Rep. 964), 412.
Brodeur *v.* Valley Falls R. Co. (16 R. I. 448; 17 Atl. Rep. 54), 478.
Bromley *v.* New York, etc., R. Co. (79 N. E. Rep. 775), 803.
Bronson *v.* Oakes (76 Fed. Rep. 734; 40 U. S. App. 413; 22 C. C. A. 520), 648.
Brooks *v.* Boston, etc., R. Co. (135 Mass. 21; 16 Am. & Eng. R. Cas. 345), 790.
Brooks *v.* Buffalo, etc., R. Co. (27 Barb. N. Y. 532), 1006.
Brooks *v.* Hannibal, etc., R. Co. (35 Mo. App. 571), 446.
Brooks *v.* New York, etc., R. Co. (30 Hun 47), 178.
Brooks *v.* Northern Pac. R. Co. (47 Fed. Rep. 687), 338.
Brooks *v.* Southern Pacific R. Co. (64 Cent. L. J. 52), 448.
Brossman *v.* Lehigh Valley R. Co. (113 Pa. St. 490; 6 Atl. Rep. 226; 57 Am. Rep. 479), 346.
Brotherton *v.* Manhattan Beach Co. (48 Neb. 563; 67 N. W. Rep. 479; 69 N. W. Rep. 757; 33 L. R. A. 598), 5.
Brow *v.* Boston, etc., R. Co. (157 Mass. 399; 32 N. E. Rep. 362), 927.
Brown *v.* Baltimore & O. R. Co. (C. C., 142 Fed. Rep. 911), 473.
Brown *v.* Blaine (41 Wash. 287; 83 Pac. Rep. 310), 192.
Brown *v.* Central Pac. R. Co. (Cal., 12 Pac. Rep. 512), 321.
Brown *v.* Central Pacific R. Co. (72 Cal. 523; 14 Pac. Rep. 138), 500.

[*References are to sections.*]

Brown *v.* Chattanooga Co. (101 Tenn. 252; 47 S. W. Rep. 415), 128.
Brown *v.* Chicago, etc., R. Co. (54 Wis. 342; 11 N. W. Rep. 356; 41 Am. Rep. 41; 3 Am. & Eng. R. Cas. 444), 703.
Brown *v.* Chicago, etc., R. Co. (139 Fed. Rep. 972; 72 C. C. A. 20; 2 L. R. A. [N. S.] 105), 746.
Brown *v.* Chicago, etc., R. Co. (64 Iowa 652; 21 N. W. Rep. 193), 191.
Brown *v.* Chicago, etc., R. Co. (69 Iowa 161; 28 N. W. Rep. 487), 334.
Brown *v.* Chicago, etc., R. Co. (80 Wis. 162; 49 N. W. Rep. 807), 787.
Brown *v.* Chicago, etc., R. Co. (102 Wis. 137; 77 N. W. Rep. 748; 44 L. R. A. 579; 13 Am. & Eng. R. Cas. [N. S.] 603), 67.
Brown *v.* Congress, etc., R. Co. (49 Mich. 153; 8 Am. & Eng. R. Cas. 383), 4.
Brown *v.* Griffin (71 Texas 654; 9 S. W. Rep. 546), 952.
Brown *v.* Hannibal, etc., R. Co. (66 Mo. 588; 99 Mo. 310; 12 S. W. Rep. 655), 185, 736.
Brown *v.* Hannibal, etc., R. Co. (50 Mo. 461; 11 Am. Rep. 420), 392.
Brown *v.* La Societe Francaise (138 Cal. 475; 71 Pac. Rep. 516), 299.
Brown *v.* Louisville, etc., R. Co. (Ky. 14 S. W. Rep. 648; 10 Am. & Eng. R. Cas. N. S. 55), 731.
Brown *v.* Manhattan Ry. Co. (94 N. Y. S. 190; 105 App. Div. 395), 125.
Brown *v.* Memphis, etc., R. Co. (4 Fed Rep. 37; 7 Fed. Rep. 51; 1 Am. & Eng. R. Cas. 247), 165, 658.
Brown *v.* Milwaukee, etc., R. Co. (22 Minn. 165; 19 Am. Ry. Rep. 298), 409.
Brown *v.* Minneapolis, etc., R. Co. (31 Minn. 553; 18 N. W. Rep. 834), 485.
Brown *v.* Missouri, etc., R. Co. (64 Mo. 536), 571.
Brown *v.* New York, etc., R. Co. (181 Mass. 365), 715.
Brown *v.* New York, etc., R. Co. (34 N. Y. 404), 679.
Brown *v.* New York, etc., R. Co. (32 N. Y. 597; 88 Am. Dec. 353), 1046.
Brown *v.* Northern Ohio Traction Co. (81 N. E. Rep. 326), 398.
Brown *v.* Northern Pac. R. Co. (Wash. 86 Pac. Rep. 1053). 117.
Brown *v.* Railroad Co. (59 Kan. 70; 52 Pac. Rep. 65), 348.
Brown *v.* Ry. Co. (68 N. H. 518), 302.
Brown *v.* Rome, etc., R. Co. (48 Hun 619; 1 N. Y. Supp. 286; 121 N. Y. 669), 935.
Brown *v.* St. Louis, etc., R. Co. (52 Ark. 120; 12 S. W. Rep. 203), 1083.
Brown *v.* Scarboro, etc., R. Co. (97 Ala. 316; 12 So. Rep. 289; 58 Am. & Eng. R. Cas. 364), 797.
Brown *v.* Southern Pacific R. Co. (7 Utah 288; 26 Pac. Rep. 579), 492.
Brown *v.* Sullivan (71 Texas 470; 10 S. W. Rep. 288), 327.
Brown *v.* Texas, etc., R. Co. (42 La. Ann. 350; 7 So. Rep. 682), 878.
Brown *v.* Union R. Co. (51 Mo. App. 192), 164.
Brown *v.* Wabash R. Co. (20 Mo. App. 222), 28.
Brown *v.* Winona, etc., R. Co. (27 Minn. 162; 6 N. W. Rep. 484; 38 Am. Rep. 285), 476.
Brown *v.* Yazoo, etc., R. Co. (41 So. Rep. 383), 598.
Browne *v.* Raleigh, etc., R. Co. (108 No. Car. 34; 47 Am. & Eng. R. Cas. 544; 12 S. E. Rep. 958), 716.
Brownfield *v.* Chicago, etc., R. Co. (107 Iowa 254; 77 N. W. Rep. 1038), 118.
Brownell *v.* Chicago, etc., R. Co. (107 Iowa 254; 77 N. W. Rep. 1038), 110.
Browning *v.* Wabash Ry. Co. (124 Mo. 55; 27 S. W. Rep. 644), 1050.
Bruce *v.* Cincinnati, etc., R. Co. (83 Ky. 174), 47.
Brundige *v.* Dodge, etc., Co. (183 Mass. 100; 66 N. E. Rep. 604), 308.
Brunke *v.* Telephone Co. (115 Mo. App. 36; 90 S. W. Rep. 753), 95.
Brunswick & B. R. Co. *v.* Hoodenpyle (58 S. E. Rep. 705), 886.
Bryan *v.* International, etc., Ry. Co. (90 S. W. Rep. 693), 253.
Bryan *v.* Missouri Pacific Ry. Co. (32 Mo. App. 228), 578.
Bryant *v.* Burlington, etc., R. Co. (66 Iowa 305; 23 N. W. Rep. 678; 55 Am. Rep. 275; 21 Am. & Eng. R. Cas. 593), 334.
Bryant *v* Rich (106 Mass. 180), 727.
Bryce *v.* Burlington, etc., R. Co. (Iowa 93 N. W. Rep. 275), 338.
Brymer *v.* Railway Co. (90 Cal. 497; 27 Pac. Rep. 371), 249.
Buchanan *v.* Chicago, etc., R. Co. (35 Am. & Eng. R. Cas. 378), 886.
Bucher *v.* New York, etc., R. Co. (98 N. Y. 128; 21 Am. & Eng. R. Cas. 361), 788.
Buck *v.* Manhattan R. Co. (15 Daly, N. Y. 276; 6 N. Y. Supp. 524; 25 N. Y. S. R. 590), 937.
Buck *v.* Manhattan R. Co. (32 N. Y. S. R. 51; 10 N. Y. Supp. 107), 837.
Buck *v.* People's Ry., etc., Co. (46 Mo. App. 555; 108 Mo. 179; 18 S. W. Rep. 1090), 851.
Buckalew *v.* Chicago, etc., R. Co. (107 Mo. App. 575; 81 S. W. Rep. 1176), 98.
Bucki *v.* Cone (25 Flor. 1; 6 So. Rep. 160), 4.
Buckland *v.* New York, etc., R. Co. (Mass. 62 N. E. Rep. 955), 123.
Buckler *v.* Newman (116 Ill. App. 546), 1057.
Bucklew *v.* Central Iowa R. Co. (64 Iowa 603), 407.
Buckley *v.* Railway Co. (118 N. Y. 540), 80.
Buckner *v.* Richmond, etc., R. Co. (72 Miss. 873; 18 So. Rep. 449), 281.
Buel *v.* New York Cent. R. Co. (31 N. Y. 314; 88 Am. Dec. 271), 39.
Bueschingo *v.* Gas Light Co. (73 Mo. 219), 140.
Buffalo, etc., R. Co. *v.* O'Hara (3

[*References are to sections.*]

Penny. [Pa.] 190; 9 Am. & Eng. R. Cas. 317), 851.
Buffett *v.* New York, etc., R. Co. (40 N. Y. 168; affirming 36 Barb. 420), 556.
Bull *v.* Mobile, etc., R. Co. (67 Ala. 206), 469.
Bullard *v.* Boston, etc., R. Co. (64 N. H. 27; 27 Am. & Eng. R. Cas. 117), 710.
Bullard *v.* Southern R. Co. (116 Ga. 644), 398.
Bullock *v.* Houston, etc., R. Co. (Texas, 55 S. W. Rep. 184), 557.
Bullock *v.* Wilmington, etc., R. Co. (105 No. Car. 180; 10 S. E. Rep. 988; 42 Am. & Eng. R. Cas. 93), 1034.
Bunting *v.* Central Pacific R. Co. (16 Nev. 277), 398.
Bunting *v.* Hogsett (139 Pa. St. 363; 21 Atl. Rep. 31; 48 Am. & Eng. R. Cas. 87), 187.
Burbank *v.* Bethel, etc. Co. (75 Me. 373; 46 Am. Rep. 400), 285.
Burbridge *v.* Kansas City, etc., R. Co. (36 Mo. App. 669), 775.
Burch *v.* Southern Pac. R. Co. (140 Fed. Rep. 270), 375.
Burde *v.* Chicago, etc., R. Co. (100 S. W. Rep. 509), 417.
Burden *v.* Lake Shore, etc., R. Co. (104 Mich. 101; 62 N. W. Rep. 173), 789.
Burger *v.* Missouri Pacific Ry. Co. (112 Mo. 238; 20 S. W. Rep. 439), 964.
Burgess *v.* Stowe (Mich., 96 N. W. Rep. 29), 108.
Burke *v.* Burke (170 Mass. 499), 314.
Burke *v.* Ireland (26 N. Y. App. Div. 487; 50 N. Y. Supp. 369; 26 Cyc. Law & Proc. Cyc. 1559), 281.
Burke *v.* Manchester, etc., R. Co. (18 W. R. 694; 22 L. T. 442), 664.
Burke *v.* Manhattan Ry. Co. (96 N. Y. S. 516; 109 App. Div. 722), 257.
Burke *v.* Missouri Pacific Ry. Co. (51 Mo. App. 491), 562.
Burke *v.* Norwich, etc., R. Co. (34 Conn. 474), 292.
Burke *v.* Syracuse, etc., R. Co. (23 N. Y. Supp. 458; 69 Hun 21), 142.
Burleigh *v.* St. Louis Transit Co. (102 S. W. Rep. 621), 1050.
Burlington, etc., R. Co. *v.* Liehe (17 Colo. 280; 29 Pac. Rep. 175), 249.
Burmeister *v.* New York, etc., Co. (15 J. & S. N. Y. 264), 283.
Burnes *v.* Kansas City, etc., R. R. Co. (129 Mo. 41), 79.
Burnett *v.* Great North., etc., R. Co. (L. R. 10 App. Cas. 147; 54 L. J. Q. B. D. 531; 53 L. T. 507; 24 Am. & Eng. R. Cas. 647), 686.
Burnham *v.* Wabash R. Co. (91 Mich. 523; 52 N. W. Rep. 14), 557.
Burns *v.* Chicago, etc., R. Co. (69 Iowa 450; 30 N. W. Rep. 25; 28 Am. & Eng. R. Cas. 409), 343.
Burns *v.* Grand Rapids, etc., R. Co. (113 Ind. 169; 15 N. E. Rep. 230), 47.
Burns *v.* North Chicago R. Co. (65 Wis. 312; 27 N. W. Rep. 43), 941.
Burns *v.* St. Louis, etc., R. Co. (76 Ark. 10; 88 S. W. Rep. 824), 411.
Burns *v.* Staten Island R. Co. (10 N. Y. S. R. 352; 45 Hun 592), 482.
Burr *v.* Pennsylvania R. Co. (64 N. J. L. 30; 44 Atl. Rep. 845), 722.
Burrows *v.* Erie R. Co. (63 N. Y. 556), 720.
Burton *v.* Missouri Pacific Ry. Co. (32 Mo. App. 455), 374.
Busby *v.* Philadelphia Traction Co. (126 Pa. St. 559; 17 Atl. Rep. 895; 42 Am. & Eng. R. Cas. 144), 991.
Busch *v.* St. Paul, etc., R. Co. (Minn., 55 N. W. Rep. 87), 661.
Busey *v.* Hooper (35 Md. 15), 74.
Bush *v.* Steinman (1 B. & P. 404), 278.
Bush *v.* Union Pacific R. Co. (62 Kan. 709; 64 Pac. Rep. 624), 1039.
Bussell *v.* Quincy O. & K. C. R. Co. (102 S. W. Rep. 613), 576.
Butcher *v.* West Virginia, etc., R. Co. 37 W. Va. 180; 16 S. E. Rep. 457; 55 Am. & Eng. R. Cas. 181), 1034.
Butler *v.* Chicago, etc., R. Co. (87 Iowa 206; 54 N. W. Rep. 208), 522.
Butler *v.* St. Paul, etc., R. Co. (59 Minn. 135; 60 N. W. Rep. 1090), 789.
Butterfield *v.* Western, etc., R. Co. (10 Allen 532), 1012.
Butts *v.* National Bank (96 Mo. App. 168; 72 S. W. Rep. 1083), 1105.
Butts *v.* St. Louis, etc., R. Co. (98 Mo. 272; 11 S. W. Rep. 754), 1008.
Buttner *v.* Baltimore, Car, etc., Co. (Md., 60 Atl. Rep. 597), 249.
Buxton *v.* Northeastern R. Co. (3 Q. B. 549), 602.
Buxton *v.* Northeastern R. Co. (3 Q. B. 549), 295.
Byrd *v.* Southern Express Co. (51 S. E. Rep. 851), 73
Byrne *v.* Boston Elevated Ry. Co. (85 N. E. Rep. 78), 1027.
Byrne *v.* New York, etc., R. Co. (104 N. Y. 362; 10 N. E. Rep. 539; 58 Am. Rep. 512), 874.
Byrnes *v.* New York, etc., R. Co. (81 N. E. Rep. 187; 113 N. Y. 251; 21 N. E. Rep. 50; 4 L. R. A. 151), 599.
Byrnes *v.* New York, etc., R. Co. (71 Hun 209; 24 N. Y. S. 517), 263.

C

Caffi *v.* New York Central, etc., Co. (102 N. Y. S. 633), 412.
Cagney *v.* Hannibal, etc., R. Co. (69 Mo. 416), 327.
Cahill *v.* Boston & M. R. Co. (190 Mass. 421; 76 N. E. Rep. 911), 519.
Cahill *v.* Chicago & A. Ry. Co. (103 S. W. Rep. 532), 408.
Cahill *v.* Cincinnati, etc., R. Co. (92 Ky. 345; 18 S. W. Rep. 2; 49 Am & Eng. R. Cas. 390), 1042.
Cahill *v.* Hilton (13 N. E. Rep. 339), 145.
Cahoon *v.* Chicago, etc., R. Co. (85 Wis. 570; 55 N. W. Rep. 900), 952.

[*References are to sections.*]

Calcaterra *v.* Iovaldi (100 S. W. Rep. 675), 194.
Caldwell *v.* Kansas City, etc., R. Co. (58 Mo. App. 453), 884.
Caldwell *v.* Missouri Pac. R. Co. (181 Mo. 455; 80 S. W. Rep. 897), 73.
Caldwell *v.* New Jersey, etc., Co. (47 N. Y. 282), 177.
Caldwell *v.* Richmond, etc., R. Co. (89 Ga. 550; 15 S. E. Rep. 678), 703.
Calhoun *v.* Gulf, etc., R. Co. (84 Texas 226; 19 S. W. Rep. 341), 974.
Callahan *v.* Chicago, etc., R. Co. (23 Iowa 562), 284.
Callahan *v.* Louisville, etc., R. Co. (11 Fed. Rep. 536), 396.
Callahan *v.* St. Louis, etc., Ter. R. Co. (170 Mo. 473; 71 S. W. Rep. 208; 60 L. R. A. 249; 94 Am. St. Rep. 746; 194 U. S. 628; 24 Sup. Ct. Rep. 857; 48 L. Ed. 1157), 386.
Callahan *v.* Warne (40 Mo. 131), 838.
Calvo *v.* Charlotte, etc., R. Co. (23 So. Car. 526; 55 Am. Rep. 28; Am. & Eng. R. Cas. 327), 495.
Calwell *v.* Minneapolis, etc., R. Co. (115 N. W. Rep. 605), 874.
Camden, etc., R. Co. *v.* Baldauf (16 Pa. St. 67), 853.
Camden, etc., R. Co. *v.* Hoosey (99 Pa. St. 492; 44 Am. Rep. 120; 6 Am. & Eng. R. Cas. 454), 801.
Camden Interstate Ry. Co. *v.* Williams (140 Fed. Rep. 985; 72 C. C. A. 680), 47.
Campbell *v.* Chicago, etc., R. Co. (45 Iowa 76), 673.
Campbell *v.* Houston, etc., R. Co. (2 Tex. Unrep. Cas. 473), 56.
Campbell *v.* Illinois Central R. Co. (100 N. W. Rep. 30), 335.
Campbell *v.* New York, etc., R. Co. (3 N. Y. Supp. 694; 19 N. Y. S. R. 659; 49 Hun 611; 121 N. Y. 669), 1018.
Campbell *v.* Pennsylvania R. Co. (Pa., 2 Atl. Rep. 489; 24 Am. & Eng. R. Cas. 427), 352.
Campbell *v.* Portland, etc., R. Co. (62 Me. 552), 859.
Campbell *v.* Pullman Car Co. (42 Fed. Rep. 484), 738.
Campbell *v.* Railroad (53 Ga. 488), 451.
Canada Southern R. Co. *v.* Jackson (17 Can. Sup. Ct. 316), 413.
Canadian, etc., R. Co. *v.* Chalifoux (22 Can. S. C. 721), 614.
Canadian Pacific R. Co. *v.* Elliott (137 Fed. Rep. 904), 265.
Canadian Pacific R. Co. *v.* Johnson (6 Montr. L. R. 213), 1071.
Candee *v.* Kansas City, etc., R. Co. (130 Mo. 142; 31 S. W. Rep. 1029), 883.
Candee *v.* Pennsylvania R. Co. (21 Wis. 582), 683.
Candelaria *v.* Atchison, etc., R. Co. (N. M. 27 Pac. Rep. 497; 48 Am. & Eng. R. Cas. 565), 1060.
Canfield *v.* New York, etc., R. Co. (46 N. Y. S. R. 911; 19 N. Y. Supp. 839), 1025.
Cannaday *v.* Atlantic Coast Line R. Co. (55 S. E. Rep. 836), 243.
Cannon *v.* New York, etc., R. Co. (80 N. E. Rep. 450), 413.
Capper *v.* Louisville, etc., R. Co. (103 Ind. 305; 2 N. E. Rep. 749; 21 Am. & Eng. R. Cas. 525), 473.
Carbine *v.* Bennington, etc., R. Co. (61 Vt. 348; 17 Atl. Rep. 491; 38 Am. & Eng. R. Cas. 45), 341.
Card *v.* Eddy (129 Mo. 510; 28 S. W. Rep. 979), 498.
Card *v.* New York, etc., R. Co. (50 Barb. N. Y. 39), 679.
Cardwell *v.* Gulf, etc., R. Co. (Texas, 88 S. W. Rep. 422), 269.
Carey *v.* Boston, etc., R. Co. (158 Mass. 228; 33 N. E. Rep. 512), 338.
Carle *v.* Bangor, etc., R. Co. (43 Me. 269), 507.
Carlisle *v.* Brisbane (113 Pa. St. 544; 6 Atl. Rep. 372; 57 Am. Rep. 483), 1041.
Carlisle *v.* Sheldon (38 Vt. 440), 1056.
Carlson *v.* Oregon, etc., R. Co. (21 Oregon 450; 28 Pac. Rep. 497; 53 Am. & England R. Cas. 135), 380.
Carlton *v.* Yadkin R. Co. (55 S. E. Rep. 429), 683.
Carman *v.* Steelville, etc., R. Co. (4 Ohio St. 399), 290.
Carnegie Steel Company *v.* Byers (149 Fed. Rep. 667; 8 L. R. A. [N. S.] 677; 6 L. R. A. [N. S.] 337), 120.
Caron *v.* Boston, etc., R. Co. (164 Mass. 523; 42 N. E. Rep. 112), 510.
Carpenter *v.* Buffalo, etc., R. Co. (38 Hun [N. Y.] 116), 70.
Carpenter *v.* Boston, etc., R. Co. (97 N. Y. 494; 49 Am. Rep. 540; 21 Am. & Eng. R. Cas. 331), 628.
Carpenter *v.* Mexican, etc., R. Co. (39 Fed. Rep. 315), 374.
Carpue *v.* London, etc, R. Co. (5 Ad. & El. [N. S.] 747), 576.
Carpue *v.* Railroad Co. (5 D. B. 747), 122.
Carr *v.* Eel River R. Co. (98 Cal. 366; 33 Pac. Rep. 213; 58 Am. & Eng. R. Cas. 239), 708.
Carr *v.* Missouri Pacific Ry. Co. (195 Mo. 214; 92 S. W. Rep. 824), 1086.
Carraher *v.* San Francisco Bridge Co. (81 Cal. 98; 22 Pac. Rep. 480), 935.
Carrico *v.* West Virginia, etc., R. Co. (35 W. Va. 389; 14 S. E. Rep. 12; 39 W. Va. 86; 19 S. E. Rep. 571; 24 L. R. A. 50; 52 Am. & Eng. R. Cas. 393), 895.
Carrier *v.* Missouri Pacific Ry. Co. (175 Mo. 410; 17 Mo. 470; 74 S. W. Rep. 1002), 883.
Carrington *v.* Louisville, etc., R. Co. (88 Ala. 473; 41 Am. & Eng. Cas. 543; 6 So. Rep. 910), 1082.
Carroll *v.* East Tennessee, etc., R. Co. (82 Ga. 452; 10 S. E. Rep. 163; 41 Am. & Eng. R. Cas. 307), 347.
Carroll *v.* Minnesota Valley R. Co. (13 Minn. 30; 14 Minn. 57), 412.
Carroll *v.* Missouri Pacific Ry. Co. (88 Mo. 239; 57 Am. Rep. 382; 26 Am. & Eng. R. Cas. 268), 856.
Carroll *v.* New York, etc., R. Co. (182 Mass. 237; 65 N. E. Rep. 69), 880.

[*References are to sections.*]

Carroll *v.* Staten Island R. Co. (58 N. Y. 126; 65 Barb. 32; 7 Am. Ry. Rep. 25), 592.
Carroll *v.* Transit Co. (107 Mo. 653; 17 S. W. Rep. 889; 52 Am. & Eng. R. Cas. 273), 796.
Carruthers *v.* Kansas City, etc., R. Co. (59 Kan. 629; 54 Pac. Rep. 673), 817.
Carson *v.* Federal Street, etc., R. Co. (147 Pa. St. 219; 23 Atl. Rep. 369; 30 Am. St. Rep. 727), 1051.
Carson *v.* Southern Ry. Co. (68 S. C. 55; 46 S. E. Rep. 525), 372.
Carsten *v.* Northern Pacific R. Co. (44 Minn. 454; 47 N. W. Rep. 69), 729.
Carter *v.* Baldwin (107 Mo. App. 229; 81 S. W. Rep. 204), 301.
Carter *v.* Berlin, etc., Co. (58 N. H. 52; 42 Am. Rep. 572), 288.
Carter *v.* Columbia, etc., R. Co. (19 So. Car. 20; 45 Am. Rep. 754; 15 Am. & Eng. R. Cas. 414), 1086.
Carter *v.* Dubah, etc., Co. (La., 36 So. Rep. 952), 307.
Carter *v.* Louisville, etc., R. Co. (98 Ind. 552; 49 Am. Rep. 780; 22 Am. & Eng. R. Cas. 360), 1088.
Carterville Co. *v.* Abbott (81 Ill. App. 279; 55 N. E. Rep. 131), 404.
Carterville *v.* Cook (16 Am. St. Rep. 248; 63 Pac. Rep. 54; 43 L. R. A. 649), 234.
Cartlich *v.* Metropolitan St. Ry. Co. (108 S. W. Rep. 584), 721.
Cartwright *v.* Chicago, etc., R. Co. (52 Mich. 606; 18 N. W. Rep. 380; 50 Am. Rep. 274; 16 Am. & Eng. R. Cas. 321), 705.
Carwen *v.* Detroit, etc., R. Co. (61 Mich. 584), 133.
Case *v.* Cordell L. & Z. Co. (103 Mo. App. 477; 78 S. W. Rep. 62), 55.
Case *v.* New York, etc., R. Co. (75 Hun 527; 27 N. Y. Supp. 496; 57 N. Y. S. T. 653), 930.
Cass *v.* Third Avenue R. Co. (20 App. Div. 591; 47 N. Y. Supp. 356), 1049.
Casey *v.* Bridge Co. (114 Mo. App. 65), 838.
Casey *v.* Canadian Pacific R. Co. (15 Ont. 574; 37 Am. & Eng. R. Cas. 172), 1080.
Casey *v.* Louisville, etc., R. Co. (84 Ky. 79), 462.
Casey *v.* Transit Co. (116 Mo. App. 248; 205 Mo. 721; 103 S. W. Rep. 1146), 49, 845.
Cashman *v.* Chase (156 Mass. 342; 31 N. E. Rep. 4), 509.
Casoris Admr. *v.* Covington, etc., R. Co. (Ky., 93 S. W. Rep. 19; 98 S. W. Rep. 304), 273.
Cassidy *v.* Maine Central R. Co. (76 Me. 488; 17 Am. & Eng. R. Co. 519), 461.
Caswell *v.* Baltimore, etc., R. Co. (98 Mass. 194), 30.
Catawissa, etc., R. Co. *v.* Armstrong (52 Pa. St. 282), 196.
Cashart *v.* Hannibal, etc., R. Co. (19 Mo. App. 113), 106.
Cathron *v.* Packing Co. (98 Mo. App. 343), 113.
Cawley *v.* Winifred, etc., R. Co. (31 W. Va. 116; 5 S. E. Rep. 318), 396.
Ceamell *v.* St. Louis Transit Co. (102 Mo. App. 198; 76 S. W. Rep. 660), 708.
Cecil *v.* American Steel Co. (129 Fed. Rep. 542), 152.
Central R. Co. *v.* Allman (147 Ill. 471; 35 N. E. Rep. 725), 104.
Central of Georgia R. Co. *v.* Alexander (144 Ala. 257; 40 So. Rep. 424), 184.
Central of Georgia Ry. Co. *v.* Barnett (44 So. Rep. 392), 1004.
Central, etc., R. Co. *v.* Bateman (75 Fed. Rep. 1021), 150.
Central of Georgia Ry. Co. *v.* Brandenburgh (58 S. E. Rep. 658), 412.
Central, etc., R. Co. *v.* Brinson (70 Ga. 207; 19 Am. & Eng. R. Cas. 42), 875.
Central of Ga. Ry. Co. *v.* Clay (59 S. E. Rep. 843), 577.
Central R. Co. *v.* Crosby (74 Ga. 737), 165.
Central R. Co. *v.* DeBray (71 Ga. 406), 491.
Central, etc., R. Co. *v.* Denson (84 Ga. 774; 11 S. E. Rep. 1039), 1085.
Central, etc., R. Co. *v.* Dixon (42 Ga. 327), 1028.
Central Trust Co. *v.* East Tenn., etc., R. Co. (69 Fed. Rep. 353), 238.
Central R. Co. *v.* Feller (84 Pa. St. 226; 18 Am. Ry. Rep. 369), 1012.
Central of Georgia Ry. Co. *v.* Floyd (59 S. E. Rep. 826), 862.
Central, etc., R. Co. *v.* Freeman (75 Ga. 338), 599.
Central Ry. Co. *v.* Geopp (45 So. Rep. 65), 827.
Central Texas, etc., R. Co. *v.* Gibson (Texas, 83 S. W. Rep. 862), 1043.
Central R. Co. *v.* Glass (60 Ga. 441), 730.
Central R. R. *v.* Gleason (69 Ga. 200), 451.
Central Ry. Co. *v.* Goodwin (120 Ga. 83; 1 Am. & Eng. Ann. Cas. 806), 98.
Central, etc., R. Co. *v.* Grant (46 Ga. 417; 11 Am. Ry. Rep. 427), 297.
Central R. Co. *v.* Harris (76 Ga. 501), 577.
Central R. Co. *v.* Haslett (74 Ga. 59), 343.
Central R. Co. *v.* Henderson (69 Ga. 715), 519.
Central Texas, etc., R. Co. *v.* Hoard (49 S. W. Rep. 142), 39.
Central, etc., R. Co. *v.* Hollinshead (81 Ga. 208; 7 S. E. Rep. 172), 886.
Central, etc., R. Co. *v.* Huggins (89 Ga. 494), 559.
Central of Georgia Ry. Co. *v.* Hunter (58 S. E. Rep. 154), 1069.
Central of Georgia Ry. Co. *v.* Hyatt (43 So. Rep. 867), 996.
Central R. Co. *v.* Keegan (160 U. S. 259; 16 Sup. Ct. Rep. 269; 40 L. Ed. 418), 461.
Central, etc., R. Co. *v.* Kelley (58 Ga. 107), 92.
Central, etc., R. Co. *v.* Kenney (58 Ga. 485; 16 Am. Ry. Rep. 131), 343.
Central, etc., R. Co. *v.* Kent (84 Ga. 351; 10 S. E. Rep. 965), 82.

[*References are to sections.*]

Central, etc., R. Co. *v.* Kitchens (83 Ga. 83; 9 S. E. Rep. 827), 401.
Central Pass. R. Co. *v.* Kuhn (86 Ky. 578), 945.
Central, etc., R. Co. *v.* Lamb (124 Ala. 172; 26 So. Rep. 969), 510.
Central, etc., R. Co. *v.* Lanier (83 Ga. 587; 10 S. E. Rep. 279), 396.
Central, etc., R. Co. *v.* Letcher (69 Ala. 106; 12 Am. & Eng. R. Cas. 115), 788.
Central of Georgia Ry. Co. *v.* McClifford (120 Ga. 90; 47 S. E. Rep. 590), 232.
Central Ry. Co. *v.* McNab (43 So Rep. 222), 557.
Central, etc., R. Co. *v.* McWhorter (115 Ga. 476; 42 S. E. Rep. 82), 349.
Central, etc., R. Co. *v.* Miles (88 Ala. 256; 6 So. Rep. 696; 41 Am. & Eng. R. Cas. 150), 708.
Central R. Co. *v.* Moore (24 N. J. L. 824), 392.
Central of Georgia Ry. Co. *v.* Motz (161 S. E. Rep. 1), 976.
Central of Georgia Co. *v.* North (58 S. E. Rep. 647), 971.
Central R. Co. *v.* Passmore (90 Ga. 203; 15 S. E. Rep. 760), 230.
Central, etc., R. Co. *v.* Perry (58 Ga. 461; 16 Am. Ry. Rep. 122), 584.
Central, etc., R. Co. *v.* Price (106 Ga. 176; 32 S. E. Rep. 77; 43 L. R. A. 402), 28.
Central, etc., R. Co. *v.* Raiford (82 Ga. 400; 9 S. E. Rep. 169; 37 Am. & Eng. R. Cas. 481), 965.
Central, etc., R. Co. *v.* Roach (64 Ga. 635; 8 Am. & Eng. R. Cas. 79), 196.
Central R. Co. *v.* Rouse (77 Ga. 393), 133.
Central R. Co. *v.* Russell (75 Ga. 810), 982.
Central R. & B. Co. *v.* Ryles (84 Ga. 420; 11 S. E. Rep. 499), 394.
Central, etc., R. Co. *v.* Sims (80 Ga. 749; 7 S. E. Rep. 176), 331.
Central, etc., R. Co. *v.* Smith (80 Ga. 526; 5 S. E. Rep. 772; 34 Am. & Eng. R. Cas. 456), 835.
Central, etc., R. Co. *v.* Smith (74 Md. 212; 21 Atl. Rep. 706), 784.
Central R. Co. *v.* Stoermer (51 Fed. Rep. 518; 1 U. S. App. 276; 2 C. C. A. 360), 48.
Central, etc., R. Co. *v.* Strickland (90 Ga. 562; 16 S. E. Rep. 352; 52 Am. & Eng. R. Cas. 216), 658.
Central R. Co. *v.* Swint (73 Ga. 651; 26 Am. & Eng. R. Cas. 482), 47.
Central, etc., R. Co. *v.* Thompson (76 Ga. 770), 768.
Central, etc., R. Co. *v.* Van Horn (38 N. J. L. 133; 13 Am. Ry. Rep. 36), 827.
Central, etc., R. Co. *v.* Vaughan (93 Ala. 209; 9 So. Rep. 468), 1067.
Central Trust Co. *v.* Wabash R. Co. (34 Fed. Rep. 616; 27 Fed. Rep. 159), 920.
Central R. Co. *v.* Whitehead (74 Ga. 441), 557.
Central R. Co. *v.* Wood (51 Ga. 515; 8 Am. Ry. Rep. 9), 175.
Cerilles, etc. Co. *v.* Desserant (178 U. S. 570; 9 N. M. 49; 49 Pac. Rep. 807), 13.
Chaffee *v.* Boston, etc., R. Co. (104 Mass. 108), 795.
Chaffee *v.* Consolidated Ry. Co. (82 N. E. Rep. 497), 583.
Chaffee *v.* Erie R. Co. (73 N. Y. S. 908; 66 App. Div. 578), 255.
Chaffee *v.* Old Colony R. Co. (17 R. I. 658; 52 Am. & Eng. R. Cas. 366), 715.
Chamberlain *v.* Milwaukee, etc., R. Co. (11 Wis. 238; but see 18 Wis. 700), 359.
Chamberlain *v.* Minneapolis, etc., R. Co. 11 Wis. 238), 220.
Chamberlain *v.* Missouri Pacific R. Co. (133 Mo. 587; 33 S. W. Rep. 437; 34 S. W. Rep. 842), 861.
Chamberlain *v.* Pierson (87 Fed. Rep. 420; 31 C. C. A. 157; 59 N. S. App. 55), 564.
Chamberlain *v.* Wheatland (26 N. Y. S. R. 602; 7 N. Y. Supp. 190), 1046.
Champion *v.* Bostick (18 Wend. 174), 228.
Chandler *v.* New York, etc., R. Co. (159 Mass. 589; 35 N. E. Rep. 89), 47.
Chandler *v.* St. Louis, etc., R. Co. (106 S. W. Rep. 553), 495.
Chapman *v.* Erie R. Co. (55 N. Y. 579), 344.
Chapman *v.* New Haven, etc., R. Co. (19 N. Y. 341; 75 Am. Dec. 344), 1044.
Chapman *v.* New York, etc. R. Co. (14 Hun [N. Y.] 484), 106.
Charlebois *v.* Gogebic, etc., R. Co. (91 Mich. 59; 51 N. W. Rep. 812), 278.
Charleston & W. C. Ry. Co. *v.* Johnson (57 S. E. Rep. 1064), 1071.
Charlock *v.* Freel (125 N. Y. 357; 26 N. E. Rep. 262), 276.
Charlton *v.* St. Louis, etc., R. Co. (200 Mo. 413; 98 S. W. Rep. 529), 505.
Charman *v.* Lake Erie, etc., R. Co. (105 Fed. Rep. 449), 511.
Chase *v.* Burlington, etc., R. Co. (76 Iowa 675; 39 N. W. Rep. 196; 38 Am. & Eng. R. Cas. 148), 191.
Chase *v.* Jamestown, etc., R. Co. (15 N. Y. S. 35), 97.
Chattanooga, etc., R. Co. *v.* Huggins (89 Ga. 494; 15 S. E. Rep. 848; 52 Am. & Eng. R. Cas. 473), 827.
Chattanooga, etc., R. Co. *v.* Lawson (101 Tenn. 406; 47 S. W. Rep. 489; 12 Am. & Eng. R. Cas. [N. S.] 669), 495.
Chattanooga El. Ry. Co. *v.* Moore (Tenn., 82 S. W. 478), 258.
Chattanooga, etc., R. Co. *v.* Venable (105 Tenn. 460; 58 S. W. Rep. 861; 51 L. R. A. 886), 568.
Chattanooga, etc., R. Co. *v.* Whitehead (89 Ga. 190; 15 S. E. Rep. 44), 281.
Check *v.* Little Miami R. Co. (2 Disney [Ohio] 237), 809.
Chenall *v.* Palmer Brick Co. (117 Ga. 106; 43 S. E. Rep. 443), 119.

[*References are to sections.*]

Cheney *v.* New York, etc., R. Co. (16 Hun [N. Y.] 415), 947.
Cherry *v.* Chicago, etc., R. Co. (191 Mo. 489), 850.
Cherry *v.* Kansas City, etc., R. Co. (52 Mo. App. 499), 729.
Cherry *v.* Louisiana & A. Ry. Co. (46 So. Rep. 596), 909.
Chesapeake, etc., R. Co. *v.* Barbour's Admr. (Ky. 92 S. W. Rep. 928), 1096.
Chesapeake, etc., Ry. Co. *v.* Crank (108 S. W. Rep. 276), 730.
Chesapeake & N. Ry. *v.* Crews (99 S. W. Rep. 368), 947.
Chesapeake Beach Ry. Co. *v.* Donahue (68 Atl. Rep. 507), 1066.
Chesapeake & O. Ry. Co. *v.* Fortune (59 S. E. Rep. 1095), 570.
Chesapeake & O. R. Co. *v.* Heath (87 Ky. 651; 9 S. W. Rep. 832), 40.
Chesapeake & Ohio R. Co. *v.* Higgins 85 Tenn. 620; 4 S. W. Rep. 47), 71.
Chesapeake, etc., R. Co. *v.* Howard (178 U. S. 153), 817.
Chesapeake, etc., R. Co. *v.* Lee (84 Va. 642; 5 S. E. Rep. 579), 412.
Chesapeake, etc., R. Co. *v.* McMichael (Ky. 15 S. W. Rep. 878), 481.
Chesapeake & O. Ry. Co. *v.* Pace (106 S. W. Rep. 1176), 877.
Chesapeake, etc., Ry. Co. *v.* Paris Admr. (59 S. E. Rep. 398), 570.
Chesapeake, etc., R. Co. *v.* Reeves (Ky. 11 S. W. Rep. 464), 92.
Chesapeake & O. Ry. Co. *v.* Robinette (107 S. W. Rep. 763), 731.
Chesapeake, etc., R. Co. *v.* Satterfield (100 S. W. Rep. 844), 177.
Chesapeake & O. Ry. Co. *v.* Wilson's Admr. (102 S. W. Rep. 810), 900.
Chestnut *v.* Southern Ind. R. Co. (157 Ind. 509; 62 N. E. Rep. 32), 267.
Chewning *v.* Ensley R. Co. (100 Ala. 493; 14 So. Rep. 204), 619.
Chicago, etc., R. Co. *v.* Adimick (33 Ill. App. 412), 206.
Chicago, etc., R. Co. *v.* Adler (56 Ill. 344; 3 Am. Ry. Rep. 278), 971.
Chicago, etc., R. Co. *v.* Adler (129 Ill. 335; 21 N. E. Rep. 846), 1016.
Chicago, etc., R. Co. *v.* Arnol (144 Ill. 261; 33 N. E. Rep. 204; 28 Am. & Eng. R. Cas. 411), 573.
Chicago, etc., R. Co. *v.* Artery (137 U. S. 507; 11 Sup. Ct. Rep. 129; 44 Am. & Eng. R. Cas. 573), 522.
Chicago & A. Ry. Co. *v.* Averill (127 Ill. App. 275), 918.
Chicago, etc., R. Co. *v.* Avery (109 Ill. 314; 8 Ill App. 133; 17 Am. & Eng. R. Cas. 649), 360.
Chicago, etc., Ry. Co. *v.* Barr (204 Ill. 168; 68 N. E. Rep. 543), 358.
Chicago, etc., R. Co. *v.* Barrett (16 Ill. App. 17), 557.
Chicago, etc., R. Co. *v.* Bayfield (37 Mich. 205), 811.
Chicago, etc., R. Co. *v.* Becker (128 Ill. 545; 21 N. E. Rep. 524), 92.
Chicago, etc., R. Co. *v.* Bell (111 Ill. App. 280; 188 Ill. App. 56), 264.
Chicago, etc., R. Co. *v.* Bentz (38 Ill. App. 485), 1029.
Chicago, etc., R. Co. *v.* Bills (104 Ind. 13; 3 N. E. Rep. 611), 560.
Chicago, etc., R. Co. *v.* Birk (99 S. W. Rep. 753), 486.
Chicago, etc., R. Co. *v.* Blank (24 Ill. 438), 472.
Chicago, etc., R. Co. *v.* Blaul (70 Ill. App. 518), 941.
Chicago, etc., R. Co. *v.* Bliss (6 Ill. App. 411), 479.
Chicago, etc., R. Co. *v.* Boggs (101 Ind. 522; 51 Am. Rep. 761; 23 Am. & Eng. R. Cas. 282), 888.
Chicago & Alton R. Co. *v.* Bonifield (8 Am. & Eng. R. Cas. 493; 104 Ill. 223), 451.
Chicago, etc., R. Co. *v.* Bragonier (119 Ill. 51; 7 N. E. Rep. 688), 134.
Chicago, etc., R. Co. *v.* Brandau (65 Ill. App. 150), 492.
Chicago Union Traction Co. *v.* Brethauer (125 Ill. App. 204; 79 N. E. Rep. 287; 223 Ill. 521), 733.
Chicago, I. & L. R. Co. *v.* Bryan (75 N. E. Rep. 678), 323.
Chicago, R. I. & P. Ry. Co. *v.* Bunch (102 S. W. Rep. 369), 1068.
Chicago, etc., R. Co. *v.* Bundy (210 Ill. 39; 71 N. E. Rep. 28), 98.
Chicago, etc., Ry. Co. *v.* Burns (104 S. W. Rep. 1081), 567.
Chicago, etc., R. Co. *v.* Byrum (153 Ill. 131; 38 N. E. Rep. 578), 708.
Chicago, etc., R. Co. *v.* Carpenter (56 Fed. Rep. 451), 99.
Chicago, etc., R. Co. *v.* Carroll (5 Ill. App. 201; 206 Ill. 318; 68 N. E. Rep. 1087), 573.
Chicago, etc., R. Co. *v.* Cauffman (38 Ill. 424), 963.
Chicago, etc., R. Co. *v.* Chicago (140 Ill. 309), 976.
Chicago, etc., R. Co. *v.* Clark (108 Ill. 113; 15 Am. & Eng. R. Cas. 261), 99.
Chicago, etc., R. Co. *v.* Clark (26 Neb. 645; 70 Ill. 276; 42 N. W. Rep. 703; 38 Am. & Eng. R. Cas. 192), 283.
Chicago, etc., R. Co. *v.* Clark (2 Ill. App. 116), 866.
Chicago, M. & St. P. Ry. Co. *v.* Clarkson 147 Fed. Rep. 397), 411.
Chicago, etc., R. Co. *v.* Clough (134 Ill. 586; 25 N. E. Rep. 664; 29 N. E. Rep. 184; 33 Ill. App. 129), 998.
Chicago, etc., R. Co. *v.* Colwell (3 Ill. App. 545), 458.
Chicago, etc., R. Co. *v.* Condon (121 Ill. App. 440), 1053.
Chicago City Ry. Co. *v.* Cooper (128 Ill. App. 528), 735.
Chicago, etc., R. Co. *v.* Coss (73 Ill. 394), 689.
Chicago, etc., R. Co. *v.* Cotton (140 Ill. 486), 806.
Chicago & A. Ry. Co. *v.* Cox (145 Fed. Rep. 157), 864.
Chicago Union Traction Co. *v.* Crosby (109 Ill. App. 644), 116.
Chicago, etc., R. Co. *v.* Cross (73 Ill.

[*References are to sections.*]

394; 214 Ill. 602; 73 N. E. Rep. 865), 804.
Chicago Grt. West. R. Co. *v.* Crotty (141 Fed. Rep. 913; 73 C. C. A. 147; 8 L. R. A. [N. S.] 832), 358.
Chicago, etc., R. Co. *v.* Custer (22 Ill. App. 188), 974.
Chicago, etc., R. Co. *v.* Davis (53 Fed. Rep. 61; 10 U. S. App. 422; 3 C. C. A. 429; 53 Am. & Eng. R. Cas. 461), 412.
Chicago, R. I. & P. R. Co. *v.* Daugaard (118 Ill. App. 67), 252.
Chicago, etc., R. Co. *v.* Daugherty (12 Ill. App. 181), 453.
Chicago, etc., R. Co. *v.* Des-Lauriers (40 Ill. App. 645), 6.
Chicago, etc., R. Co. *v.* Dewey (26 Ill. 255), 414.
Chicago, etc., R. Co. *v.* Dickson (88 Ill. 431; 21 Am. Ry. Rep. 328), 447.
Chicago, etc., R. Co. *v.* Dignham (1 Ill. App. 162), 787.
Chicago & A. R. Co. *v.* Dillon (123 Ill. 750; 15 N. E. Rep. 181; 5 Am. St. Rep. 559; 17 Ill. App. 355), 896.
Chicago, etc., R. Co. *v.* Doherty (53 Ill. App. 282), 736.
Chicago, etc., R. Co. *v.* Donehue (75 Ill. 106), 343.
Chicago, etc., R. Co. *v.* Donovan (160 Fed. Rep. 826), 942.
Chicago, etc., R. Co. *v.* Dougherty (110 Ill. 521; 17 N. E. Rep. 1; 19 Am. & Eng. R. Cas. 292), 959.
Chicago, etc., R. Co. *v.* Dovorak (7 Ill. App. 555), 974.
Chicago, etc., R. Co. *v.* Dowd (115 Ill. 659), 985.
Chicago, etc., R. Co. *v.* Doyle (60 Miss. 977; 8 Am. & Eng. R. Cas. 171), 469.
Chicago, etc., R. Co. *v.* Drake (33 Ill. App. 114), 691.
Chicago, etc., R. Co. *v.* Driscoll (176 Ill. 330; 52 N. E. Rep. 921; 107 Ill. App. 615; 207 Ill. 432; 69 N. E. Rep. 620; 12 Am. & Eng. R. Cas. [N. S.] 644), 493.
Chicago, etc., R. Co. *v.* Dunn (52 Ill. 451; 61 Ill. 385; 12 Am. Ry. Rep. 427), 455, 877.
Chicago, etc., R. Co. *v.* Dunleavy (Ill., 39 Am. & Eng. R. Cas. 381), 448.
Chicago, etc., R. Co. *v.* Dynleavy (129 Ill. 132; 22 N. E. Rep. 15; 39 Am. & Eng. R. Cas. 381), 861.
Chicago, etc., R. Co. *v.* Eaton (194 Ill. 441; 62 N. E. Rep. 784), 498.
Chicago, etc., R. Co. *v.* Eininger (114 Ill. 79; 29 N. E. Rep. 196), 1081.
Chicago, etc., Co. *v.* Elder (149 Ill. 173; 36 N. E. Rep. 565), 602.
Chicago, etc., R. Co. *v.* Fears (53 Ill. 115), 451.
Chicago, etc., R. Co. *v.* Felton (125 Ill. 458; 17 N. E. Rep. 765; 24 Ill. App. 376; 33 Am. & Eng. R. Cas. 533), 775.
Chicago, etc., R. Co. *v.* Fenn (3 Ind. App. 250; 29 N. E. Rep. 790), 1003.
Chicago, etc., R. Co. *v.* Ferguson (3 Co'o. App. 414; 33 Pac. Rep. 684; 86 Pac. Rep. 471) 291, 801.
Chicago, etc., R. Co. *v.* Few (15 Ill. App. 125), 186.
Chicago-Couterville, etc., R. Co. *v.* Fidelity & Casualty Co. (130 Fed. Rep. 957), 6.
Chicago, etc., R. Co. *v.* Fietsahur (123 Ill. 518; 15 N. E. Rep. 169), 460.
Chicago, etc., R. Co. *v.* Fisher (141 Ill. 614; 51 N. E. Rep. 406; 49 Kan. 460; 30 Pac. Rep. 462), 801, 878.
Chicago, etc., R. Co. *v.* Fitzsimmons (40 Ill. App. 360), 999.
Chicago, etc., R. Co. *v.* Flaherty (96 Ill. App. 563), 718.
Chicago, etc., R. Co. *v.* Flexman (9 Ill. App. 250), 735.
Chicago, etc., R. Co. *v.* Florens (32 Ill. App. 365), 884.
Chicago, etc., R. Co. *v.* Flynn (154 Ill. 448; 40 N. E. Rep. 332),
Chicago, etc., R. Co. *v.* Gardner (116 Ill. App. 619), 19.
Chicago, etc., R. Co. *v.* Gates (162 Ill. 98; 61 Ill. App. 211), 651.
Chicago, etc., R. Co. *v.* Geary (110 Ill. 383; 17 Am. & Eng. R. Cas. 606), 343.
Chicago, etc., Co. *v.* Gill (132 Ill. App. 310), 973.
Chicago, etc., R. Co. *v.* Goebel (119 Ill. 515), 866.
Chicago, etc., R. Co. *v.* Goltz (71 Ill. App. 414), 495.
Chicago, etc., R. Co. *v.* Gomes (46 Ill. App. 255), 183.
Chicago, etc., R. Co. *v.* Gore (202 Ill. 192), 718.
Chicago, etc., R. Co. *v.* Green (93 Ill. App. 105), 398.
Chicago, etc., R. Co. *v.* Gregory (58 Ill. 272), 479.
Chicago, etc., R. Co. *v.* Gretzner (46 Ill. 74), 885.
Chicago, etc., Ry. Co. *v.* Groner (95 S. W. Rep. 1118), 622.
Chicago, R. I. & P. R. Co. *v.* Hamlin (215 Ill. 525; 74 N. E. Rep. 705), 225.
Chicago, etc., Co. *v.* Harney (28 Ind. 28), 350.
Chicago, etc., R. Co. *v.* Harrington (192 Ill. 9; 61 N. E. Rep. 622), 1041.
Chicago & G. T. R. Co. *v.* Hart (209 Ill. 414; 70 N. E. Rep. 654; 66 L. R. A. 75), 235.
Chicago, etc., R. Co. *v.* Harwood (90 Ill. 425; 80 Ill. 88), 447, 455.
Chicago, etc., R. Co. *v.* Hatch (79 Ill. 137), 995.
Chicago, etc., R. Co. *v.* Hazzard (26 Ill. 373), 580.
Chicago, etc., R. Co. *v.* Hedges (118 Ind. 5; 20 N. E. Rep. 530; 37 Am. & Eng. R. Cas. 516), 390.
Chicago, etc., R. Co. *v.* Hedges (105 Ind. 398; 7 N. E. Rep. 801; 25 Am. & Eng. R. Cas. 550), 1006.
Chicago City R. Co. *v.* Hennessy (16 Ill. App. 153), 288.
Chicago, etc., R. Co. *v.* Henry (7 Ill. App. 322), 479.
Chicago, etc., R. Co. *v.* Hines (132 Ill. 161; 23 N. E. Rep. 1021), 340.

[References are to sections.]

Chicago, etc., R. Co. *v.* Hoffman (82 Ill. App. 453), 39.
Chicago, etc., R. Co. *v.* Hogarth (38 Ill. 370), 885.
Chicago, etc., R. Co. *v.* Holland (122 Ill. 461; 13 N. E. Rep. 145; 30 Am. & Eng. R. Cas. 590), 175.
Chicago, etc., R. Co. *v.* Honey (63 Fed. Rep. 39; 12 C. C. A. 190; 26 L. R. A. 42), 234.
Chicago, etc., R. Co. *v.* House (172 Ill. 601; 50 N. E. Rep. 151), 487.
Chicago, etc., R. Co. *v.* Houston (95 U. S. 697), 408.
Chicago, B. & Q. R. Co. *v.* Howard (45 Neb. 570; 63 N. W. Rep. 872), 220.
Chicago, etc., R. Co. *v.* Howell (109 Ill. App. 546; 70 N. E. Rep. 15), 360.
Chicago, etc., R. Co. *v.* Hoyt (16 Ill. App. 237; 122 Ill. 369; 12 N. E. Rep. 225; 31 Am. & Eng. R. Cas. 309), 462, 479.
Chicago, etc., R. Co. *v.* Hutchinson (120 Ill. 589; 11 N. E. Rep. 855; 32 Am. & Eng. R. Cas. 82), 409.
Chicago, etc., R. Co. *v.* Ingraham (33 Ill. App. 351), 882.
Chicago, Burlington & Q. R. Co. *v.* Iowa (94 U. S. 161; 24 L. Ed. 94), 7.
Chicago, etc., R. Co. *v.* Jaekson (55 Ill. 492), 475.
Chicago, etc., R. Co. *v.* Jacobs (63 Ill. 178), 937.
Chicago, etc., R. Co. *v.* Jennings (157 Ill. 274; 41 N. E. Rep. 629), 1001.
Chicago, etc., R. Co. *v.* Johnson (116 Ill. 206; 4 N. E. Rep. 381), 455.
Chicago, etc., R. Co. *v.* Johnston (103 Ill. 512; 8 Am. & Eng. R. Cas. 225), 15.
Chicago, etc., R. Co. *v.* Knapp (Texas, 83 S. W. Rep. 233), 98.
Chicago *v.* Keefe (114 Ill. 230; 47 Ill. 108), 190, 480.
Chicago, etc., R. Co. *v.* Kellogg (54 Neb. 127; 74 N. W. Rep. 454; 55 Neb. 748; 76 N. W. Rep. 462), 494, 118.
Chicago, etc., Ry. Co. *v.* Kimmel (221 Ill. 547; 77 N. E. Rep. 936), 269.
Chicago, etc., R. Co. *v.* Kinnare (115 Ill. App. 132), 99.
Chicago, etc., R. Co. *v.* Koehler (47 Ill. App. 147), 783.
Chicago R. Co. *v.* Korando (129 Ill. App. 620), 929.
Chicago, etc., R. Co. *v.* Kowalski (92 Fed. Rep. 310; 34 C. C. A. 1), 1058.
Chicago, etc., R. Co. *v.* Krahlenbuhl (65 Neb. 889; 91 N. W. Rep. 880; 59 L. R. A. 920), 1073.
Chicago, etc., R. Co. *v.* Kruger (23 Ill. App. 639; 124 Ill. 457), 453.
Chicago, etc., R. Co. *v.* Kuster (22 Ill. App. 188), 991.
Chicago, etc. R. Co. *v.* Landauer (36 Neb. 642; 54 N. W. Rep. 976; 54 Am. & Eng. R. Cas. 640), 721.
Chicago, etc., R. Co. *v.* Lane (130 Ill. 116; 22 N. E. Rep. 513; 30 Ill. App. 437), 935.
Chicago, etc., R. Co. *v.* Lammert (12 Ill. App. 408), 466.
Chicago, etc., R. Co. *v.* La Porte (Ind., 71 N. E. Rep. 166), 69.
Chicago, etc., R. Co. *v.* Llauber (9 Ill. App. 613), 801.
Chicago, etc., *v.* Leach (104 Ill. App. 30), 321.
Chicago, etc., R. Co. *v.* Lee (60 Ill. 501; 68 Ill. 576; 87 Ill. 454), 946.
Chicago, etc., R. Co. *v.* Legekraus (91 N. W. Rep. 358), 60.
Chicago, etc., R. Co. *v.* Lewis (145 Ill. 67; 5 Ill. App. 242; 33 N. E. Rep. 960; 58 Am. & Eng. R. Cas. 126), 600.
Chicago, etc., R. Co. *v.* Logue (47 Ill. App. 292), 974.
Chicago, etc., R. Co. *v.* Lonergan (118 Ill. 41; 7 N. E. Rep. 55; 28 Am. & Eng. R. Cas. 491), 321.
Chicago, etc., R. Co. *v.* Louderback (125 Ill. App. 323), 991.
Chicago, etc., R. Co. *v.* Lowell (151 U. S. 209; 38 L. Ed. 131; 14 Sup. Ct. Rep. 281), 632.
Chicago Union Traction Co. *v.* Lowrenrosen (125 Ill. App. 194; 78 N. E. Rep. 813; 222 Ill. 506), 823.
Chicago, etc., R. Co. *v.* Lundstrom (16 Neb. 354; 49 Am. Rep. 718; 20 N. W. Rep. 198; 21 Am. & Eng. R. Cas. 528), 490.
Chicago, etc., R. Co. *v.* Mahoney (4 Ill. App. 262), 419.
Chicago, etc., R. Co. *v.* Mann (111 N. W. Rep. 379), 552.
Chicago, etc., R. Co. *v.* Marshall (Ind., 175 N. E. Rep. 973), 26.
Chicago, etc., R. Co. *v.* Mason (27 Ill. App. 450), 455.
Chicago, etc., R. Co. *v.* May (108 Ill. 288; 15 Am. & Eng. R. Cas. 320), 190.
Chicago, etc., R. Co. *v.* McAra (52 Ill. 296), 679.
Chicago, etc., R. Co. *v.* McCandish (79 N. E. Rep. 903), 877.
Chicago, etc., R. Co. *v.* McCarthy (61 Ill. App. 300), 1057.
Chicago Union Traction Co. *v.* McClevey (126 Ill. App. 21), 727.
Chicago, etc., R. Co. *v.* McDaniel (134 Ind. 166; 32 N. E. Rep. 728), 864.
Chicago, etc., R. Co. *v.* McGraw (26 Colo. 363; 45 Pac. Rep. 383), 265.
Chicago, etc., R. Co. *v.* McKean (40 Ill. 218), 451.
Chicago, etc., R. Co. *v.* McKnight (16 Ill. App. 596), 965.
Chicago, etc., R. Co. *v.* McLain (94 Ill. 109), 488.
Chicago, etc., R. Co. *v.* McLallen (84 Ill. 109), 486.
Chicago, etc., R. Co. *v.* McLarren (84 Ill. 110), 143.
Chicago, etc., R. Co. *v.* McLaughlin (119 U. S. 566; 7 Sup. Ct. Rep. 1366), 504.
Chicago *v.* McLean (133 Ill. 148; 24 N. E. Rep. 527; 8 L. R. A. 765), 185.
Chicago Tr. Co. *v.* Mee (218 Ill. 9; 75 N. E. Rep. 800; 119 Ill. App. 332), 116.
Chicago, etc., R. Co. *v.* Mehlsack (131

Ill. 61; 22 N. E. Rep. 812; 41 Am. & Eng. R. Cas. 60), 1087.
Chicago, etc., R. Co. *v.* Merckes (36 Ill. App. 195), 401.
Chicago & A. R. Co. *v.* Merriam (95 Ill. App. 628), 266.
Chicago, etc., *v.* Meyers (168 Ill. 139; 48 N. E. Rep. 66), 284.
Chicago, etc., R. Co. *v.* Michie (83 Ill. 427), 561.
Chicago, etc., R. Co. *v.* Miller (46 Mich. 532; 9 N. W. Rep. 841; 6 Am. & Eng. R. Cas. 89), 1021.
Chicago, etc., R. Co. *v.* Mock (72 Ill. 141), 456.
Chicago, etc., Ry. Co. *v.* Moran (129 Ill. App. 38), 560.
Chicago, etc., Ry. Co. *v.* Moranda (108 Ill. 576), 261.
Chicago, etc., R. Co. *v.* Morris (26 Ill. 400), 58.
Chicago Ry. Co. v. Mumford (21 Alb. L. J. 214), 125.
Chicago, etc., R. Co. *v.* Murray (62 Ill. 326; 7 Am. Ry. Rep. 308), 456.
Chicago, etc., R. Co. *v.* Notzki (66 Ill. 455), 999.
Chicago & N. W. Ry. Co. *v.* O'Brien 132 Fed. Rep. 593; 67 C. C. A. 421), 118.
Chicago, etc., R. Co. *v.* O'Connor (13 Ill. App. 62; 119 Ill. 586; 9 N. E. Rep. 263; 19 Ill. App. 591), 455, 459.
Chicago, etc., R. Co. *v.* O'Donnel (109 Ill. App. 616; 69 N. E. Rep. 882), 26.
Chicago Terminal, etc., R. Co. *v.* O'Donnell (114 Ill. App. 345; 72 N. E. Rep. 1133), 69.
Chicago, etc., R. Co. *v.* Olsen (12 Ill. App. 245), 409.
Chicago, etc., R. Co. *v.* Osceuring (4 Ill. App. 533), 493.
Chicago, etc., R. Co. *v.* Ostrander (116 Ind. 259; 32 Am. & Eng. R. Cas. 361; 15 N. E. Rep. 227), 152.
Chicago, etc., R. Co. *v.* Payne (59 Ill. 534; 49 Ill. 499; 11 Am. Ry. Rep. 157), 985.
Chicago, etc., R. Co. *v.* People (105 Ill. 657; 120 Ill. 667; 13 Am. & Eng. R. Cas. 42), 686, 886.
Chicago, etc., R. Co. *v.* Perkins (125 Ill. 127; 17 N. E. Rep. 1), 877.
Chicago, etc., R. Co. *v.* Pillsbury (123 Ill. 9; 14 N. E. Rep. 23; 5 Am. St. Rep. 483), 744.
Chicago, etc., R. Co. *v.* Pondrom (51 Ill. 333), 457.
Chicago, etc., R. Co. *v.* Pontius (52 Kan. 264; 34 Pac. Rep. 739; 157 U. S. 209; 39 L. Ed. 675), 504.
Chicago, etc., R. Co. *v.* Pulliam (111 Ill. App. 305), 106.
Chicago City Ry. Co. *v.* Pural (127 Ill. App. 652; 79 N. E. Rep. 686; 224 Ill. 324), 576.
Chicago, etc., Co. *v.* Rainneger (140 Ill. 334; 29 N. E. Rep. 1106; 33 Am. St. Rep. 249), 307.
Chicago, etc., Ry. Co. *v.* Ralston (93 Pac. Rep. 592), 583.
Chicago, etc., R. Co. *v.* Rathneau (80 N. E. Rep. 119; 225 Ill. 278), 500.
Chicago Terminal R. Co. *v.* Reddick (82 N. E. Rep. 598; 230 Ill. 105), 473.
Chicago, etc., R. Co. *v.* Reilly (212 Ill. 506; 72 N. E. Rep. 454; 40 Ill. App. 416), 114, 773.
Chicago, etc., R. Co. *v.* Riley (145 Fed. Rep. 137), 260.
Chicago, etc., R. Co. *v.* Robinson (106 Ill. 142; 19 Am. & Eng. R. Cas. 396), 972.
Chicago, etc., R. Co. *v.* Rogers (17 Ill. App. 638), 453.
Chicago, etc., R. Co. *v.* Rood (163 Ill. 477; 45 N. E. Rep. 238), 576.
Chicago, etc., R. Co. *v.* Ross (112 U. S. 377; 5 Sup. Ct. Rep. 184; 28 L. Ed. 787), 461.
Chicago, etc., R. Co. *v.* Rush (84 Ill. 570), 468.
Chicago, etc., R. Co. *v.* Ryan (131 Ill. 474; 70 Ill. 211; 23 N. E. Rep. 385; 43 Am. & Eng. R. Cas. 396), 398, 1021.
Chicago Tr. Co. *v.* Sawnsch (218 Ill. 130; 75 N. E. Rep. 797; 1 L. R. A. [N. S.] 670), 471.
Chicago, etc., R. Co. *v.* Scanlan (170 Ill. 106), 246.
Chicago, etc., R. Co. *v.* Scates (90 Ill. 586), 620.
Chicago, etc., R. Co. *v.* Schaefer (121 Ill. App. 334), 169.
Chicago, etc., R. Co. *v.* Schmitz (211 Ill. 446; 71 N. E. Rep. 1050), 77.
Chicago, etc., R. Co. *v.* Shannon (43 Ill. 338), 68.
Chicago City Ry. Co. *v.* Shreve (128 Ill. App. 462; 80 N. E. Rep. 1049; 226 Ill. 530), 703.
Chicago, etc., R. Co. *v.* Smith (80 N. E. Rep. 716), 985.
Chicago, etc., R. Co. *v.* Smith (124 Ill. App. 627), 985.
Chicago, etc., R. Co. *v.* Smith (69 Ill. App. 69), 1043.
Chicago, etc., R. Co. *v.* Smith (46 Mich. 504; 4 Am. & Eng. R. Cas. 535), 1084.
Chicago, etc., R. Co. *v.* Snyder (117 Ill. 376, 18 Ill. App. 640; 7 N. E. Rep. 604; 28 Am. & Eng. R. Cas. 611), 465.
Chicago, etc., R. Co. *v.* Spiker (134 Ind. 380; 33 N. E. Rep. 280; 55 Am. & Eng. R. Cas. 200), 104.
Chicago & C. R. Co. *v.* Stamps (26 Ill. App. 219), 872.
Chicago *v.* Stearns (105 Ill. 554), 459.
Chicago, etc., R. Co. *v.* Steckman (125 Ill. App. 299), 186.
Chicago, etc., R. Co. *v.* Stevens (189 Ill. 266; 59 N. E. Rep. 577), 369.
Chicago, etc., Co. *v.* Stewart (77 Ill. App. 66), 715.
Chicago, etc., Ry. Co. *v.* Stibbs (87 Pac. Rep. 293), 578.
Chicago, etc., R. Co. *v.* Still (19 Ill. 499), 458.
Chicago, etc., R. Co. *v.* Stroud (114 Ill. App. 479), 116.
Chicago, etc., R. Co. *v.* Stube (15 Ill. App. 39), 153.

[*References are to sections.*]

Chicago, etc., R. Co. *v.* Stumps (69 Ill. 409), 1084.
Chicago, etc., R. Co. *v.* Sullivan (143 Ill. 48), 985.
Chicago, etc., R. Co. *v.* Sullivan (63 Ill. 293), 455.
Chicago, etc., R. Co. *v.* Sullivan (17 N. E. Rep. 460), 167.
Chicago, etc., R. Co. *v.* Sutton (63 Fed. Rep. 394; 11 C. C. A. 251), 26.
Chicago, etc., R. Co. *v.* Swan (176 Ill. 424; 52 N. E. Rep. 916; 12 Am. & Eng. R. Cas. [N. S.] 674), 490.
Chicago & N. W. Ry. Co. *v.* Sweeney (52 Ill. 330), 451.
Chicago, etc., R. Co. *v.* Swett (45 Ill. 197), 201.
Chicago, etc., R. Co. *v.* Tackett (Ind., 71 N. E. Rep. 524), 338.
Chicago Union Traction Co. *v.* Theorell (120 Ill. App. 490), 255.
Chicago, etc., R. Co. *v.* Thompson (99 Ill. App. 277), 487.
Chicago, etc., R. Co. *v.* Thurston (11 Ill. App. 631), 453.
Chicago, etc., R. Co. *v.* Touhy (26 Ill. App. 99), 476.
Chicago, etc., R. Co. *v.* Travis (44 Ill. App. 466), 375.
Chicago, etc., R. Co. *v.* Trayes (33 Ill. App. 307), 806.
Chicago, etc., R. Co. *v.* Triplett (88 Ill. 482), 1012.
Chicago, etc., R. Co. *v.* Trotter (60 Miss. 442), 689.
Chicago, etc., R. Co. *v.* Tuite (44 Ill. App. 535), 468.
Chicago, B. & Q. R. Co. *v.* Van Patten (64 Ill. 510; 74 Ill. 91), 451, 455.
Chicago, etc., Ry. Co. *v.* Boelker (129 Fed. Rep. 522), 885.
Chicago, etc., R. Co. *v.* Voight (9 Am. Neg. Cas. 291), 653.
Chicago, etc., R. Co. *v.* Wagoner (90 Ill. App. 566), 677.
Chicago, etc., R. Co. *v.* Wall (93 Ill. App. 411), 1053.
Chicago & A. Ry. Co. *v.* Walters (217 Ill. 87; 75 N. E. Rep. 441), 79.
Chicago, etc., R. Co. *v.* Ward (61 Ill. 130; 12 Am. Ry. Rep. 434), 852.
Chicago, etc., *v.* Warner (123 Ill. 88; 14 N. E. Rep. 206), 447.
Chicago, etc., R. Co. *v.* Warner (108 Ill. 538; 18 Am. & Eng. R. Cas. 100), 164.
Chicago, etc., R. Co. *v.* Watkins (43 Kan. 50; 22 Pac. Rep. 985), 167.
Chicago, etc., R. Co. *v.* Wheelbarger (88 Pac. Rep. 531), 1014.
Chicago, etc., R. Co. *v.* White (110 Ill. App. 23), 91.
Chicago, etc., Ry. Co. *v.* White (209 Ill. 124; 70 N. E. Rep. 588), 864.
Chicago, etc., R. Co. *v.* Wilcox (21 L. R. A. 76), 1037.
Chicago, etc., Ry. Co. *v.* Wild (109 Ill. App. 88), 341.
Chicago, etc., R. Co. *v.* Wilgus (40 Neb. 660; 58 N. W. Rep. 1125), 861.
Chicago, etc., R. Co. *v.* Willard (111 Ill. App. 225), 28.
Chicago, etc., R. Co. *v.* Wilson (133 Ill. 55; 24 N. E. Rep. 555; 42 Am. & Eng. R. Cas. 153), 955.
Chicago & Alton R. Co. *v.* Wise (106 Ill. App. 174; 206 Ill. 453; 69 N. E. Rep. 500), 161.
Chicago, etc., Ry. Co. *v.* Wisker (71 N. E. Rep. 223; 72 N. E. Rep. 614), 511.
Chicago, etc., R. Co. *v.* Wooldridge (32 Ill. App. 237), 793.
Chicago & A. Ry. Co. *v.* Wright (120 Ill. App. 218), 940.
Chicago, etc., R. Co. *v.* Young (26 Ill. App. 115), 479.
Chicago, etc., R. Co. *v.* Zernecke (59 Neb. 689; 82 N. W. Rep. 26), 608.
Chick *v.* Southwestern R. Co. (57 Ga. 357), 62.
Childs *v.* Pennsylvania R. Co. (150 Pa. St. 73; 24 Atl. Rep. 341), 981.
Chilton *v.* St. Louis, etc., R. Co. (114 Mo. 88; 21 S. W. Rep. 457), 658.
Chisholm *v.* Manhattan Ry. Co. (101 N. Y. S. 622), 464.
Chitty *v.* St. Louis, etc., R. Co. (148 Mo. 64; 49 S. W. Rep. 868), 806.
Choate *v.* Missouri Pacific Ry. Co. (67 Mo. App. 105), 666.
Choctaw, etc., Ry. Co. *v.* Doughty (91 S. W. Rep. 768), 514.
Choctaw, etc., Ry. Co. *v.* Jones (Ark., 92 S. W. Rep. 244), 379.
Choctaw, etc., R. Co. *v.* Holloway (114 Fed. Rep. 458; 52 C. C. A. 260), 26.
Choctaw O. & G. R. Co. *v.* Jones (Ark., 4 L. R. A. [N. S.] 837), 379.
Choctaw, etc., Ry. Co. *v.* McDade (112 Fed. Rep. 888; 50 C. C. A. 591; 191 U. S. 64; 48 L. Ed. 96), 369.
Chollette *v.* Omaha, etc., R. Co. (26 Neb. 159; 41 N. W. Rep. 1106), 819.
Choppin *v.* New Orleans, etc., R. Co. (17 La. Ann. 19), 164.
Christensen *v.* Rio Grande, etc., R. Co. (Utah, 74 Pac. Rep. 876), 341.
Christian *v.* Columbus, etc., R. Co. (79 Ga. 460; 38 Am. & Eng. R. Cas. 261; 7 S. E. Rep. 216), 40.
Christianson *v.* Chicago, etc., R. Co. (67 Minn. 94; 69 N. W. Rep. 640), 38.
Christie *v.* Chicago, etc., R. Co. (60 Minn. 161; 63 N. W. Rep. 482), 619.
Christie *v.* Griggs (2 Camp. 79), 122.
Christy *v.* Chesapeake, etc., R. Co. (35 W. Va. 117; 12 S. E. Rep. 1111), 1077.
Christy *v.* Elliott (216 Ill. 31; 74 N. E. Rep. 1035; 108 Am. St. Rep. 196; 1 L. R. A. [N. S.] 215), 1055.
Church *v.* Chicago, etc., R. Co. (119 Mo. 203; 23 S. W. 1056), 1104.
Church *v.* Chicago, etc., R. Co. (50 Minn. 218; 52 N. W. Rep. 647), 316.
Cincinnati, etc., R. Co. *v.* Adam (Ky., 13 S. W. Rep. 428), 56.
Cincinnati, etc., R. Co. *v.* Bravard (Ind., 76 N. E. Rep. 899), 122.
Cincinnati, etc., R. Co. *v.* Butler (103 Ind. 31; 2 N. E. Rep. 138; 23 Am. & Eng. R. Cas. 262), 1033.
Cincinnati, etc., R. Co. *v.* Carper (112 Ind. 26; 13 N. E. Rep. 122; 31 Am. & Eng. R. Cas. [N. S.] 632), 500.

[References are to sections.]

Cincinnati & T. P. Ry. Co. *v.* Champ (104 S. W. Rep. 988; 31 Ky. Law Rep. 1054), 889.
Cincinnati, etc., R. Co. *v.* Clark (57 Fed. Rep. 125), 489.
Cincinnati, etc., R. Co. *v.* Cooper (120 Ind. 469; 22 N. E. Rep. 340; 6 L. R. A. 241), 734.
Cincinnati, etc., R. Co. *v.* Duffrain (36 Ill. App. 352), 788.
Cincinnati, etc., R. Co. *v.* Eaton (94 Ind. 474), 39.
Cincinnati, etc., R. Co. *v.* Gaines (104 Ind. 526; 4 N. E. Rep. 34; 54 Am. Rep. 334), 902.
Cincinnati, etc., R. Co. *v.* Gray (101 Fed. Rep. 623; 41 C. C. A. 535; 50 L. R. A. 47), 493.
Cincinnati & T. P. Ry. Co. *v.* Gibony (100 S. W. Rep. 216), 621.
Cincinnati & N. O. Ry. Co. *v.* Hill's Admr. (89 S. W. Rep. 523; 28 Ky. L. R. 530), 270.
Cincinnati, etc., R. Co. *v.* Howard (124 Ind. 280; 24 N. E. Rep. 892), 91.
Cincinnati, etc., R. Co. *v.* Kassen (49 Ohio St. 230; 31 N. E. Rep. 282; 16 L. R. A. 674; 52 Am. & Eng. R. Cas. 427), 575.
Cincinnati, etc., R. Co. *v.* Lang (118 Ind. 579; 21 N. E. Rep. 317; 38 Am. & Eng. R. Cas. 25), 471.
Cincinnati, etc., R. Co. *v.* Long (112 Ind. 166; 13 N. E. Rep. 659; 31 Am. & Eng. R. Cas. 138), 397.
Cincinnati, etc., R. Co. *v.* Madden (134 Ind. 462; 34 N. E. Rep. 227), 245.
Cincinnati, etc., Ry. Co. *v.* Maley's Admr. (25 Ky. L. R. 690; 76 S. W. Rep. 334), 380.
Cincinnati, etc., R. Co. *v.* McMullen (117 Ind. 439; 20 N. E. Rep. 287; 38 Am. & Eng. R. Cas. 165), 90.
Cincinnati Ry. Co. *v.* Mounts (104 S. W. Rep. 748), 622.
Cincinnati, etc., R. Co. *v.* Murray (53 Ohio St. 570; 42 N. E. Rep. 596; 30 L. R. A. 508), 136.
Cincinnati, etc., R. Co. *v.* Peters (80 Ind. 168; 6 Am. & Eng. R. Cas. 126), 833.
Cincinnati, etc., R. Co. *v.* Phinney (Ind. 77 N. E. Rep. 296), 357.
Cincinnati, etc., R. Co. *v.* Previtt (92 Ky. 223; 17 S. W. Rep. 484), 58.
Cincinnati, etc., Ry. Co. *v.* Rhodes (102 S. W. Rep. 321), 866.
Cincinnati, etc., R. Co. *v.* Roberts (110 Ky. 856; 62 S. W. Rep. 901), 492.
Cincinnati, etc., Co. *v.* Robertson (139 Fed. Rep. 519), 327.
Cincinnati, etc., R. Co. *v.* Roesch (126 Ind. 445; 26 N. E. Rep. 171), 243.
Cincinnati, etc., Ry. Co. *v.* Salzman (52 Ohio St. 558; 40 N. E. Rep. 891; 49 Am. St. Rep. 745; 31 L. R. A. 261), 569.
Cincinnati, etc., Ry. Co. *v.* South Fork, etc., Co. (139 Fed. Rep. 528; 1 L. R. A. [N. S.] 533), 76.
Cincinnati, etc., R. Co. *v.* Thiebald (114 Fed. Rep. 918; 52 C. C. A. 538), 69.
Cincinnati, etc., R. Co. *v.* Walrath (38 Ohio St. 461), 565.
Cincinnati, etc., R. Co. *v.* Wright (54 Ohio St. 181; 43 N. E. Rep. 688; 32 L. R. A. 340), 1043.
Cirello *v.* Metropolitan, etc., Co. (88 N. Y. S. 932), 96.
Citizens Ry. Co. *v.* Carey (56 Ind. 396), 125.
Citizens R. Co. *v.* Twiname (111 Ind. 587; 13 N. E. Rep. 55; 30 Am. & Eng. R. Cas. 616), 834.
Citizens, etc., R. Co. *v.* Willoby (134 Ind. 563; 33 N. E. Rep. 627; 58 Am. & Eng. R. Cas. 485), 92.
City, etc., R. Co. *v.* Conery (61 Ark. 381; 33 S. W. Rep. 426; 31 L. R. A. 365), 26.
City R. Co. *v.* Lee (50 N. J. L. 435; 14 Atl. Rep. 883; 7 Am. St. Rep. 798), 807.
City, etc., R. Co. *v.* Moore (80 Md. 348; 30 Atl. Rep. 643; 45 Am. St. Rep. 345), 282.
Clampit *v.* Chicago, etc., R. Co. (84 Iowa 71; 50 N. W. Rep. 673; 49 Am. & Eng. R. Cas. 468), 947.
Clancy *v.* Transit Co. (192 Mo. 615), 115.
Clapp *v.* Minneapolis, etc., R. Co. (36 Minn. 6; 29 N. W. Rep. 340), 97.
Clark *v.* Boston, etc., R. Co. (128 Mass. 1; 1 Am. & Eng. R. Cas. 134), 408.
Clark *v.* Boston, etc., R. Co. (64 N. H. 325; 10 Atl. Rep. 676; 31 Am. & Eng. R. Cas. 548), 986.
Clark *v.* Chicago, etc., R. Co. (127 Mo. 208; 29 S. W. Rep. 1013), 599.
Clark *v.* Hannibal, etc., R. Co. (136 Mo. 202), 283.
Clark *v.* Missouri, K. & T. R. Co. (179 Mo. 66; 77 S. W. Rep. 882), 269.
Clark *v.* Missouri Pacific Ry. Co. (48 Kan. 654; 29 Pac. Rep. 1138), 344.
Clark *v.* Missouri Pacific Ry. Co. (35 Kan. 354), 991.
Clark *v.* New York, etc., R. Co. (40 Hun 605; 2 N. Y. S. R. 249; 113 N. Y. 670; 21 N. E. Rep. 1116; 23 N. Y. S. R. 994), 1102.
Clark *v.* Northern Pacific R. Co. (47 Minn. 380; 50 N. W. Rep. 365), 1016.
Clark *v.* Northern Pac. R. Co. (Wash., 69 Pac. Rep. 636), 64.
Clark *v.* Pacific R. Co. (39 Mo. 184), 35.
Clark *v.* Richmond, etc., R. Co. (78 Va. 709; 18 Am. & Eng. R. Cas. 78), 324.
Clark *v.* St. Paul, etc., R. Co. (28 Minn. 128; 9 N. W. Rep. 581; 2 Am. & Eng. R. Cas. 240), 341.
Clark *v.* Seoul (137 Mass. 380), 393.
Clark *v.* Van Vleck (112 N. W. Rep. 648), 192.
Clark *v.* Vermont, etc., R. Co. (28 Vt. 103), 279.
Clark *v.* Wilmington, etc., R. Co. (109 N. Car. 430; 14 S. E. Rep. 43; 48 Am. & Eng. R. Cas. 546), 153.
Clarke *v.* Pennsylvania R. Co. (132 Ind. 199; 31 N. E. Rep. 808), 480.
Clay *v.* Central, etc., R. Co. (84 Ga. 345), 64.

[*References are to sections.*]

Clay *v.* Railroad (56 Ill. App. 235), 158.
Claypool *v.* Wigmore (Ind., 71 N. E. Rep. 509), 20.
Claxton *v.* Lexington, etc., R. Co. (13 Bush, 636; 17 Am. Ry. Rep. 12), 200.
Claxton's Admr. *v.* Lexington, etc., R. Co. (13 Bush. 636), 98.
Cleary *v.* Long Island R. Co. (66 N. Y. S. R. 568; 54 App. Div. 284), 348.
Cleary *v.* Transit Co. (108 Mo. App. 433; 83 S. W. Rep. 1029), 119.
Cleaver *v.* Louisville, etc., R. Co. (100 S. W. Rep. 223), 167.
Cleghorn *v.* New York, etc., R. Co. (56 N. Y. 44), 173.
Clem *v.* Wabash R. Co. (72 Mo. App. 433), 1065.
Clemens *v.* Hannibal, etc., R. Co. (53 Mo. 366), 37.
Clements *v.* Alabama, etc., R. Co. (127 Ala. 166; 28 So. Rep. 643), 512.
Cleveland, etc., R. Co. *v.* Arbaugh (47 Ill. App. 360), 1029.
Cleveland & St. L. Ry. Co. *v.* Austin (127 Ill. App. 281), 473.
Cleveland, etc., R. Co. *v.* Ballentine (56 U. S. App. 266; 84 Fed. Rep. 935; 28 C. C. A. 572), 2.
Cleveland, etc., Ry. Co. *v.* Bergschicker (69 N. E. Rep. 1000), 521.
Cleveland, etc., R. Co. *v.* Bertrand (11 Ohio St. 457), 1071.
Cleveland, etc., Ry. Co. *v.* Carr (95 Ill. App. 576), 339.
Cleveland *v.* Central R. Co. (73 Ga. 793), 204.
Cleveland, etc., R. Co. *v.* Crawford (24 Ohio St. 631; 15 Am. Rep. 633), 1040.
Cleveland, etc., R. Co. *v.* Curran (19 Ohio St. 1; 2 Am. Rep. 362), 567.
Cleveland, etc., R. Co. *v.* Doerr (41 Ill. App. 530), 880.
Cleveland, etc., R. Co. *v.* Dukeman (130 Ill. App. 105), 1032.
Cleveland, etc., R. Co. *v.* Elliott (28 Ohio St. 340), 1006.
Cleveland, etc., R. Co. *v.* Terry (8 Ohio St. 570), 1012.
Cleveland, etc., Ry. Co. *v.* Haas (Ind., 74 N. E. Rep. 1003), 269.
Cleveland, etc., Ry. Co. *v.* Hadley (84 N. E. Rep. 13), 769.
Cleveland, etc., R. Co. *v.* Halbert (179 Ill. 196; 53 N. E. Rep. 623; 75 Ill. App. 592), 896.
Cleveland, etc., R. Co. *v.* Henry (80 N. E. Rep. 636), 848.
Cleveland, etc., Ry. Co. *v.* Houghland (85 N. E. Rep. 369), 1023.
Cleveland, etc., Ry. Co. *v.* Keary (3 Ohio St. 201), 360.
Cleveland, etc., R. Co. *v.* Ketchum (133 Ind. 346; 33 N. E. Rep. 116; 19 L. R. A. 339), 563.
Cleveland, etc., R. Co. *v.* Lee (154 Ind. 430), 398.
Cleveland, etc., R. Co. *v.* Lindsay (109 Ill. App. 533), 20.
Cleveland, etc., R. Co. *v.* Mauson (30 Ohio St. 451), 1058.
Cleveland, etc., R. Co. *v.* McHenry (47 Ill. App. 301), 654.
Cleveland, etc., R. Co. *v.* Newell (75 Ind. 542; 8 Am. & Eng. R. Cas. 377), 661.
Cleveland, etc., R. Co. *v.* Newell (104 Ind. 264), 181.
Cleveland, etc., R. Co. *v.* Osgood (Ind., 70 N. E. Rep. 839), 69.
Cleveland, etc., Ry. Co. *v.* Patterson (75 N. E. Rep. 875), 20.
Cleveland, etc., R. Co. *v.* Richey (43 Ill. App. 247), 974.
Cleveland, etc., R. Co. *v.* Rowan (66 Pa. St. 393), 199.
Cleveland, etc., R. Co. *v.* Schneider (45 Ohio St. 678; 17 N. E. Rep. 321; 35 Am. & Eng. R. Cas. 334), 922.
Cleveland, etc., R. Co. *v.* Selsor (55 Ill. App. 685), 249.
Cleveland, etc., R. Co. *v.* Snow (Ind., 74 N. E. Rep. 908), 249.
Cleveland, etc., R. Co. *v.* Somers (24 Ohio Cir. Ct. R. 67), 332.
Cleveland, etc., R. Co. *v.* Walter (45 Ill. App. 642), 419.
Cleveland, etc., R. Co. *v.* Ward (147 Ind. 256; 45 N. E. Rep. 325), 266.
Cleveland, etc., R. Co. *v.* Workman (66 Ohio St. 509; 64 N. E. Rep. 582), 349.
Cleveland, etc., R. Co. *v.* Wynant (114 Ind. 525; 17 N. E. Rep. 118; 35 Am. & Eng. R. Cas. 328), 97.
Cleveland, etc., R. Co. *v.* Wynant (134 Ind. 681; 55 Am. & Eng. R. Cas. 80; 34 N. E. Rep. 569), 151.
Cliff *v.* Midland R. Co. (L. R., 5 Q. B. 258; 18 W. R. 456; 22 L. T. 382), 930.
Clifford *v.* Old Colony R. Co. (141 Mass. 564; 6 N. E. Rep. 751), 492.
Close *v.* Lake Shore, etc., R. Co. (73 Mich. 647; 41 N. W. Rep. 828; 37 Am. & Eng. R. Cas. 522), 1020.
Clotworthy *v.* Hannibal, etc., R. Co. (80 Mo. 220; 21 Am. & Eng. R. Cas. 371), 789.
Clow *v.* Pittsburg Traction Co. (27 Atl. Rep. 1004), 599.
Clowdis *v.* Fresno, etc., Co. (118 Cal. 315; 50 Pac. Rep. 373), 284.
Clowers *v.* Wabash, etc., R. Co. (21 Mo. App. 213), 374.
Clussman *v.* Long Island R. Co. (9 Hun 618; 73 N. Y. 606), 630.
Clymer *v.* Railway Co. (5 Blatchf. 317), 229.
Clyde *v.* Richmond, etc., R. Co. (69 Fed. Rep. 673), 488.
Coakley *v.* Boston, etc., R. Co. (33 N. E. Rep. 930), 962.
Coal Creek Mining Co. *v.* Davis (90 Tenn. 711; 18 S. W. Rep. 387), 477.
Coal Co. *v.* Polland (62 N. E. Rep. 492), 506.
Coates *v.* Burlington, etc., R. Co. (62 Iowa 486; 15 Am. & Eng. R. Cas. 265), 341.
Cobb *v.* Great Western R. Co. (1 Q. B. 459; 58 Am. & Eng. R. Cas. 169), 767.
Cobb *v.* Lindell Ry. Co. (149 Mo. 135; 50 S. W. Rep. 310), 678.
Cobb *v.* St. Louis, etc., R. Co. (149 Mo. 609; 50 S. W. Rep. 894; 13 Am.

[*References are to sections.*]

& Eng. R. Cas. [N. S.] 632), 500.
Cockle *v.* London, etc., R. Co. (L. R., 7 C. P. 321; 41 L. J. C. P. 140; 27 L. T. 320; 20 W. R. 754), 714.
Cody *v.* Market St. Ry. Co. (Cal., 82 Pac. Rep. 666), 125.
Cody *v.* New York, etc., R. Co. (151 Mass. 462; 24 N. E. Rep. 402; 7 L. R. A. 843), 803.
Coe *v.* Van Why (33 Colo. 315; 80 Pac. Rep. 894), 98.
Coe *v.* Washington Mills (149 Mass. 543; 21 N. E. Rep. 966), 299.
Coffee *v.* New York, etc., R. Co. (155 Mass. 21; 28 N. E. Rep. 1128; 48 Am. & Eng. R. Cas. 370), 99.
Coffin *v.* St. Louis, etc., R. Co. (22 Mo. App. 601), 956.
Coffman *v.* Louisville, etc., R. Co. (18 S. W. Rep. 1012), 461.
Cogan *v.* Cass Ave R. Co. (101 Mo. App. 179; 73 S. W. Rep. 738), 392.
Cogbill *v.* Louisville & N. R. Co. (44 So. Rep. 683), 513.
Cogdell *v.* Southern Ry. Co. (129 N. C. 398; 40 S. E. Rep. 202), 382.
Coggs *v.* Bernard (2 Lord Raymond 909), 15.
Cogswell *v.* Oregon, etc., R. Co. (6 Oregon 417), 1098.
Cohen *v.* Eureka, etc., R. Co. (14 Nev. 376), 980.
Cohen *v.* Hamblin, etc., Co. (186 Mass. 544; 71 N. E. Rep. 948), 318.
Cole *v.* Blue Ridge Ry. Co. (S. C., 55 S. E. Rep. 126), 117.
Cole *v.* Chicago, etc., R. Co. (71 Wis. 114; 37 N. W. Rep. 84; 5 Am. St. Rep. 201; 33 Am. & Eng. R. Cas. 271), 464.
Cole *v.* St. Louis Tr. Co. (183 Mo. 81; 81 S. W. Rep. 1138), 360.
Colegreve *v.* New York, etc., R. Co. (20 N. Y. 492), 675.
Coleman *v.* Charleston, etc., Ry. Co. (138 N. Car. 354), 663.
Coleman *v.* Georgia, etc., R. Co. (84 Ga. 1; 10 S. E. Rep. 498; 40 Am. & Eng. R. Cas. 690), 570.
Coleman *v.* Himmerberger-Harrison Co. (Mo., 79 S. W. Rep. 981), 78.
Coleman *v.* Mechanics Iron Co. (2 Am. Neg. Rep. 374), 95.
Coleman *v.* New York, etc., R. Co. (106 Mass. 160), 749.
Coleman *v.* Riches (16 C. B. 104; 81 E. C. L. 487), 209.
Coleman *v.* South, etc., R. Co. (4 H. & C. 699), 682.
Coleman *v.* Yazoo, etc., R. Co. (43 So. Rep. 473), 737.
Coles *v.* Union Ter. Ry. Co. (Iowa, 99 N. W. Rep. 108), 869.
Coley *v.* Kansas City So. Ry. Co. (Texas, 95 S. W. Rep. 96), 335.
Coley *v.* North Car. R. Co. (129 N. Car. 407; 40 S. E. Rep. 195), 243.
Collett *v.* London, etc., R. Co. (16 Q. B. 984; 15 Jur. 1053; 20 L. J. Q. B. 411), 563.
Collier *v.* Great Northern R. Co. (40 Wash. 639; 82 Pac. Rep. 935), 229.
Collins *v.* Burlington, etc., R. Co. (83 Iowa 346; 49 N. W. Rep. 848), 412.
Collins *v.* East Tennessee, etc., R. Co. (9 Heisk. [Tenn.] 841), 166.
Collins *v.* Long Island R. Co. (29 J. & S. N. Y. 154; 18 N. Y. Supp. 779), 1047.
Collins *v.* New York, etc., R. Co. (24 N. Y. Supp. 1090; 55 N. Y. S. R. 82; 71 Hun 504), 1060.
Collins *v.* New York, etc., R. Co. (23 J. & S. [N. Y.] 31; 8 N. Y. S. R. 764; 112 N. Y. 665; 20 N. E. Rep. 413), 864.
Collins *v.* St. Paul, etc., R. Co. (30 Minn. 31; 8 Am. & Eng. R. Cas. 150), 469.
Collins *v.* Southern Ry. Co. (42 So. Rep. 167), 664.
Collins *v.* Texas, etc., R. Co. (15 Texas Civ. App. 169; 39 S. W. Rep. 643), 818.
Collins *v.* Toledo, etc., R. Co. (80 Mich. 390; 45 N. W. Rep. 178), 630.
Collis *v.* Selden (3 C. P. 495), 18.
Collyer *v.* Pennsylvania R. Co. (49 N. J. L. 59; 6 Atl. Rep. 437), 467.
Colorado, etc., R. Co. *v.* Andrews (11 Colo. App. 205; 53 Pac. Rep. 518), 609.
Colorado, etc., R. Co. *v.* Holmes (5 Colo. 516; 8 Am. & Eng. R. Cas. 410), 391.
Colorado, etc., R. Co. *v.* Naylor (17 Colo. 501; 30 Pac. Rep. 249), 380.
Colorado, etc., R. Co. *v.* O'Brien (16 Colo. 219; 27 Pac. Rep. 701; 48 Am. & Eng. R. Cas. 235), 372.
Colorado, etc., R. Co. *v.* Ogden (3 Colo. 499), 373.
Colorado, etc., R. Co. *v.* Thomas (33 Colo. 517; 81 Pac. Rep. 801; 70 L. R. A. 681), 1039.
Colorado Springs Electric Co. *v.* Soper (88 Pac. Rep. 161), 1058.
Columbia & Puget Sound R. R. Co. *v.* Hawthorne (144 U. S. 202; 36 L. Ed. 405), 95.
Columbus, etc., R. Co. *v.* Arnold (31 Ind. 174), 476.
Columbus, etc., R. Co. *v.* Bridges (86 Ala. 448; 5 So. Rep. 864; 38 Am. & Eng. R. Cas. 136), 346.
Columbus, etc., R. Co. *v.* Erick (51 Ohio St. 146; 37 N. E. Rep. 128), 494.
Columbus, etc., R. Co. *v.* Farrell (31 Ind. 408), 704.
Columbus, etc., R. Co. *v.* Powell (40 Ind. 37), 560.
Columbus, etc., R. Co. *v.* Troesch (68 Ill. 545), 482.
Columbus, etc., R. Co. *v.* Wood (86 Ala. 164; 5 So. Rep. 463), 1084.
Commonwealth *v.* Boston, etc., R. Co. (121 Mass. 36), 68.
Commonwealth *v.* Boston, etc., R. Co. (101 Mass. 201), 916.
Commonwealth *v.* Boston, etc., R. Co. (129 Mass. 500; 1 Am. & Eng. R. Cas. 457), 720.
Commonwealth *v.* Fitchburg, etc., R. Co. (126 Mass. 472), 661.

[*References are to sections.*]

Commonwealth Co. *v.* Rose (214 Ill. 545; 73 N. E. Rep. 780; 114 Ill. App. 181), 33.
Commonwealth *v.* Vermont, etc., R. Co. (108 Mass. 7), 225.
Condiff *v.* Kansas City, etc., R. Co. (45 Kan. 256; 25 Pac. Rep. 562; 48 Am. & Eng. R. Cas. 417), 410.
Condon *v.* Missouri Pacific R. Co. (78 Mo. 567), 494.
Condran *v.* Chicago, etc., R. Co. (67 Fed. Rep. 522), 1070.
Cone *v.* Delaware, etc., R. Co. (81 N. Y. 206; 37 Am. Rep. 491; 2 Am. & Eng. R. Cas. 57), 471.
Cones *v.* Cincinnati, etc., R. Co. (114 Ind. 328; 16 N. E. Rep. 638), 1015.
Congrave *v.* Southern Pacific R. Co. (88 Cal. 360; 26 Pac. Rep. 175; 48 Am. & Eng. R. Cas. 337), 461.
Conklin *v.* New York, etc., R. Co. (43 N. Y. S. R. 414; 63 Hun 628; 17 N. Y. Supp. 651), 1018.
Conley *v.* Cincinnati, etc., R. Co. (41 Am. & Eng. R. Cas. 537; 89 Ky. 402; 12 S. W. Rep. 764), 58.
Conley *v.* Richmond, etc., R. Co. (109 No. Car. 692; 14 S. E. Rep. 303; 52 Am. & Eng. R. Cas. 490), 820.
Conlon *v.* Eastern R. Co. (135 Mass. 195; 15 Am. & Eng. R. Cas. 99), 288.
Conlon *v.* New York, etc., R. Co. (74 Hun 115; 56 N. Y. S. R. 316), 866.
Conlon *v.* Oregon, etc., R. Co. (23 Oregon 499; 32 Pac. Rep. 397; 53 Am. & Eng. R. Cas. 356), 380.
Connell *v.* Chesapeake, etc., R. Co. (93 Va. 44; 32 L. R. A. 792; 24 S. E. Rep. 467; 57 Am. St. Rep. 786), 763.
Connelly *v.* Manhattan R. Co. (68 Hun [N. Y.] 456), 592.
Connelly *v.* Minneapolis, etc., R. Co. (38 Minn. 80; 35 N. W. Rep. 582), 500.
Conner *v.* Burlington, etc., R. Co. (74 Iowa 383; 37 N. W. Rep. 966), 371.
Connolly *v.* Crescent City R. Co. (41 La. Ann. 57; 5 So. Rep. 259; 3 L. R. A. 153), 730.
Connolly *v.* New York, etc., R. Co. (158 Mass. 8; 32 N. E. Rep. 937), 632.
Connolly *v.* Union Sewer Co. (184 U. S. 540), 504.
Connor *v.* Burlington, C. R. & N. Ry. Co. (71 Iowa 490; 32 N. W. Rep. 465; 60 Am. St. Rep. 814), 3.
Connor *v.* Concord, etc., R. Co. (67 N. H. 311; 30 Atl. Rep. 1121), 576.
Connor *v.* Elmira, etc., R. Co. (92 Hun 339; 36 N. Y. S. 926), 39.
Conover *v.* Neher Ross Co. (38 Wash. 172; 80 Pac. Rep. 281), 85.
Conroy *v.* Detroit Ry. Co. (Mich., 102 N. W. Rep. 641), 125.
Conroy *v.* Pennsylvania R. Co. (1 Pittsb. [Pa.] 440), 771.
Consolidated, etc., R. Co. *v.* Behr (59 N. J. L. 477; 37 Atl. Rep. 142), 1059.
Consolidated C. Co. *v.* Fleishbein (109 Ill. App. 509; 207 Ill. 593; 69 N. E. Rep. 963), 161.
Consolidated, etc., R. Co. *v.* Hannei (146 Ill. 614; 35 N. E. Rep. 162), 176.
Consolidated Traction Co. *v.* Hoimark (60 N. J. L. 456; 38 Atl. Rep. 684), 1049.
Consolidated Kansas City, etc., R. Co. *v.* Osborne (66 Kan. 393; 71 Pac. Rep. 838), 87.
Consolidated, etc., Ref. Co. *v.* Peterson (8 Kan. App. 316), 368.
Content *v.* Railroad Co. (165 Mass. 267; 43 N. E. Rep. 94), 326.
Continental, etc., Co. *v.* Stead (95 U. S. 161), 980.
Conway *v.* Philadelphia, etc., R. Co. (17 Phila. [Pa.] 71), 919.
Conway *v.* Troy, etc., R. Co. (41 Hun [N. Y.] 639; 1 N. Y. S. R. 587), 1030.
Cook *v.* Central R. Co. (67 Ala. 533), 961.
Cook *v.* Clay Hill R. Co. (60 Cal. 604; 6 Am. & Eng. R. Cas. 175), 191.
Cook *v.* Hannibal, etc., R. Co. (63 Mo. 397), 150.
Cook *v.* New York, etc., R. Co. (119 N. Y. 653; 29 N. Y. S. R. 994), 365.
Cook *v.* St. Paul, etc., R. Co. (34 Minn. 157; 24 N. W. Rep. 311), 311.
Cooke *v.* Lorance Co. (33 Hun 351), 275.
Coolbroth *v.* Maine C. R. Co. (77 Me. 165; 21 Am. & Eng. R. Cas. 599), 321.
Coombs *v.* Fitchburg, etc., R. Co. (156 Mass. 200; 30 N. E. Rep. 1140; 53 Am. & Eng. R. Cas. 353), 328.
Cooney *v.* Commonwealth, etc., Ry. Co. (81 N. E. Rep. 905), 482.
Coontz *v.* Missouri Pacific Ry. Co. (115 Mo. 669; 22 S. W. Rep. 572), 185.
Cooper *v.* Atlantic Coast Line R. Co. (59 S. E. Rep. 704), 570.
Cooper *v.* Central R. Co. (44 Iowa 134), 492.
Cooper *v.* Lake Shore, etc., R. Co. (66 Mich. 261; 33 N. W. Rep. 306), 166.
Cooper *v.* Milwaukee, etc., R. Co. (23 Wis. 668), 482.
Cooper *v.* Pittsburg, etc., R. Co. (24 W. Va. 37), 500.
Copeland *v.* Southern, etc., R. Co. (61 Ala. 376), 414.
Copley *v.* New Haven, etc., R. Co. (136 Mass. 6; 19 Am. & Eng. R. Cas. 373), 1030.
Coppins *v.* New York, etc., R. Co. (122 N. Y. 557; 25 N. E. Rep. 915; 44 Am. & Eng. R. Cas. 618), 482.
Corbett *v.* St. Louis, etc., R. Co. (26 Mo. App. 621), 478.
Corcoran *v.* Boston, etc., R. Co. (133 Mass. 507), 399.
Corcoran *v.* Concord, etc., R. Co. (56 Fed. Rep. 1014), 1088.
Corcoran *v.* Holbrook (59 N. Y. 517; 17 Am. Rep. 369), 247.
Corcoran *v.* New York, etc., R. Co. (46 App. Div. 201; 61 N. Y. Supp. 672), 493.
Corcoran *v.* New York, etc., R. Co. (19 Hun [N. Y.] 368), 1105.
Corcoran *v.* St. Louis, etc., R. Co. (105 Mo. 399; 16 S. W. Rep. 411), 414.
Corning Steel Co. *v.* Pohlplotz (Ind., 64 N. E. 535), 961.
Cordell *v.* New York, etc., R. Co. (70 N.

[*References are to sections.*]

Y. 119; 18 Am. Ry. Rep. 511), 1019.
Core *v.* Ohio River R. Co. (38 W. Va. 456; 18 S. E. Rep. 596), 485.
Corliss *v.* Worcester, etc., R. Co. (63 N. H. 404; 21 Am. & Eng. R. Cas. 208), 201.
Corning Steel Co. *v.* Pohlplotz (Ind. 64 N. W. Rep. 476), 6.
Cornman *v.* E. C. Ry. Co. (4 H. & N. 78), 39.
Cornman *v.* London, etc., Co. (4 Hurl. & N. 781, 786), 604.
Cornwall *v.* Charlotte, etc., R. Co. (97 N. Car. 11; 2 S. E. Rep. 659), 392.
Correll *v.* Burlington, etc., R. Co. (38 Iowa 120), 984.
Corrister *v.* Kansas City, etc., R. Co. (25 Mo. App. 619), 169.
Corwin *v.* New York, etc., R. Co. (13 N. Y. 42), 602.
Cosgrove *v.* New York, etc., R. Co. (6 Am. & Eng. R. Cas. 35; 87 N. Y. 88; 41 Am. Rep. 355), 969.
Cosgrove *v.* New York, etc., R. Co. (18 Hun 329), 953.
Costello *v.* Syracuse, etc., R. Co. (65 Barb. [N. Y.] 92; 55 N. Y. 641), 887.
Costikyan *v.* Rome, etc., R. Co. (12 N. Y. Supp. 683), 655.
Cott *v.* Lewiston R. Co. (86 N. Y. 214), 903.
Cotton *v.* Willmar & S. F. Ry. Co. (109 N. W. Rep. 835), 1047.
Cotton *v.* Wood (8 C. B. N. S. 568; 98 E. C. L.), 2.
Cottrell *v.* Pawtucket St. Ry. Co. (65 Atl. Rep. 269; 27 R. I. 565), 796.
Couch *v.* Charlotte, etc., R. Co. (22 So. Car. 557; 28 Am. & Eng. R. Cas. 331), 323.
Coudy *v.* St. Louis, etc., R. Co. (13 Mo. App. 587; 85 Mo. 79), 664.
Coughlan *v.* Cambridge (166 Mass. 268; 44 N. E. Rep. 218), 226.
Coughlan *v.* Philadelphia, etc., R. Co. (67 Atl. Rep. 148), 200.
Coullard *v.* Tecumseh, etc., Co. (151 Mass. 85), 308.
Countryman *v.* East Tennessee, etc., R. Co. (89 Ga. 835; 16 S. E. Rep. 84), 418.
County *v.* Pacific Coast Co. (53 Atl. Rep. 386), 55.
Course *v.* New York, etc., R. Co. (17 N. Y. S. R. 715; 49 Hun 609; 2 N. Y. Supp. 312), 352.
Cousins *v.* Lake Shore, etc., R. Co. (96 Mich. 386; 56 N. W. Rep. 14), 783.
Covey *v.* Hannibal, etc., R. Co. (86 Mo. 635), 251.
Covington, etc., Co. *v.* Steinbrock (61 Ohio St. 215; 55 N. E. Rep. 618; 76 Am. St. Rep. 375), 282.
Covington Transfer Co. *v.* Kelly (36 Ohio St. 86; 38 Am. Rep. 558; 3 Am. & Eng. R. Cas. 335), 1043.
Covington *v.* Western R. Co. (81 Ga. 273; 6 S. E. Rep. 593; 34 Am. & Eng. R. Cas. 469), 790.
Cowan *v.* Chicago, etc., R. Co. (80 Wis. 284; 50 N. W. Rep. 180), 471.
Cowan *v.* Milwaukee, etc., R. Co. (80 Wis. 284; 50 N. W. Rep. 180), 393.
Cowan *v.* Union Pacific R. Co. (35 Fed. Rep. 43), 602.
Coward *v.* East Tenn., etc., R. Co. (16 Lea. [Tenn.] 225; 57 Am. Rep. 226), 849.
Cowles *v.* New York & H. R. Co. (66 Atl. Rep. 1020, 1024), 903.
Cowles *v.* Richmond, etc., R. Co. (84 N. C. 309; 37 Am. Rep. 620; 2 Am. & Eng. R. Cas. 90), 475.
Cox's Admr. *v.* Louisville & N. R. Co. (104 S. W. Rep. 282; 31 Ky. Law Rep. 875), 883.
Cox *v.* Chicago, etc., R. Co. (102 Iowa 711; 72 N. W. Rep. 301; 9 Am. & Eng. R. Cas. [N. S.] 604), 20.
Cox *v.* Great Western R. Co. (L. R., 9 Q. B. 106; 6 Am. & Eng. R. Cas. 485; 43 & 44 Vict. 42), 303.
Coy *v.* Missouri Pac. Ry. Co. (86 Pac. Rep. 468), 412.
Coyle *v.* Long Island R. Co. (33 Hun [N. Y.] 37), 945.
Coyne *v.* Union Pacific R. Co. (133 U. S. 370; 33 L. Ed. 651), 339.
Coyne *v.* United Ry. Cos. (Mo. App. 98 S. W. Rep. 110), 208.
Craddock *v.* Louisville, etc., R. Co. (Ky. 16 S. W. Rep. 125), 411.
Craig *v.* Chicago, etc., R. Co. (54 Mo. App. 523), 321.
Craig *v.* Mt. Carbon R. Co. (45 Fed. Rep. 448), 1072.
Craker *v.* Chicago, etc., R. Co. (36 Wis. 757), 735.
Cramer *v.* Springfield, etc., R. Co. (112 Mo. App. 350; 87 S. W. Rep. 24), 557.
Cranch *v.* Brooklyn Heights R. Co. (78 N. E. Rep. 1078; 186 N. Y. 310), 411.
Crandall *v.* Minneapolis, etc., R. Co. (Minn., 105 N. W. Rep. 185), 649.
Crane *v.* Chicago, etc., Ry. Co. (Iowa, 99 N. W. Rep. 169), 338.
Crane *v.* Missouri Pac. R. Co. (87 Mo. 588; 25 Am. & Eng. R. Cas. 440), 94.
Crane *v.* Pennsylvania R. Co. (67 Atl. Rep. 877), 889.
Crank *v.* Forty-Second Street R. Co. (6 N. Y. Supp. 229), 183.
Cranston *v.* New York, etc., R. Co. (125 N. Y. 724; 32 N. Y. S. R. 592; 57 Hun 590), 967.
Craps *v.* Syracuse (183 N. Y. 395; 76 N. E. Rep. 465, 1092), 55.
Cratt *v.* Albermarle, etc., Co. (132 No. Car. 151; 43 S. E. Rep. 597), 280.
Craven *v.* Central Pac. R. Co. (72 Cal. 345), 104.
Craven *v.* Mayers (165 Mass. 271; 42 N. E. Rep. 1131), 223.
Crawford *v.* Cincinnati, etc., R. Co. (26 Ohio St. 580; 13 Am. Ry. Rep. 387), 659.
Crawford *v.* Delaware, etc., R. Co. (22 J. & S. 262; 121 N. Y. 652; 24 N. E. Rep. 1092), 1051.
Crawford *v.* Delaware, etc., R. Co. (13 N. Y. S. R. 298), 955.
Crawford *v.* New York, etc., R. Co. (23 Ohio Cir. Ct. 207), 348.

[References are to sections.]

Crawford *v.* United Ry. Co. (Md., 61 Atl. Rep. 287), 266.
Crebarry *v.* Transit Co. (28 N. Y. S. 291; 77 Hun 74), 255.
Creech *v.* Charleston, etc., R. Co. (66 So. Car. 528), 718.
Creed *v.* Pennsylvania R. Co. (86 Pa. St. 139), 771.
Cregg *v.* Chicago, etc., R. Co. (91 Mich. 624; 52 N. W. Rep. 62), 377.
Crew *v.* St. Louis, etc., R. Co. (20 Fed. Rep. 87), 483.
Crine *v.* East Tennessee, etc., R. Co. (84 Ga. 651; 11 S. E. Rep. 556), 669.
Crispin *v.* Babbitt (81 N. Y. 516), 461.
Crissey *v.* Railroad Co. (75 Pa. St. 83), 125.
Criswell *v.* Pittsburg, etc., R. Co. (30 W. Va. 798; 6 S. E. Rep. 31; 33 Am. & Eng. R. Cas. 232), 485.
Cronk *v.* Wabash R. Co. (123 Iowa 349; 98 N. W. Rep. 884), 83.
Croom *v.* Chicago, etc., R. Co. (52 Minn. 296; 53 N. W. Rep. 1128), 586.
Cross *v.* Illinois Cent. R. Co. (110 S. W. Rep. 290), 922.
Cross *v.* Kansas City, etc., R. Co. (56 Mo. App. 674), 559.
Crow *v.* Wabash, etc., R. Co. (23 Mo. App. 357), 1078.
Crowe *v.* New York, etc., R. Co. (70 Hun 37; 53 N. Y. S. R. 558; 23 N. Y. Supp. 1100), 327.
Crowley *v.* Appleton (148 Mass. 98; 18 N. E. Rep. 675), 274.
Crowley *v.* Burlington, etc., R. Co. (65 Iowa 658; 20 N. W. Rep. 467; 22 N. W. Rep. 918), 408.
Crowley *v.* Louisville, etc., R. Co. (21 Ky. L. R. 1434; 55 S. W. Rep. 434), 898.
Crowley *v.* Pacific Mills (148 Mass. 228; 19 N. E. Rep. 344), 269.
Crown *v.* Orr (140 N. Y. 450), 80.
Crumpley *v.* Hannibal, etc., R. Co. (98 Mo. 34; 11 S. W. Rep. 244; 111 Mo. 152; 19 S. W. Rep. 820), 200.
Crumpley *v.* Hannibal, etc., R. Co. (19 S. W. Rep. 820), 971.
Crutchfield *v.* Richmond, etc., R. Co. (76 N. Car. 320), 471.
Crutchfield *v.* Richmond, etc., R. Co. (78 N. Car. 300; 16 Am. Ry. Rep. 212), 399.
Cryder *v.* Chicago, R. I. & P. Ry. Co. (152 Fed. Rep. 417), 327.
Cuddy *v.* Horn (46 Mich. 596; 10 N. W. Rep. 32; 41 Am. Rep. 178), 1048.
Cupp *v.* Newark, etc., R. Co. (35 N. J. L. 17; 10 Am. Rep. 205), 279.
Cruty *v.* Erie, etc., R. Co. (3 T. & C. N. Y. 244), 323.
Culberson *v.* Chicago, etc., R. Co. (50 Mo. App. 556), 708.
Culbertson *v.* Metropolitan, etc., R. Co. 140 Mo. 35; 36 S. W. Rep. 834), 200.
Culhane *v.* New York, etc., R. Co. (60 N. Y. 133; 10 Am. Ry. Rep. 142), 931.
Cullan *v.* Missouri, etc., Ry. Co. (84 Mo. App. 340), 708.
Cullen *v.* Delaware, etc., Co. (113 N. Y. 667; 21 N. E. Rep. 716), 1009.
Cullen *v.* Norton (126 N. Y. 1; 26 N. E. Rep. 905), 476.
Cully *v.* Northern Pac. R. Co. (35 Wash. 241; 77 Pac. Rep. 202), 73.
Culpepper *v.* Northeastern R. Co. (90 Texas 627; 40 S. W. Rep. 386), 491.
Culver *v.* South Haven, etc., R. Co. (144 Mich. 254; 107 N. W. Rep. 908; 109 N. W. Rep. 256), 95.
Culver *v.* South Haven, etc., R. Co. (Mich., 101 N. W. Rep. 663), 258.
Cumberland, etc., R. Co. *v.* Magnus (61 Md. 53; 18 Am. & Eng. R. Cas. 182), 789.
Cumberland, etc., R. Co. *v.* Scally (27 Md. 589), 139.
Cumberland, etc., R. Co. *v.* State (44 Md. 283; 45 Md. 229), 480.
Cummings *v.* Brooklyn R. Co. (104 N. Y. 669), 916.
Cummings *v.* Evansville, etc., R. Co. (115 Ind. 417; 18 N. E. Rep. 6; 36 Am. & Eng. R. Cas. 147), 74.
Cunningham *v.* Chicago, etc., R. Co. (5 McCreary [U. S.] 465; 17 Fed. Rep. 882; 12 Am. & Eng. R. Cas. 217), 410.
Cunningham *v.* International, etc., R. Co. (51 Texas 503; 52 Am. Rep. 632), 281.
Cunningham *v.* Union Pacific R. Co. (4 Utah 206; 7 Pac. Rep. 795), 92.
Curl *v.* Chicago, etc., R. Co. (63 Iowa 417; 16 N. W. Rep. 69; 11 Am. & Eng. R. Cas. 85), 92.
Curley *v.* Illinois, etc., R. Co. (40 La. Ann. 810; 6 So. Rep. 103), 880.
Curran *v.* Merchants, etc., Co. (130 Mass. 374), 302.
Currans *v.* Seattle & S. F. Ry. Co. (76 Pac. Rep. 87), 157.
Currelli *v.* Jackson (77 Conn. 115; 58 Atl. Rep. 762), 79.
Curtis *v.* Central R. Co. (6 McLean U. S. 401), 580.
Curtis *v.* Detroit, etc., R. Co. (27 Wis. 158; 5 Am. Ry. Rep. 368), 778.
Curtis *v.* McNail (173 Mo. 270; 73 S. W. Rep. 167), 157.
Curtis *v.* Railroad Co. (18 N. Y. 538), 122.
Curtis *v.* Rochester, etc., R. Co. (18 N. Y. 534; 75 Am. Dec. 258), 765.
Curtis *v.* Southern Ry. Co. (61 S. E. Rep. 539), 875.
Cushman *v.* Cushman (61 N. E. Rep. 262), 145.
Cusick *v.* Adams (115 N. Y. 55), 1076.
Cusick *v.* Adams (N. Y., 21 N. E. Rep. 673), 872.
Cutridge *v.* Missouri Pacific Ry. Co. (105 Mo. 520; 16 S. W. Rep. 943), 419.
Cypher *v.* Railroad Co. (149 Pa. St. 359; 24 Atl. Rep. 225), 265.
Czezewzka *v.* Benton, etc., Ry. Co. (121 Mo. 201; 25 S. W. Rep. 911), 304.

D

Dacey *v.* Old Colony R. Co. (153 Mass. 112; 26 N. E. Rep. 437), 526.
Daggett *v.* Illinois, etc., R. Co. (34 Iowa 284), 797.

[*References are to sections.*]

Dahlstrom *v.* St. Louis, I. M. & S. Ry. Co. (96 Mo. 99; 8 S. W. Rep. 777; 35 Am. & Eng. R. Cas. 387), 1077.
Dahlstrom *v.* St. Louis, etc., R. Co. (108 Mo. 525; 18 S. W. Rep. 919), 977.
Daignau *v.* Grand Trunk R. Co. (153 Fed. Rep. 593), 182.
Daily *v.* Richmond, etc., R. Co. (106 No. Car. 301; 11 S. E. Rep. 320; 42 Am. & Eng. R. Cas. 124), 1084.
Dale *v.* Delaware, etc., R. Co. (73 N. Y. 468), 94.
Daley *v.* Norwich, etc., R. Co. (26 Conn. 591), 1091.
Dallas, etc., R. Co. *v.* Able (72 Texas 150; 9 S. W. Rep. 871; 37 Am. & Eng. R. Cas. 453), 913.
Dallas *v.* Gulf, etc., R. Co. (61 Texas 196; 21 Am. & Eng. R. Cas. 575), 354.
Dallas Ry. Co. *v.* Hardy (86 S. W. Rep. 1053), 184.
Dallas, etc., R. Co. *v.* McAlister (90 S. W. Rep. 933), 175.
Dallas, etc., R. Co. *v.* Spicker (61 Texas 427; 21 Am. & Eng. R. Cas. 160; 48 Am. Rep. 297), 60.
Dalton *v.* Atlantic, etc., R. Co. (4 Hughes U. S. 180), 341.
Dalton *v.* Railroad (114 Iowa 257; 86 N. W. Rep. 272), 951.
Daly *v.* New Jersey, etc., R. Co. (155 Mass. 1; 29 N. E. Rep. 507), 68.
Damrill *v.* St. Louis, etc., Ry. Co. (27 Mo. App. 202), 1011.
Dana *v.* New York, etc., R. Co. (23 Hun [N. Y.] 473), 489.
Dandie *v.* Southern Pacific R. Co. (42 La. Ann. 686; 7 So. Rep. 792), 400.
Dando *v.* Home, etc., Tel. Co. (103 S. W. Rep. 103), 194.
Daniel *v.* Chesapeake, etc., R. Co. (36 W. Va. 397; 15 S. E. Rep. 162; 16 L. R. A. 383; 53 Am. & Eng. R. Cas. 503), 475.
Daniel *v.* Metropolitan, etc., R. Co. (5 H. L. Cas. 45; 20 W. R. 37; 40 L. J. C. P. 121; 24 L. T. 815), 291.
Daniel *v.* Metropolitan, etc., R. Co. (3 C. P. 591; 37 L. J. C. P. 280), 279.
Daniels *v.* New York, etc., R. Co. (26 Am. St. Rep. 253; 13 L. R. A. 248; 154 Mass. 349; 28 N. E. Rep. 283), 1073.
Daniels *v.* Savannah, etc., R. Co. (86 Ga. 345; 12 S. E. Rep. 365), 64.
Daniels *v.* Union Pacific R. Co. (6 Utah 357; 23 Pac. Rep. 762), 479.
Darracott *v.* Chesapeake, etc., R. Co. (83 Va. 288; 31 Am. & Eng. R. Cas. 157), 410.
Darrigan *v.* New York, etc., R. Co. (52 Conn. 285; 52 Am. Rep. 590; 23 Am. & Eng. R. Cas. 438), 488.
Darwin *v.* Charlotte, etc., R. Co. (23 So. Car. 531; 55 Am. Rep. 32), 392.
Daub *v.* Northern Pacific R. Co. (18 Fed. Rep. 625), 401.
Daugherty *v.* Chicago, M. & St. P. Ry. Co. (114 N. W. Rep. 902), 1072.
Daume *v.* Chicago, etc., R. Co. (72 Wis. 523; 40 N. W. Rep. 394; 7 Am. St. Rep. 879; 35 Am. & Eng. R. Cas. 416), 942.
Davey *v.* London, etc., R. Co. (12 Q. B. D. 70; 35 L. J. Q. B. D. 58), 994.
Davey *v.* London, etc., R. Co. (L. R., 11 Q. B. D. 213; 14 Am. & Eng. R. Cas. 650), 1009.
Davidon *v.* Cornell (132 N. Y. 228; 30 N. E. Rep. 573; 43 N. Y. S. R. 887), 372.
Davidson *v.* Davidson (46 Minn. 117; 48 N. W. Rep. 560), 119.
Davidson *v.* Lake Shore, etc., R. Co. (171 Pa. 522; 33 Atl. Rep. 86), 110.
Davidson *v.* Southern Pacific R. Co. (44 Fed. Rep. 476), 175.
Davies *v.* People's Ry. Co. (159 Mo. 1; 67 Mo. App. 598; 59 S. W. Rep. 982), 412.
Davies *v.* Southern Pacific R. Co. (98 Cal. 19; 32 Pac. Rep. 708), 476.
Davis *v.* Atlanta, etc., R. Co. (63 S. C. 370, 577; 41 S. E. Rep. 468, 892), 227.
Davis *v.* Baltimore, etc., R. Co. (152 Pa. St. 314; 25 Atl. Rep. 498), 331.
Davis *v.* Button (78 Cal. 247; 18 Pac. Rep. 133; 20 Pac. Rep. 545), 551.
Davis *v.* Camden G. & W. Ry. Co. (63 Atl. Rep. 843), 801.
Davis *v.* Central Vermont R. Co. (55 Vt. 84; 45 Am. Rep. 590), 475.
Davis *v.* Chicago, etc., R. Co. (58 Wis. 646; 17 N. W. Rep. 406; 46 Am. Rep. 667; 15 Am. & Eng. R. Cas. 424), 1068.
Davis *v.* Columbia, etc., R. Co. (21 S. C. 93; 28 Am. & Eng. R. Cas. 440), 189.
Davis *v.* Concord, etc., R. Co. (55 Vt. 84; 11 Am. & Eng. R. Cas. 173), 500.
Davis *v.* Detroit, etc., R. Co. (20 Mich. 105), 344.
Davis *v.* Guarnieri (45 Ohio St. 470; 15 N. E. Rep. 350; 4 Am. St. Rep. 548), 1056.
Davis *v.* Kansas City, etc., R. Co. (46 Mo. App. 180), 1030.
Davis *v.* Louisville, etc., R. Co. (97 S. W. Rep. 1122), 874.
Davis *v.* Louisville, etc., R. Co. (69 Miss. 136; 10 So. Rep. 450), 774.
Davis *v.* Mercer, etc., Co. (164 Ind. 413; 73 N. E. Rep. 899), 20.
Davis *v.* New York, etc., R. Co. (143 Mass. 301; 58 Am. Rep. 138; 28 Am. & Eng. R. Cas. 223; 9 N. E. Rep. 815), 45.
Davis *v.* New York, etc., R. Co. (47 N. Y. 400; 2 Am. Ry. Rep. 394), 1006.
Davis *v.* New York, etc., R. Co. (159 Mass. 532; 34 N. E. Rep. 1070), 510.
Davis *v.* Oregon, etc., R. Co. (8 Oregon 172), 405.
Davis *v.* Pennsylvania R. Co. (34 Pa. Super. Ct. 388), 933.
Davis *v.* Railroad Co. (159 Mo. 1), 408.
Davis *v.* St. Louis, etc., R. Co. (53 Ark. 117; 13 S. W. Rep. 801; 44 Am. & Eng. R. Cas. 690), 374.
Davis *v.* Seaboard, etc., R. Co. (136 N. C. 115; 48 S. E. Rep. 591), 96.
Davis *v.* Southern Pacific R. Co. (98 Cal. 19; 32 Pac. Rep. 708), 485.

[*References are to sections.*]

Dawson *v.* Boston, etc., R. Co. (156 Mass. 127; 30 N. E. Rep. 466), 781.
Dawson *v.* Chicago, etc., R. Co. (79 Mo. 296), 850.
Dawson *v.* Louisville, etc., R. Co. (11 Am. & Eng. R. Cas. 134), 174.
Dawson *v.* New York, etc., Co. (52 N. Y. Supp. 133; 31 App. Div. 537), 680.
Dawson *v.* Transit Co. (102 Mo. App. 277; 76 S. W. Rep. 689), 718.
Day *v.* Citizens, etc., Co. (81 Mo. App. 471), 313.
Day *v.* Missouri, etc., R. Co. (112 S. W. Rep. 1019), 955.
Day *v.* Owen (5 Mich. 520), 820.
Day *v.* Toledo, etc., R. Co. (42 Mich. 523; 4 N. W. Rep. 203; 2 Am. & Eng. R. Cas. 126), 348.
Dayharsh *v.* Hannibal, etc., R. Co. (103 Mo. 570; 23 Am. St. Rep. 900; 15 S. W. Rep. 554), 158.
Deakin *v.* Illinois Cent. R. Co. (127 Ill. App. 258), 861.
Dealey *v.* Philadelphia, etc., R. Co. (Pa. 4 Atl. Rep. 170), 499.
Dealey *v.* Philadelphia, etc., R. Co. (Pa., Rep. 824), 199.
Dean *v.* Pennsylvania R. Co. (129 Pa. St. 514; 18 Atl. Rep. 718; 15 Am. St. Rep. 733; 6 L. R. A. 143), 1039.
Dean *v.* Railroad (199 Mo. l. c. 408; 97 S. W. Rep. 910), 1058.
Dean *v.* Woodenware Co. (107 Mo. App. 167), 162.
Deane *v.* Clayton (7 Taunt. 489), 1073.
Deane *v.* Transit Co. (192 Mo. 575; 91 S. W. Rep. 505), 775.
Deans *v.* Wilmington, etc., R. Co. (107 No. Car. 686; 12 S. E. Rep. 77; 45 Am. & Eng. R. Cas. 45), 1084.
Deayill *v.* Southern Pacific R. Co. (50 Cal. 383; 12 Am. Ry. Rep. 180), 1091.
Debbins *v.* Old Colony R. Co. (154 Mass. 402; 28 N. E. Rep. 274; 47 Am. & Eng. R. Cas. 531), 1018.
DeBolt *v.* Kansas City, etc., R. Co. (123 Mo. 496; 27 S. W. Rep. 575), 859.
Decatur Car, etc., Co. *v.* Mehaffey (Ala., 29 So. Rep. 646), 20.
Decatur Car Mfg. Co. *v.* Terry (Ala., 41 So. Rep. 829), 270.
Deckard *v.* Wabash R. Co. (Mo., 85 S. W. Rep. 982), 127.
Decker *v.* Chicago & St. P. Ry. Co. (112 N. W. Rep. 901), 563.
DeForrest *v.* Jewett (88 N. Y. 264; 8 Am. & Eng. R. Cas. 495), 326.
DeGarcia *v.* San Antonio, etc., R. Co. (77 S. W. Rep. 275), 60.
Degg *v.* Midland R. Co. (1 H. & N. 773; 3 Jur. [N. S.] 395; 26 L. J. Ex. 171), 466.
DeGraff *v.* Railway Co. (76 N. Y. 125), 266.
DeGroff *v.* New York, etc., R. Co. (76 N. Y. 125), 307.
DeHam *v.* Mexican Nat. R. Co. (Texas, 22 S. W. Rep. 249), 44.
Deibold *v.* Pennsylvania R. Co. (50 N. J. L. 478; 14 Atl. Rep. 576), 1094.
DeKay *v.* Chicago, etc., R. Co. (41 Minn. 178; 43 N. W. Rep. 182; 4 L. R. A. 632; 39 Am. & Eng. R. Cas. 463), 775.
Delamater *v.* Milwaukee, etc., R. Co. (24 Wis. 578), 785.
De La Pena *v.* Railroad (Texas, 74 S. W. Rep. 58), 872.
Delaplain *v.* Kansas City, etc., Co. (109 Mo. App. l. c. 113; 83 S. W. Rep. 72), 234.
Delaware, etc., R. Co. *v.* Cadow (120 Pa. St. 559; 14 Atl. Rep. 450; 35 Am. & Eng. R. Cas. 405), 1095.
Delaware, etc., R. Co. *v.* Converse (139 U. S. 469; 11 Sup. Ct. Rep. 569; 49 Am. & Eng. R. Cas. 323), 1036.
Delaware, etc., R. Co. *v.* Devore (114 Fed. Rep. 155; 52 C. C. A. 77), 1058.
Delaware & H. Co. *v.* Larnard (161 Fed. Rep. 520), 921.
Delaware, etc., Co. *v.* Nuttall (119 Pa. St. 149; 13 Atl. Rep. 65), 252.
Delaware, etc., R. Co. *v.* Perrett (60 N. J. L. 589; 40 Atl. Rep. 1131), 787.
Delaware, etc., R. Co. *v.* Taffey (38 N. J. L. 525; 13 Am. Ry. Rep. 75), 940.
Delaware, etc., R. Co. *v.* Trautwein (52 L. J. L. 169; 19 Atl. Rep. 178; 41 Am. & Eng. R. Cas. 187), 619.
Delaware, etc., R. Co. *v.* Walsh (47 N. J. L. 548), 729.
Delaware, etc., R. Co. *v.* Webster (6 Atl. Rep. 841; 27 Am. & Eng. R. Cas. 160), 791.
Delaware & H. R. Co. *v.* Wilkins (153 Fed. Rep. 845), 412.
Dell *v.* McGrath (92 Minn. 187; 99 N. W. Rep. 629), 98.
DeLoge *v.* New York, etc., R. Co. (92 Hun 149; 36 N. Y. Supp. 697; 157 N. Y. 688; 51 N. E. Rep. 1090), 1055.
Del Sejnore *v.* Halliman (153 N. Y. 274; 47 N. E. Rep. 308), 128.
DeMaley *v.* Morgen, etc., R. Co. (45 La. Ann. 1329; 14 So. Rep. 61; 58 Am. & Eng. R. Cas. 448), 801.
DeMase *v.* Oregon, etc., Ry. Co. (40 Wash. 108; 82 Pac. Rep. 170), 253.
Demers *v.* Marshall (172 Mass. 548; 52 N. E. Rep. 1066; 59 N. E. Rep. 454), 145.
Deni *v.* Pennsylvania R. Co. (181 Pa. St. 525; 37 Atl. Rep. 558; 59 Am. St. Rep. 676), 69.
Deming *v.* Chicago, etc., R. Co. (80 Mo. App. 152), 685.
Denman *v.* Johnson (85 Mich. 387; 48 N. W. Rep. 565), 105.
Denman *v.* St. Paul, etc., R. Co. (26 Minn. 357; 4 N. W. Rep. 605), 1031.
Dennick *v.* Central R. Co. (103 U. S. 11), 47.
Dennis *v.* Pittsburg, etc., R. Co. (165 Pa. St. 624; 31 Atl. Rep. 52), 680.
Denny *v.* New York Central R. Co. (13 Gray 481), 32.
Denton *v.* Great Northern R. Co. (5 El. & Bl. 860; 25 L. J. Q. B. 129), 102.
Denver & R. G. Co. *v.* Burchard (Colo., 86 Pac. Rep. 749), 270.
Denver, etc., R. Co. *v.* Driscoll (12 Colo. 520; 21 Pac. Rep. 708; 38 Am. & Eng. R. Cas. 105), 472.
Denver, etc., R. Co. *v.* Dwyer (3 Colo. App. 408), 398.
Denver, etc., R. Co. *v.* Harris (122 U.

[*References are to sections.*]

S. 597; 31 Am. & Eng. R. Cas. 592), 177.
Denver, etc., R. Co. *v.* Hodgson (18 Colo. 117; 31 Pac. Rep. 954), 1003.
Denver, etc., R. Co. *v.* Norgate (141 Fed. Rep. 247; 72 C. C. A. 365), 356.
Denver Cit. Co. *v.* Norton (141 Fed. Rep. 599; 73 C. C. A. 1), 1041.
Denver, etc., R. Co. *v.* Pickard (8 Colo. 163; 6 Pac. Rep. 149; 18 Am. & Eng. R. Cas. 284), 784.
Denver, etc., R. Co. *v.* Pilgrim (9 Colo. App. 86; 47 Pac. Rep. 657), 609.
Denver, etc., Co. *v.* Reid (22 Colo. 349; 45 Pac. Rep. 378), 446.
Denver, etc., R. Co. *v.* Ryan (17 Colo. 98; 28 Pac. Rep. 79), 1005.
Denver, etc., R. Co. *v.* Scott (Colo., 81 Pac. Rep. 763), 338.
Denver, etc., R. Co. *v.* Vitello (Colo., 81 Pac. Rep. 766), 98.
Denver, etc., R. Co. *v.* Warring (86 Pac. Rep. 305), 69.
Denver, etc., R. Co. *v.* Woodward (4 Colo. 1), 192.
Deppe *v.* Chicago, etc., R. Co. (36 Iowa 52), 482.
Depuy *v.* Chicago, etc., R. Co. (110 Mo. App. 110; 84 S. W. Rep. 103), 360.
Derby *v.* Kentucky, etc., R. Co. (Ky., 4 S. W. Rep. 303), 337.
Dering *v.* New York, etc., R. Co. (50 N. Y. S. R. 832; 67 Hun 650; 22 N. Y. Supp. 344), 411.
Derr *v.* Lehigh Valley R. Co. (158 Pa. St. 365; 27 Atl. Rep. 1002), 50.
De Santes *v.* New York, N. H. & H. R. Co. (103 N. Y. S. 849), 500.
Deschner *v.* St. Louis & M. R. R. Co. (98 S. W. Rep. 737), 22.
Deserant *v.* Coal, etc. R. Co. (178 U. S. 409; 44 L. Ed. 1127), 958.
Detrich *v.* Metropolitan R. Co. (102 S. W. Rep. 1044), 170.
Detroit, etc., R. Co. *v.* Curtis (23 Wis. 152), 842.
Detroit, etc., Co. *v.* Grable (94 Fed. Rep. 73), 327.
Detroit, etc., R. Co. *v.* Van Steiberg (17 Mich. 99), 104.
De Vane *v.* Atlanta & A. R. Co. (Ga., 60 S. E. Rep. 1079), 560.
Deverson *v.* Eastern R. Co. (58 N. H. 129), 91.
Devine *v.* Boston, etc., R. Co. (159 Mass. 348; 34 N. E. Rep. 539), 479.
Devitt *v.* Railroad (50 Mo. 302), 311.
DeVitto *v.* Craig (165 N. Y. 378; 59 N. E. Rep. 141), 365.
Devlin *v.* Smith (89 N. Y. 470), 255.
Devlin *v.* Wabash, etc., R. Co. (87 Mo. 545; 28 Am. & Eng. R. Cas. 524), 419.
Devoe *v.* New York, etc., R. Co. (75 N. Y. S. 136; 70 App. Div. 495), 265.
Devoy *v.* St. Louis Transit Co. (192 Mo. 197; 91 S. W. Rep. 140), 554.
Dewald *v.* Kansas City, etc., Ry. Co. (44 Kan. 586; 47 Am. & Eng. R. Cas. 557), 720.
Dewey *v.* Detroit, etc., R. Co. (97 Mich. 329; 56 N. W. Rep. 756; 52 N. W. 942; 16 L. R. A. 342; 53 Am. & Eng. R. Cas. 550), 494.
Dewire *v.* Boston, etc., R. Co. (148 Mass. 343; 19 N. E. Rep. 523; 2 L. R. A. 166; 37 Am. & Eng. R. Cas. 57), 556.
De Prisco *v.* Wilmington, etc., R. Co. (57 Atl. Rep. 906), 91.
Deyo *v.* New York, etc., R. Co. (18 N. Y. 534; 75 Am. Dec. 258), 764.
Deyo *v.* New York, etc., R. Co. (34 N. Y. 9), 598.
Diamond Block Coal Co. *v.* Cuthbertson (Ind., 67 N. E. Rep. 558), 208.
Dice *v.* Williamette, etc., Co. (8 Oregon 60), 557.
Dickens *v.* New York, etc., R. Co. (1 Abb. App. Dec. 504), 201.
Dickens *v.* New York, etc., R. Co. (23 N. Y. 158), 61.
Dickinson *v.* Northeastern R. Co. (2 H. & C. 735; 33 L. J. Ex. 91; 12 W. R. 52; 9 L. T. 299), 64.
Dickinson *v.* Port Huron, etc., R. Co. (53 Mich. 43; 18 N. W. Rep. 553; 21 Am. & Eng. R. Cas. 456), 611.
Dickinson *v.* West End R. Co. (177 Mass. 365; 59 N. E. Rep. 60; 83 Am. St. Rep. 284; 52 L. R. A. 326), 568.
Dickson *v.* Missouri Pacific Ry. Co. (104 Mo. 491; 16 S. W. Rep. 381), 940.
Dickson *v.* Omaha, etc., R. Co. (124 Mo. 140; 27 S. W. Rep. 476; 25 L. R. A. 320), 602.
Diebold *v.* Pennsylvania R. Co. (50 N. J. L. 478; 14 Atl. Rep. 576), 859.
Diehl *v.* Lehigh, etc., Co. (140 Pa. St. 487; 21 Atl. Rep. 430), 345.
Diekman *v.* Morgen's, etc., R. Co. (40 La. Ann. 787; 5 So. Rep. 76), 999.
Diesen *v.* Chicago, etc., R. Co. (43 Minn. 454; 45 N. W. Rep. 864), 105.
Diggs *v.* Louisville N. R. Co. (158 Fed. Rep. 97), 704.
Dillon *v.* Connecticut River R. Co. (154 Mass. 478; 28 N. E. Rep. 899), 1078.
Dillon *v.* Manhattan R. Co. (16 N. Y. S. R. 767; 49 Hun 608; 1 N. Y. Supp. 679), 685.
Dillon *v.* Union Pacific R. Co. (3 Dill. U. S. 319), 461.
Dimick *v.* Chicago, etc., R. Co. (80 Ill. 338), 1022.
Dimmey *v.* Wheeling, etc., R. Co. (27 W. Va. 32), 394.
Dimmitt *v.* Hannibal, etc., R. Co. (40 Mo. App. 654), 792.
Dinwiddie *v.* Louisville, etc., R. Co. (9 Lea [Tenn.] 309; 15 Am. & Eng. R. Cas. 483), 657.
Disher *v.* New York, etc., R. Co. (41 Hun [N. Y.] 37; 114 N. Y. 619; 21 N. E. Rep. 415), 321.
Distler *v.* Long Island R. Co. (151 N. Y. 424; 45 N. E. Rep. 937; 35 L. R. A. 762), 783.
Dist. of Columbia *v.* Arms (107 U. S. 519; 2 Supp. Ct. 840; 27 L. Ed. 618), 95.
Ditberner *v.* Chicago, etc., R. Co. (47 Wis. 138; 2 N. W. Rep. 69), 549.

[*References are to sections.*]

Dixon *v.* Chicago, etc., R. Co. (109 Mo. 413; 19 S. W. Rep. 412; 53 Am. & Eng. R. Cas. 589), 139.
Dixon *v.* Chicago, etc., R. Co. (104 Mo. 413; 16 S. W. Rep. 409; 109 Mo. 413; 19 S. W. Rep. 412; 53 Am. & Eng. R. Cas. 589), 461.
Dlauhi *v.* St. Louis, etc., R. Co. (105 Mo. 645; 16 S. W. Rep. 281; 139 Mo. 291; 40 S. W. Rep. 890; 37 L. R. A. 406; 60 Am. St. Rep. 576), 389.
Dobbin *v.* Brown (101 N. Y. 188, 193; 23 N. E. Rep. 537), 119.
Dobbin *v.* Railroad Co. (81 N. C. 446; 31 Am. Rep. 512), 360.
Dobyns *v.* Yazoo, etc., R. Co. (43 So. Rep. 934), 194.
Dodge *v.* Boston, etc., Co. (148 Mass. 207; 19 N. E. Rep. 373), 619.
Dodge *v.* Burlington, etc., R. Co. (34 Iowa 276; 5 Am. Ry. Rep. 507), 917.
Doggett *v.* Chicago, B. & Q. R. Co. (134 Iowa 690; 112 N. W. Rep. 171; 13 L. R. A. [N. S.] 364), 732.
Doggett *v.* Richmond, etc., R. Co. (78 N. Car. 305; 16 Am. Ry. Rep. 193), 390.
Doing *v.* New York, etc., R. Co. (73 Hun 270; 26 N. Y. Supp. 405), 142.
Dolan *v.* Boot, etc., Mills (185 Mass. 576; 70 N. E. Rep. 1025), 99.
Dolan *v.* Delaware, etc., R. Co. (71 N. Y. 285), 940.
Dolan *v.* Sierra Ry. Co. (135 Cal. 435; 67 Pac. Rep. 686), 258.
Domrill *v.* St. Louis, etc., R. Co. (27 Mo. App. 202), 1006.
Donahue *v.* Old Colony R. Co. (153 Mass. 356; 26 N. E. Rep. 868), 510.
Donahue *v.* Wabash R. Co. (83 Mo. 560; 53 Am. Rep. 594), 410.
Donaldson *v.* Milwaukee, etc., R. Co. (21 Minn. 293; 20 Am. Ry. Rep. 15), 1094.
Donaldson *v.* Mississippi, etc., R. Co. (18 Iowa 280), 105.
Donk Bros., etc., Co. *v.* Peters (95 Ill. App. 193; 61 N. E. Rep. 830), 154.
Donnegan *v.* Erhardt (119 N. Y. 468; 23 N. E. Rep. 1051; 7 R. A. 527), 260.
Donnely *v.* Brooklyn City R. Co. (109 N. Y. 16; 15 N. E. Rep. 733; 34 Am. & Eng. R. Cas. 103), 139.
Donnolly *v.* Boston, etc., R. Co. (151 Mass. 210; 24 N. E. Rep. 38; 42 Am. & Eng. R. Cas. 182), 1020.
Donohue *v.* Boston, etc., R. Co. (Mass., 59 N. E. Rep. 663), 369.
Donohue *v.* St. Louis, etc., R. Co. (91 Mo. 357; 2 S. W. Rep. 424; 28 Am. & Eng. R. Cas. 673), 1019.
Donovan *v.* Boston, etc., R. Co. (158 Mass. 450; 33 N. E. Rep. 583), 102.
Donovan *v.* Manhattan R. Co. (49 N. Y. S. R. 722; 21 N. Y. Supp. 457), 176.
Dooley *v.* Missouri, etc., Ry. Co. (110 S. W. Rep. 135), 866.
Dooley *v.* Mobile, etc., R. Co. (69 Miss. 648; 12 So. Rep. 956), 1078.
Doremus *v.* Root (23 Wash. l. c. 715; 63 Pac. Rep. 574; 54 L. R. A. 649), 234.
Dorman *v.* Broadway, etc., R. Co. (16 N. Y. S. R. 753; 1 N. Y. Supp. 334), 198.
Dorrah *v.* Illinois, etc., R. Co. (65 Miss. 14; 3 So. Rep. 36; 7 Am. St. Rep. 629; 30 Am. & Eng. R. Cas. 576), 704.
Dorsey *v.* Phillips Const. Co. (42 Wis. 583; 15 Am. Ry. Rep. 148), 341.
Doss *v.* Missouri, etc., Ry. Co. (59 Mo. 27; 21 Am. Rep. 371; 8 Am. Ry. Rep. 462), 570.
Dorsett *v.* St. Paul, etc., Co. (40 Wash. 276; 82 Pa. Rep. 273), 85.
Dotta *v.* Northern Pacific R. Co. (36 Wash. 506), 398.
Dougan *v.* Champlain Tr. Co. (56 N. Y. 1), 94.
Dougherty *v.* Chicago & St. P. Ry. Co. (114 N. W. 902), 698.
Dougherty *v.* Chicago, etc., R. Co. (86 Ill. 467; 17 Am. Ry. Rep. 489), 789.
Dougherty *v.* Chicago, etc., R. Co. (104 N. W. Rep. 672), 126.
Dougherty *v.* Kansas City, etc., R. Co. (128 Mo. 33; 30 S. W. Rep. 317; 49 Am. St. Rep. 536), 651.
Dougherty *v.* Missouri, etc., R. Co. (97 Mo. 647; 11 S. W. Rep. 251; 8 S. W. Rep. 900; 81 Mo. 325; 51 Am. Rep. 239), 596.
Dougherty *v.* Pittsburgh Rys. Co. (213 Pa. 346; 62 Atl. Rep. 926), 122.
Douglas & G. R. Co. *v.* Swindle (59 S. E. Rep. 600), 827.
Douglas *v.* Texas, etc., R. Co. (63 Texas 564), 478.
Dover *v.* Mississippi River, etc., R. Co. (100 Mo. App. 330; 73 S. W. Rep. 298), 368.
Dow *v.* Kansas Pacific R. Co. (8 Kan. 642; 5 Am. Ry. Rep. 401), 470.
Dowd *v.* Chicago, etc., R. Co. (84 Wis. 105; 54 N. W. Rep. 24; 58 Am. & Eng. R. Cas. 18), 570.
Dowd *v.* Erie R. Co. (N. J., 57 Atl. Rep. 248), 372.
Dowell *v.* Burlington, etc., R. Co. (62 Iowa 629), 334.
Dowell *v.* Guthrie (116 Mo. 646; 22 S. W. Rep. 893), 1105.
Dowling *v.* Allen (102 Mo. 213; 14 S. W. Rep. 751), 308.
Downey *v.* Chesapeake, etc., R. Co. (28 W. Va. 732), 778.
Downey *v.* Low (22 App. Div. 460; 48 N Y. S. 207), 284.
Downey *v.* Sawyer (157 Mass. 418; 32 N. E. Rep. 654), 345.
Doyle *v.* Kansas City, etc., R. Co. (95 S. W. Rep. 200), 561.
Doyle *v.* Pennsylvania R. Co. (139 N. Y. 637; 34 N. E. Rep. 1063), 1036.
Doyle *v.* St. Paul, etc., R. Co. (42 Minn. 79; 43 N. W. 787; 41 Am. & Eng. R. Cas. 376), 99.
Drain *v.* St. Louis, etc., R. Co. (86 Mo. 574), 1104.
Drake *v.* Chicago, etc., R. C. (51 Mo. App. 562) 904.
Drake *v.* Chicago, etc., R. Co. (63 Iowa 302; 19 N. W. Rep. 215; 17 Am. & Eng. R. Cas. 45), 74.

[*References are to sections.*]

Drake *v.* Pennsylvania R. Co. (137 Pa. St. 352; 20 Atl. Rep. 994), 778.
Drake *v.* Antonio, etc., Ry. Co. (Texas, 89 S. W. Rep. 407), 253.
Drake *v.* Union Pac. R. Co. (2 Idaho 453; 21 Pac. Rep. 560), 336.
Drawdy *v.* Atlantic Coast Line R. Co. (58 S. E. Rep. 980), 1029.
Drew *v.* Central Pacific R. Co. (51 Cal. 425; 12 Am. Ry. Rep. 222), 557.
Drew *v.* Sixth Avenue R. Co. (26 N. Y. 49), 202.
Dreyfus *v.* St. Louis, etc., R. Co. (102 S. W. Rep. 53), 170.
Driscoll *v.* Chicago, etc., R. Co. (97 Ill. App. 668; 176 Ill. 330; 52 N. E. Rep. 921; 12 Am. & Eng. R. Cas. [N. S.] 644), 493.
Drogmund *v.* Metropolitan R. Co. (122 Mo. App. 154; 98 S. W. Rep. 1091), 554.
Dryden *v.* Pennsylvania R. Co. (211 Pa. St. 620; 61 Atl. Rep. 249), 1039.
Drymala *v.* Thompson (26 Minn. 40; 1 N. W. Rep. 255), 479.
Duame *v.* Chicago, etc., R. Co. (72 Wis. 523; 40 N. W. Rep. 294; 7 Am. St. Rep. 879; 35 Am. & Eng. R. Cas. 416), 700.
Dube *v.* The Queen (3 Can. Exch. 147), 653.
Duckworth *v.* Johnson (4 H. & N. 653; 5 Jur. [N. S.] 630; 29 L. J. Ex. 25), 188.
Duff *v.* Allegheny Valley R. Co. (91 Pa. St. 458; 36 Am. Rep. 675; 2 Am. & Eng. R. Cas. 1), 1084.
Duff *v.* Great Northern R. Co. (Ir. L. R., 4 C. L. 178), 852.
Duffy *v.* Atlantic, etc., R. Co. (56 S. E. Rep. 557), 882.
Duffy *v.* Kivilin (98 Ill. App. 483; 63 N. E. Rep. 503), 139.
Duffy *v.* Missouri Pacific Ry. Co. (19 Mo. App. 380), 985.
Duffy *v.* New York, etc., R. Co. (Mass., 77 N. E. Rep. 1031), 358.
Dugan's Admr. *v.* Chesapeake, etc., R. Co. (24 Ky. L. R. 1754; 72 S. W. Rep. 291), 1100.
Duggan *v.* Boston & M. R. R. (66 Atl. Rep. 829), 992.
Duke *v.* Missouri Pacific Ry. Co. (99 Mo. 347; 12 S. W. Rep. 636), 175.
Dulaney *v.* R. R. Co. (21 Mo. App. 597), 304.
Dullnig *v.* Duerler, etc., Co. (87 S. W. Rep. 332), 120.
Duncan *v.* Chicago, etc., R. Co. (60 S. E. Rep. 189), 871.
Duncan *v.* Maine C. R. Co. (113 Fed. Rep. 508), 852.
Duncan *v.* Missouri Pacific Ry. Co. (46 Mo. App. 207), 1001.
Duncan *v.* New York, etc., R. Co. (67 Conn. 266; 34 Atl. Rep. 1041), 1001.
Duncan *v.* St. Louis, etc., R. Co. (44 So. Rep. 418), 14.
Dundon *v.* New York, etc., R. Co. (67 Conn. 266; 34 Atl. Rep. 1041), 941.
Dunkerley *v.* Webemdorfer, etc., Co. (N. J., 58 Atl. Rep. 94), 375.
Dunkman *v.* Wabash R. Co. (95 Mo. 232; 4. S. W. Rep. 670), 398.
Dunlap *v.* Richmond, etc., R. Co. (81 Ga. 136; 7 S. E. Rep. 283), 79.
Dunn *v.* Cass Avenue, etc., R. Co. (21 Mo. App. 188), 136.
Dunn *v.* Chicago, etc., R. Co. (107 N. W. Rep. 616), 522.
Dunn *v.* Grand Trunk R. Co. (58 Me. 187), 561.
Dunn *v.* McNamee (59 N. J. L. 498; 37 Atl. Rep. 61), 307.
Dunn *v.* New Jersey, etc., R. Co. (71 N. J. L. 21; 58 Atl. Rep. 164), 683.
Dunn *v.* Oregon Short Line R. Co. (28 Utah 478; 80 Pac. Rep. 311), 339.
Dunn *v.* Pennsylvania R. Co. (20 Phila. Pa. 258), 181.
Dunn *v.* Seaboard R. Co. (78 Va. 645; 49 Am. Rep. 388; 16 Am. & Eng. R. Cas. 363), 802.
Dunphy *v.* Boston El. Ry. Co. (Mass., 78 N. E. Rep. 479), 273.
Durant *v.* Coal Co. (97 Mo. 62; 10 S. W. Rep. 484), 356.
Durbin *v.* New York, N. H. & H. R. Co. (80 N. E. Rep. 219), 57.
Durbin *v.* Oregon, etc., R. Co. (17 Ore. 5; 17 Pac. Rep. 5; 11 Am. St. Rep. 778; 32 Am. & Eng. R. Cas. 149), 1016.
Duree *v.* Chicago, etc., R. Co. (Iowa, 92 N. W. Rep. 890), 321.
Durkee *v.* Central Pac. R. Co. (56 Cal. 388), 62.
Durkee *v.* Central, etc., R. Co. (69 Cal. 533; 11 Pac. Rep. 130; 58 Am. Rep. 562), 92.
Dutro *v.* Metropolitan, etc., R. Co. (111 Mo. App. 258; 86 S. W. Rep. 915), 79.
Duval *v.* Atlantic Coast, etc., R. Co. 134 N. Car. 331; 46 S. E. Rep. 750; 101 Am. St. Rep. 830; 65 L. R. A. 722), 1043.
Duval *v.* Hunt (34 Fla. 85; 15 So. Rep. 876), 518.
Dwinelle *v.* New York, etc., R. Co. (120 N. Y. 117; 24 N. E. Rep. 319; 2 L. R. A. 224), 557.
Dwyer *v.* American Exp. Co. (82 Wis. 307; 52 N. W. Rep. 304; 53 Am. & Eng. R. Cas. 612), 139.
Dwyer *v.* Express Co. (82 Wis. 312), 159.
Dyas *v.* Southern Pac. R. Co. (73 Pac. Rep. 972), 96.
Dye *v.* Delaware, etc., R. Co. (130 N. Y. 671; 29 N. E. Rep. 320; 53 Am. & Eng. R. Cas. 286), 97.
Dyer *v.* Erie R. Co. (71 N. Y. 228), 974.
Dyerson *v.* Union Pac. R. Co. (87 Pac. Rep. 680), 413.
Dysart *v.* Kansas City, etc., R. Co. (145 Mo. 83; 46 S. W. Rep. 751), 492.
Dysinger *v.* Cincinnati, etc., R. Co. (93 Mich. 646; 53 N. W. Rep. 825), 335.
Dyson *v.* New York, etc., R. Co. (57 Conn. 9; 17 Atl. Rep. 137), 883.

E

Eads *v.* Metropolitan R. Co. (43 Mo. App. 545), 735.
Early *v.* Lake Shore, etc., R. Co. (66 Mich. 449; 33 N. W. Rep. 813; 30 Am. & Eng. R. Cas. 163), 97.

[*References are to sections.*]

Eason *v.* Sabine, etc., R. Co. (65 Texas 577), 316.
East, etc., R. Co. *v.* Sims (80 Ga. 807; 6 S. E. Rep. 595), 309.
East Line, etc., R. Co. *v.* Culberson (72 Texas 375), 281.
East Line, etc., R. Co. *v.* Lee (71 Texas 538; 9 S. W. Rep. 904), 817.
East Line, etc., R. Co. *v.* Rushing (69 Texas 306; 6 S. W. Rep. 834; 34 Am. & Eng. R. Cas. 367), 666.
East Line R. Co. *v.* Smith (65 Texas 167), 202.
East St. Louis, etc., R. Co. *v.* Altgen (210 Ill. 213; 71 N. E. Rep. 377), 77.
East St. Louis, etc., R. Co. *v.* Enright (47 Ill. App. 494), 475.
East St. Louis, etc., R. Co. *v.* McElroy (29 Ill. App. 504), 419.
East St. Louis, etc., R. Co. *v.* O'Hara (59 Ill. App. 649), 493.
East St. Louis, etc., Ry. Co. *v.* Zink (82 N. E. Rep. 283; 229 Ill. 180) 835.
East Tennessee, etc., R. Co. *v.* Atlanta, etc., R. Co. (49 Fed. Rep. 608), 40.
East Tennessee, etc., R. Co. *v.* Collins (85 Tenn. 227; 1 S. W. Rep. 883), 492.
East Tennessee, etc., R. Co. *v.* Connor (15 Lea [Tenn.] 254), 787.
East Tennessee, etc., R. Co. *v.* DeArmond (86 Tenn. 73; 5 S. W. Rep. 600; 6 Am. St. Rep. 816), 489.
East Tennessee, etc., R. Co. *v.* Deaver (79 Ala. 216), 678.
East Tennessee, etc., R. Co. *v.* Duggan (51 Ga. 212; 6 Am. Ry. Rep. 195), 519.
East Tennessee, etc., R. Co. *v.* Feathers (10 Lea [Tenn.] 103; 15 Am. & Eng. R. Cas. 446), 886.
East Tennessee, etc., R. Co. *v.* Fleetwood (15 S. E. Rep. 778), 739.
East Tennessee, etc., R. Co. *v.* Gurley 12 Lea [Tenn.] 46; 17 Am. & Eng. R. Cas. 568), 373.
East Tennessee, etc., R. Co. *v.* Holmes (97 Ala. 332; 12 So. Rep. 286; 58 Am. & Eng. R. Cas. 252), 787.
East Tennessee, etc., R. Co. *v.* Hughes (Ga. 17 S. E. Rep. 949; 58 Am. & Eng. R. Cas. 373), 791.
East Tennessee, etc., R. Co. *v.* Hull (Tenn., 41 Am. & Eng. R. Cas. 495), 448.
East Tennessee, etc., R. Co. *v.* King (81 Ala. 177; 2 So. Rep. 153; 31 Am. & Eng. R. Cas. 385), 969.
East Tennessee R. Co. *v.* Lockhart (79 Ala. 315), 25.
East Tennessee R. Co. *v.* Maloy (77 Ga. Ala. 177; 2 So. Rep. 152; 31 Am. & Eng. R. Cas. 352), 451.
East Tennessee, etc., R. Co. *v.* Markens (88 Ga. 60; 13 S. E. Rep. 855; 14 L. R. A. 281), 1043.
East Tennessee R. Co. *v.* Massingill (15 Lea [Tenn.] 328), 703.
East Tennessee, etc., R. Co. *v.* Mitchell (11 Heisk. 400), 193.
East Tennessee, etc., Co. *v.* Perkins (88 Ga. 1; 13 S. E. Rep. 952), 321.
East Tennessee, etc., R. Co. *v.* Reynolds (93 Ga. 570; 20 S. E. Rep. 70), 39.
East Tennessee, etc., R. Co. *v.* Rush 15 Lea [Tenn.] 145), 492.
East Tennessee, etc., R. Co. *v.* Toppins (10 Lea [Tenn.] 58; 11 Am. & Eng. R. Cas. 222), 419.
East Tennessee, etc., R. Co. *v.* Watson (94 Ala. 634; 10 So. Rep. 228), 630.
East Tennessee, etc., R. Co. *v.* Winters (85 Tenn. 240; 1 S. W. Rep. 790), 661.
Easton *v.* Houston, etc., R. Co. (32 Fed. Rep. 893), 492.
Eaton *v.* Boston & Lowell R. Co. (11 Allen 500), 17.
Eaton *v.* Delaware, etc., R. Co. (57 N. Y. 382; 15 Am. Rep. 513), 561.
Eaton *v.* European R. Co. (59 Me. 520; 8 Am. Rep. 430), 283.
Eaton *v.* Fitchburg, etc., R. Co. (129 Mass. 364; 2 Am. & Eng. R. Cas. 183), 933.
Eaton *v.* New York Cent. & H. R. R. Co. (109 N. Y. Supp. 419), 110.
Eaton *v.* Railroad (57 N. Y. 382; 13 Am. Law. Reg. 672), 698.
Eberts *v.* Detroit, etc., Ry. Co. (115 N. W. Rep. 43), 848.
Eckart *v.* Long Island R. Co. (57 Barb. 555; 43 N. Y. 502), 806.
Eckhard *v.* Transit Co. (190 Mo. 593; 89 S. W. Rep. 602), 115.
Eckherd *v.* Chicago, etc., R. Co. (70 Iowa 353; 30 N. W. Rep. 615; 27 Am. & Eng. R. Cas. 114), 787.
Eckert *v.* Great Northern Ry. Co. (116 N. W. Rep. 1024), 866.
Eckles *v.* Norfolk, etc., R. Co. (96 Va. 69; 25 S. E. Rep. 545), 500.
Eddy *v.* Powell (49 Fed. Rep. 814; 4 U. S. App. 259; 1 C. C. A. 448), 1027.
Eddy *v.* Rider (79 Texas 53), 658.
Eddy *v* Wallace (49 Fed. Rep. 801; 4 U. S. App. 264; 1 C. C. A. 435; 52 Am. & Eng. R. Cas. 265), 184.
Eden *v.* Railway Co. (14 B. Mon. 165), 61.
Ederly *v.* Vicksburg, etc., Co. (112 La. 728; 36 So. Rep. 664), 229.
Edgar *v.* Castello (14 So. Car. 20), 62.
Edge *v.* Southwest Missouri Electric Ry. Co. (104 S. W. Rep. 90), 488.
Edgerly *v.* Union St. R. Co. (67 N. H. 312), 398.
Edginton *v.* Burlington, etc., R. Co. (116 Iowa 410; 90 N. W. Rep. 95; 57 L. R. A. 561), 38.
Edmunds *v.* St. Louis, etc., R. Co. (3 Mo. App. 603) 176.
Edmundston *v.* Pittsburg, etc., R. Co. (23 Am. & Eng. R. Cas. 423), 292.
Edward's Admr. *v.* Chesapeake & O. Ry. Co. (108 S. W. Rep. 303), 1080.
Edwards *v.* Chicago, etc., R. Co. (94 Mo. App. 36; 67 S. W. Rep. 950), 940.
Eels *v.* St. Louis, etc., R. Co. (52 Fed. Rep. 903), 849.
Egan *v.* Dry Dock, etc., R. Co. (12 N. Y. App. Div. 556; 42 N. Y. S. 188), 266.

[*References are to sections.*]

Eggman *v.* St. Louis, etc., R. Co. (47 Ill. App. 507), 1065.
Egmann *v.* St. Louis, etc., R. Co. (65 Ill. App. 345), 493.
Ehrishman *v.* East Harrisburg, etc., R. Co. (150 Pa. St. 180; 24 Atl. Rep. 596; 51 Am. & Eng. R. Cas. 190), 1003.
Eichelburger *v.* Pittsburg, etc., R. Co. (Ohio, 9 Am. & Eng. R. Cas. 158), 74.
Eichorn *v.* New Orleans, etc., R. Co. (114 La. Ann. 712; 38 So. Rep. 526), 65.
Eighing *v.* Union Pacific Ry. Co. (93 Iowa 538; 61 N. W. Rep. 1056; 27 L. R. A. 296), 217.
Eikenberry *v.* Transit Co. (103 App. 442; 80 S. W. Rep. 360), 690.
Eilert *v.* Green Bay R. Co. (48 Mo. 606), 953.
Eingarten *v.* Illinois, etc., Co. (94 Wis. 70; 68 N. W. Rep. 664; 59 Am. St. Rep. 859; 34 L. R. A. 503), 463.
Eldridge *v.* Long Island R. Co. (1 Sandf. [N. Y.] 89), 822.
Elgin J. & E. R. Co. *v.* Hoadley (122 Ill. App. 165; 77 N. E. Rep. 151; 220 Ill. 462), 950.
Elgin, etc., R. Co. *v.* Lawlor (82 N. E. Rep. 407; 229 Ill. 621), 877.
Elgin, etc., R. Co. *v.* Raymond (148 Ill. 241; 35 N. E. Rep. 729), 998.
Elgin, A. & S. Traction Co. *v.* Wilson (120 Ill. App. 371; 75 N. E. Rep. 436, 217 Ill. 47), 33.
Eliot *v.* Kansas City, etc., R. Co. (102 S. W. Rep. 532), 399.
Elkins *v.* Boston, etc., R. Co. (115 Mass. 190; 7 Am. Ry. Rep. 456), 1012.
Ell *v.* Northern Pacific R. Co. (1 N. Dak. 336; 48 Am. & Eng. R. Cas. 318), 476.
Elledge *v.* National City R. Co. (100 Cal. 282; 34 Pac. Rep. 720), 485.
Ellet *v.* St. Louis, etc., R. Co. (76 Mo. 518; 12 Am. & Eng. R. Cas. 183), 32.
Ellinger *v.* Philadelphia, etc., R. Co. (153 Pa. St. 215; 25 Atl. Rep. 1132; 58 Am. & Eng. R. Cas. 429), 591.
Elliot *v.* St. Louis, etc., R. Co. (67 Mo. 272), 271.
Elliott *v.* Chicago, etc., R. Co. (5 Dak. 523; 41 N. W. Rep. 758; 3 L. R. A. 363; 38 Am. & Eng. R. Cas. 62), 1092.
Elliott *v.* Railroad (150 N. S. 245), 412.
Ellis *v.* Atlantic Coast Line R. Co. (53 Fla. 650; 40 So. Rep. 213; 13 L. R. A. N. S. 320), 636.
Ellis *v.* Great Western R. Co. (L. R., 9 C. P. 551; 43 L. J. C. P. 304; 31 L. T. 814), 972.
Ellis *v.* Lake Shore, etc., R. Co. (138 Pa. St. 506; 21 Atl. Rep. 140), 988.
Ellis *v.* New York, etc., R. Co. (95 N. Y. 546), 471.
Ellis *v.* Southern Ry. Co. (163 Fed. Rep. 686), 1095.
Ellis *v.* Wabash R. Co. (17 Mo. App. 126), 903.
Ellis *v.* Waldron (19 R. I. 369; 33 Atl. Rep. 869), 120.
Elmgren *v.* Chicago, M. & St. P. Ry. Co. (112 N. W. Rep. 1067), 388.
El Paso Electric Ry. Co. *v.* Boer (108 S. W. Rep. 199), 721.
El Paso, etc., Ry. Co. *v.* Vizard (Texas, 88 S. W. Rep. 457), 372.
Ellsworth *v.* Metheny (104 Fed. Rep. 119; 44 C. C. A. 484; 51 L. R. A. 389), 227.
Ely *v.* Pittsburg, etc., R. Co. (27 Atl. Rep. 970; 158 Pa. St. 233), 1014.
Ely *v.* St. Louis, etc., R. Co. (77 Mo. 34; 16 Am. & Eng. R. Cas. 342), 32.
Elyton Land Co. *v.* Mingea (89 Ala. 521; 780 Rep. 666; 43 Am. & Eng. R. Cas. 309), 1043.
Emma Cotton, etc., Co. *v.* Hale (56 Ark. 232; 19 S. W. Rep. 600), 345.
Emmerson *v.* Fay (94 Va. 60; 26 S. E. Rep. 386), 288.
Enches *v.* New York, etc., R. Co. (135 Pa. St. 194; 19 Atl. Rep. 939), 788.
Endress *v.* Lake Shore, etc., R. Co. (117 N. Y. 640; 22 N. E. Rep. 1130), 1005.
England *v.* Boston, etc., R. Co. (153 Mass. 490; 27 N. E. Rep. 1), 704.
Engle *v.* New York, etc., R. Co. (160 Mass. 260; 35 N. E. Rep. 547; 22 L. R. A. 283), 512.
Engleking *v.* Kansas City, etc., R. Co. (187 Mo. 158; 86 S. W. Rep. 89), 412.
English *v.* Amidon (72 N. H. 301; 56 Atl. Rep. 548), 246.
English *v.* Chicago, etc., R. Co. (24 Fed. Rep. 906), 349.
Enos *v.* Rhode Island R. Co. (R. I., 67 Atl. Rep. 5; 12 L. R. A. [N. S.] 244), 568.
Enright *v.* Toledo, etc., R. Co. (93 Mich. 409; 53 N. W. Rep. 536), 468.
Ensley R. Co. *v.* Chewning (93 Ala. 24; 9 So. Rep. 458; 50 Am. & Eng. R. Cas. 46), 626.
Ephland *v.* Missouri, etc., R. Co. (137 Mo. 187; 57 Mo. App. 147; 38 S. W. Rep. 926; 35 L. R. A. 109; 7 Am. & Eng. R. Cas. [N. S.] 579), 693.
Eppendorf *v.* New York, etc., R. Co. (69 N. Y. 195), 692.
Epperson *v.* Postal Tel., etc., Co. (155 Mo. 346; 50 S. W. Rep. 795; 55 S. W. Rep. 1050), 323.
Eppstein *v.* Missouri Pacific Ry. Co. (197 Mo. 734; 94 S. W. Rep. 967), 1065.
Erickson *v.* Milwaukee, etc., R. Co. (93 Mich. 414; 53 N. W. Rep. 393), 485.
Erickson *v.* Monson, etc. (100 Me. 107; 60 Atl. Rep. 708), 115.
Erickson *v.* St. Paul, etc., R. Co. (41 Minn. 500; 43 N. W. Rep. 332; 5 L. R. A. 786), 408.
Erie *v.* Caulkins (85 Pa. St. 247; 27 Am. Rep. 642), 300.
Erie R. Co. *v.* Farrell (147 Fed. Rep. 220), 977.
Erie R. Co. *v.* Kane (155 Fed. Rep. 118), 537.
Erie R. Co. *v.* McCormick (69 Ohio St. 45; 68 N. E. Rep. 571), 326.
Erie City R. Co. *v.* Schuster (113 Pa. St. 412; 6 Atl. Rep. 269; 57 Am. Rep. 471), 1058.
Ergott *v.* New York (96 N. Y. 264), 27.

[*References are to sections.*]

Ernst *v.* Hudson River R. Co. (39 N. Y. 61; 36 How. Pr. 84), 939.
Ernest *v.* Hudson River R. Co. (35 N. Y. 9; 32 How. Pr. 61), 954.
Erwin *v.* Kansas City, etc., R. Co. (94 Mo. App. 289; 68 S. W. Rep. 88), 670.
Erwin *v.* St. Louis, etc., R. Co. (96 Mo. 290; 9 S. W. Rep. 577), 948.
Eskridge *v.* Cincinnati, etc., R. Co. (89 Ky. 367; 12 S. W. Rep. 580; 42 Am. & Eng. R. Cas. 176), 953.
Esrey *v.* Southern Pacific R. Co. (88 Cal. 399; 26 Pac. Rep. 211), 392.
Estes *v.* Missouri Pacific R. Co. (110 Mo. App. 725; 111 Mo. App. 1; 85 S. W. Rep. 627; 85 S. W. Rep. 909), 578.
Eureka Springs R. Co. *v.* Timmonds (51 Ark. 459; 11 S. W. Rep. 690; 40 Am. & Eng. R. Cas. 698), 816.
Evans *v.* Atlantic, etc., R. Co. (62 Mo. 49), 397.
Evans *v.* Chicago, etc., R. Co. (109 S. W. Rep. 79), 862.
Evans, etc., Co. *v.* Crawford (Neb., 93 N. W. Rep. 177), 308.
Evans, etc., Co. *v.* Crawford (Neb., 94 N. W. Rep. 814), 319.
Evans *v.* Interstate Transit Co. (106 Mo. 594), 626.
Evans *v.* Iron, etc., Co. (42 Fed. Rep. 519), 307.
Evans *v.* Lake Shore, etc., R. Co. (88 Mich. 442; 50 N. W. Rep. 386), 919.
Evans *v.* Lake Shore, etc., R. Co. (12 Hun [N. Y.] 289), 307.
Evans *v.* Louisville, etc., R. Co. (70 Miss. 527; 12 So. Rep. 581), 528.
Evans *v.* Milwaukee, etc., R. Co. (88 Mich. 444; 50 S. W. Rep. 386; 14 L. R. A. 223), 941.
Evans *v.* St. Louis, etc., R. Co. (11 Mo. App. 463), 784.
Evans *v.* St. Paul, etc., R. Co. (88 Mich. 444; 50 N. W. Rep. 386; 14 L. R. A. 223), 1001.
Evans *v.* Wabash R. Co. (178 Mo. 508; 77 S. W. Rep. 515), 323.
Evansville, etc., R. Co. *v.* Crist (116 Ind. 446; 19 N. E. Rep. 310), 104.
Evansville, etc., R. Co. *v.* Griffin (100 Ind. 221; 50 Am. Rep. 788), 862.
Evansville, etc., R. Co. *v.* Guyton (115 Ind. 450; 17 N. E. Rep. 101; 33 Am. & Eng. R. Cas. 311), 482.
Evansville, etc., R. Co. *v.* Henderson (134 Ind. 636; 33 N. E. Rep. 1021), 492.
Evansville, etc., R. Co. *v.* Hiatt (17 Ind. 102), 1046.
Evansville, etc., R. Co. *v.* Kyte (6 Ind. App. 52; 32 N. E. Rep. 1134), 734.
Evansville, etc., R. Co. *v.* Lowdermilk (15 Ind. 120), 57.
Evansville & T. H. R. Co. *v.* Yeager (83 N. E. Rep. 742), 1072.
Evarts *v.* Santa Barbara Ry. Co. (80 Pac. Rep. 830), 204.
Evensen *v.* Lexington, etc., R. Co. (187 Mass. 77; 72 N. E. Rep. 355), 1039.
Everett *v.* Oregon, etc., R. Co. (9 Utah 340; 34 Pac. Rep. 289), 667.
Everhart *v.* Terre Haute, etc., R. Co. (78 Ind. 292; 41 Am. Rep. 567; 4 Am. & Eng. R. Cas. 599), 466.
Evers *v.* Wiggins Ferry Co. (116 Mo. App. 130; 92 S. W. Rep. 118), 660.
Everts *v.* Santa Barbara Consolidated R. Co. (86 Pac. Rep. 830), 194.
Ewald *v.* Chicago, etc., R. Co. (70 Wis. 420; 36 N. W. Rep. 12; 5 Am. St. Rep. 178), 568.
Ewald *v.* Michigan Cent. R. Co. (107 Ill. App. 294), 323.
Ewan *v.* Chicago, etc., R. Co. (38 Wis. 613), 961.
Ewing *v.* Pittsburg, etc., R. Co. (147 Pa. St. 40; 23 Atl. Rep. 340; 48 Am. & Eng. R. Cas. 506), 171.
Exton *v.* Central R. Co. (63 N. J. L. 356; 46 Atl. Rep. 1099; 56 L. R. A. 508), 744.

F

Faber *v.* Reiss, etc., Co. (124 Wis. 554; 102 N. W. 1049), 100.
Faber *v.* St. Paul, etc., R. Co. (29 Minn. 465; 13 N. W. Rep. 902; 8 Am. & Eng. R. Cas. 277), 1019.
Fagin *v.* Rhode Island R. Co. (27 R. I. 51; 60 Atl. Rep. 672), 116.
Fagundes *v.* Central Pacific R. Co. (79 Cal. 97; 21 Pac. Rep. 437), 500.
Fairbank Canning Co. *v.* Innes (24 Ill. App. 33; 125 Ill. 410; 17 N. E. Rep. 720), 120.
Fairchild *v.* Stage Co. (13 Cal. 599), 122.
Fairmount & Arch St. Ry. Co. *v.* Stutler (54 Pa. St. 375), 18.
Faith *v.* New York Central, etc., R. Co. (185 N. Y. 556; 77 N. E. Rep. 1186; 95 N. Y. S. 774; 109 App. Div. 222), 534.
Falk *v.* New York, etc., R. Co. (N. J., 29 Atl. Rep. 157; 58 Am. & Eng. R. Cas. 191), 710.
Falls *v.* San Francisco, etc., R. Co. (97 Cal. 114; 31 Pac. Rep. 901), 685.
Fanning *v.* St. Louis Transit Co. (103 Mo. App. 151; 78 S. W. Rep. 62), 661.
Farber *v.* Missouri Pacific Ry. Co. (116 Mo. 81; 22 S. W. Rep. 631), 1087.
Farley *v.* Harris (40 Atl. Rep. 798), 895.
Farley *v.* Wilmington, etc., R. Co. (3 Penn.-Del. 581; 52 Atl. Rep. 543), 1055.
Farlow *v.* Kelly (108 U. S. 288; 2 Sup. Ct. Rep. 555; 11 Am. & Eng. R. Cas. 104), 674.
Farmer *v.* Central Iowa R. Co. (67 Iowa 136; 24 N. W. Rep. 895), 397.
Farmer *v.* Wilmington, etc., R. Co. (88 N. Car. 564; 20 Am. & Eng. R. Cas. 481), 390.
Farrell *v.* Citizens' Light & Ry. Co. (114 N. W. Rep. 1063), 722.
Farrell *v.* Great Northern Ry. Co. (111 N. W. Rep. 388), 578.
Farrier *v.* Colorado Springs Rapid Transit Ry. Co. (95 Pac. Rep. 294), 742.
Farwell *v.* Boston, etc., R. Co. (4 Metc. [Mass.] 49, 55), 315.

[*References are to sections.*]

Farwell *v.* Railroad Co. (8 Allen 441), 311.
Fasini *v.* N. Y. Cent., etc., R. Co. (96 N. Y. S. 415; 109 App. Div. 404), 528.
Faulkner *v.* Erie R. Co. (49 Barb. N. Y. 324), 478.
Faust *v.* Philadelphia, etc., R. Co. (191 Pa. St. 420; 43 Atl. Rep. 329), 1052.
Favor *v.* Boston, etc., R. Co. (114 Mass. 350; 19 Am. Rep. 364), 891.
Fawcett *v.* York, etc., R. Co. (16 Q. B. 610; 15 Jur. 173; 20 L. J. Q. B. 222), 923.
Fay *v.* Minneapolis, St. P. M. Ry. Co. (111 N. W. Rep. 683), 886.
Feagin *v.* Gulf, etc., R. Co. (100 S. W. Rep. 346), 691.
Fearns *v.* New York, etc., R. Co. (186 Mass. 529; 72 N. E. Rep. 68), 258.
Fearous *v.* Kansas City, etc., R. Co. (180 Mo. 208; 79 S. W. Rep. 394), 398.
Feary *v.* Metropolitan Ry. Co. (162 Mo. 75; 62 S. W. Rep. 452), 657.
Fechley *v.* Traction Co. (119 Mo. App. 358; 96 S. W. Rep. 421), 1039.
Feeney *v.* Long Island R. Co. (116 N. Y. 375; 22 N. E. Rep. 402; 26 N. Y. S. R. 729; 42 Hun 657; 5 L. R. A. 544; 39 Am. & Eng. R. Cas. 639), 172.
Fehurich *v.* Michigan, etc., R. Co. (87 Mich. 606; 49 N. W. Rep. 890), 1029.
Felder *v.* Columbia, etc., R. Co. (21 So. Car. 35; 53 Am. Rep. 656; 27 Am. & Eng. R. Cas. 264), 809.
Felder *v.* Louisville, etc., R. Co. (2 McMull [So. Car.] 403), 1100.
Feldheim *v.* Brooklyn, etc., R. Co. (107 N. Y. S. 413), 801.
Feldschneider *v.* Chicago, etc., R. Co. (99 N. W. Rep. 1034), 122.
Fell *v.* Rich Hill, etc., Co. (23 Mo. App. 216), 288.
Felsch *v.* Babb (101 N. W. Rep. 1011), 92.
Felton *v.* Chicago, etc., R. Co. (69 Iowa 577; 29 N. W. Rep. 618; 27 Am. & Eng. R. Cas. 229), 749.
Ferguson *v.* Central R. Co. (67 Atl. Rep. 602), 496.
Ferguson *v.* Columbus, etc., R. Co. (77 Ga. 102), 1073.
Ferguson *v.* Delaware, etc., Co. (58 Atl. Rep. 74), 70.
Ferguson *v.* Grand Trunk R. Co. (Rap. Jud. Que., 20 C. S. 54), 243.
Ferguson *v.* Railway Co. (71 S. C. 352; 52 S. E. Rep. 138), 64.
Ferguson *v.* St. Louis & S. F. R. Co. (100 S. W. Rep. 537), 576.
Ferguson *v.* Virginia & C. R. Co. (13 Nev. 184), 872.
Ferguson *v.* Wisconsin, etc., R. Co. (63 Wis. 145; 23 N. W. Rep. 123; 19 Am. & Eng. R. Cas. 285), 74.
Ferren *v.* Ry. Co. (143 Mass. 197; 9 N. E. Rep. 608), 243.
Fewings *v.* Mendenhall (88 Minn. 336; 93 N. W. Rep. 127; 97 Am. St. Rep. 519; 60 L. R. A. 601), 758.
Field *v.* Chicago, etc., R. Co. (4 McCrary [U. S.] 573; 8 Am. & Eng. R. Cas. 425; 14 Fed. Rep. 332), 917.
Field *v.* Middlesex R. Co. (109 Mass. 398), 650.
Fielder *v.* St. Louis, etc., R. Co. (107 Mo. 645; 18 S. W. Rep. 847; 54 Am. & Eng. R. Cas. 162), 1079.
Fiero *v.* New York, etc., R. Co. (71 Hun [N. Y.] 213), 406.
Filbert *v.* Delaware, etc., Co. (121 N. Y. 207; 23 N. E. Rep. 1104), 498.
Filbert *v.* New York, etc., Ry. Co. (88 N. Y. S. 438; 95 App. Div. 199), 254.
Filer *v.* New York, etc., R. Co. (49 N. Y. 42; 3 Am. Ry. Rep. 460), 182.
Files *v.* Boston, etc., R. Co. (149 Mass. 204; 21 N. E. Rep. 311), 1071.
Fillingham *v.* St. Louis Transit Co. (102 Mo. App. 573; 77 S. W. Rep. 314), 657.
Fink *v.* Missouri, etc., Co. (82 Mo. 276; 10 Mo. App. 61), 276.
Finlayson *v.* Chicago, etc., R. Co. (1 Dill. [U. S.] 579), 1090.
Finklestein *v.* New York, etc., R. Co. (41 Hun [N. Y.] 34; 2 N. Y. S. R. 680), 959.
Finley *v.* Chicago, etc., R. Co. (71 Minn. 471; 74 N. W. Rep. 174), 1056.
Finnell *v.* Delaware, etc., R. Co. (42 N. Y. S. R. 354), 325.
Firebaugh *v.* Seattle, etc., El. Co. (40 Wash. 658; 82 Pac. Rep. 995), 121.
Fishburn *v.* Burlington & N. W. R. Co. (127 Iowa 483; 103 N. W. Rep. 481), 26.
Fisher's Admr. *v.* Chesapeake & O. R. Co. (Va., 52 S. E. Rep. 373), 249.
Fisher *v.* Chicago, etc., R. Co. (77 Mich. 546; 43 N. W. Rep. 926), 336.
Fisher *v.* Delaware, etc., Co. (153 Pa. St. 379; 26 Atl. Rep. 18), 308.
Fisher *v.* Metropolitan R. Co. (34 Hun N. Y. 433), 178.
Fisher *v.* Oregon, etc., R. Co. (22 Ore. 533; 30 Pac. Rep. 435; 16 L. R. A. 519; 53 Am. & Eng. R. Cas. 539), 485.
Fisher *v.* West Virginia, etc., R. Co. (19 S. E. Rep. 578; 58 Am. & Eng. R. Cas. 337), 405.
Fisk *v.* Central Pac. R. Co. (72 Cal. 38; 13 Pac. Rep. 144), 308.
Fisk *v.* Fitchburg, etc., R. Co. (158 Mass. 238; 33 N. E. Rep. 510), 326.
Fitzgerald *v.* Boston, etc., R. Co. (156 Mass. 293; 31 N. E. Rep. 7), 139.
Fitzgerald *v.* Honkomp (44 Ill. App. 365), 379.
Fitzgerald *v.* Long Island R. Co. (117 N. Y. 653; 22 N. E. Rep. 1133; 27 N. Y. S. R. 980; 21 N. Y. S. R. 942; 3 N. Y. Supp. 230), 919.
Fitzgerald *v.* Long Island R. Co. (10 N. Y. S. R. 433; 45 Hun 591; 117 N. Y. 653), 1002.
Fitzgerald *v.* New York, etc., R. Co. (36 N. Y. S. R. 755), 346.
Fitzgerald *v.* Paper Co. (30 Miss. Rep. 438; 62 N. Y. S. R. 597), 356.
Fitzgerald *v.* Railroad Co. (59 Hun 225; 25 N. Y. S. R. 205), 356.

[*References are to sections.*]

Fitzgerald *v.* Southern R. Co. (N. C. 6 L. R. A. [N. S.] 337), 119.
Fitzhugh *v.* Boston & M. R. R. (80 N. E. Rep. 792), 411.
Fitzjohn *v.* St. Louis Tr. Co. (188 Mo. 74; 81 S. W. Rep. 907), 150.
Fitzmaurice *v.* New York & H. R. R. Co. (78 N. E. Rep. 418), 571.
Fitzpatrick *v.* New Albany, etc., R. Co. (7 Ind. 436), 479.
Flaherty *v.* Minneapolis, etc., R. Co. (39 Minn. 328; 40 N. W. Rep. 160; 1 L. R. A. 680), 1043.
Flanagan *v.* New York, etc., R. Co. (70 App. Div. 505; 75 N. Y. Supp. 225; 173 N. Y. 631; 66 N. E. Rep. 1108), 1055.
Flanagan *v.* New York, etc., R. Co. (5 Silv. Sup. Ct. [N. Y.] 495), 706.
Flanagan *v.* Philadelphia, etc., R. Co. (181 Pa. St. 237; 37 Atl. Rep. 341), 630.
Flanagan *v.* Smelting Co. (63 N. J. L. 647; 44 Atl. Rep. 762), 255.
Flanders *v.* Ry. Co. (51 Minn. 193; 53 N. W. Rep. 544), 258.
Flannagan *v.* Chicago, etc., R. Co. (50 Wis. 462; 7 N. W. Rep. 337), 344.
Flannegan *v.* Chesapeake, etc., R. Co. (40 W. Va. 436; 21 S. E. Rep. 1028), 489.
Flansberg *v.* Heuwood, etc., Co. (190 Mass. 125; 76 N. E. Rep. 599), 260.
Fleming *v.* Brooklyn, etc., R. Co. (1 Abb. N. Cas [N. Y.] 433), 869.
Fleming *v.* Bushnell (57 N. Y. Supp. 230), 145.
Fleming *v.* Kansas City, etc., R. Co. (89 Mo. App. 129), 674.
Fleming *v.* Pittsburg, etc., R. Co. (158 Pa. St. 130; 27 Atl. Rep. 858; 22 L. R. A. 351; 38 Am. St. Rep. 835), 759.
Fleming *v.* St. Paul, etc., R. Co. (27 Minn. 411; 6 N. W. Rep. 448), 341.
Fleming *v.* Western Pacific R. Co. (49 Cal. 253; 7 Am. Ry. Rep. 265), 1023.
Fletcher *v.* Atlantic, etc., R. Co. (64 Mo. 484), 389.
Fletcher *v.* Baltimore, etc., R. Co. (168 U. S. 135; 42 L. Ed. 411; 18 Sup. Ct. Rep. 35), 568.
Fletcher *v.* Boston, etc., R. Co. (1 Allen [Mass.] 9), 866.
Fletcher *v.* Fitchburg, etc., R. Co. (149 Mass. 127; 3 L. R. A. 743; 21 N. E. Rep. 302), 1020.
Flike *v.* Boston, etc., R. Co. (53 N. Y. 553), 472.
Flint *v.* Norwich, etc., Co. (34 Conn. 554), 749.
Flint *v.* Norwich, etc., R. Co. (110 Mass. 222), 886.
Flint, etc., R. Co. *v.* Stark (38 Mich. 714), 697.
Flood *v.* London West (28 Ont. App. Rep. 530), 1047.
Florence, etc., R. Co. *v.* Whipps (Colo., 138 Fed. Rep. 13), 852.
Flori *v.* St. Louis (3 Mo. App. 231), 1056.
Florida, etc., R. Co. *v.* Hirst (30 Fla. 1; 11 So. Rep. 506; 52 Am. & Eng. R. Cas. 409), 658.
Florida, etc., R. Co. *v.* Sullivan (120 Fed. Rep. 799; 57 C. C. A. 167; 61 L. R. A. 410), 47.
Florida, etc., Ry. Co. *v.* Wade (43 So. Rep. 775), 784.
Florida, etc., R. Co. *v.* Webster (25 Fla. 394 5 So. Rep. 714), 600.
Flower *v.* Pennsylvania R. Co. (69 Pa. St. 210), 466.
Floytroupe *v.* Boston, etc., R. Co. (163 Mass. 152; 39 N. E. Rep. 797), 789.
Flynn *v.* Bridge Co. (42 Mo. App. 529), 255.
Flynn *v.* Erie Co. (12 N. Y. St. Rep. 88), 275.
Flynn *v.* Kansas City, etc., R. Co. (78 Mo. 195; 18 Am. & Eng. R. Cas. 23), 373.
Flynn *v.* Transit Co. (113 Mo. App. 185; 87 S. W. Rep. 560), 737.
Fogarty *v.* St. Louis Transfer Co. (180 Mo. 490; 79 S. W. Rep. 664), 463.
Fogarty *v.* Southern Pac. Co. (91 Pac. Rep. 50), 500.
Fogus *v.* Chicago, etc., R. Co. (50 Mo. App. 250), 99.
Foley *v.* Boston & M. R. R. Co. (79 N. E. Rep. 765), 796.
Foley *v.* California, etc., Co. (115 Cal. 184; 49 Pac. Rep. 42), 311.
Foley *v.* Chicago, etc., R. Co. (48 Mich. 622; 12 N. W. Rep. 879; 42 Am. Rep. 481; 6 Am. & Eng. R. Cas. 161), 347.
Foley *v.* Chicago, etc., R. Co. (64 Iowa 644; 21 N. W. Rep. 124), 522.
Folk *v.* Schaeffer (186 Pa. 253; 40 Atl. Rep. 401), 119.
Follman *v.* Mankato (35 Minn. 522; 29 N. W. Rep. 317; 59 Am. Rep. 340), 1057.
Foran *v.* New York, etc., R. Co. (64 Hun [N. Y.] 510; 46 N. Y. S. R. 423; 19 N. Y. Supp. 417), 1018.
Forbes *v.* Chicago, etc., Ry. Co. (113 N. W. Rep. 477), 558.
Ford *v.* Central, etc., R. Co. (69 Iowa 627; 21 N. W. Rep. 587; 17 Am. & Eng. R. Cas. 599), 74.
Ford *v.* Fitchburg, etc., Co. (110 Mass. 240), 263.
Ford *v.* Lake Shore, etc., R. Co. (124 N. Y. 493; 26 N. E. Rep. 1101; 48 Am. & Eng. R. Cas. 201), 360.
Ford *v.* Lake Shore, etc., R. Co. (36 N. Y. S. R. 494), 142.
Ford *v.* London, etc., R. Co. (2 F. & F. 730), 579.
Ford *v.* Providence Co. (Ky., 99 S. W. Rep. 611), 92.
Fordham *v.* London, etc., R. Co. (L. R., 4 C. P. 619; 38 L. J. C. P. 324; 17 W. R. 896; L. R., 3 C. P. 368; 37 L. J. C. P. 176), 682.
Fordyce *v.* Beecher (2 Texas Civ. App. 29; 21 S. W. Rep. 179), 175.
Fordyce *v.* Brinley (58 Ark. 206; 24 S. W. Rep. 250), 494.
Fordyce *v.* Chancey (2 Texas Civ. App. 24; 21 S. W. Rep. 181), 94.

[*References are to sections.*]

Fordyce *v.* Jackson (56 Ark. 594; 20 S. W. Rep. 528, 597), 679.
Fordyce *v.* Key (74 Ark. 19; 84 S. W. Rep. 797), 92.
Fordyce *v.* Lowman (57 Ark. 160; 20 S. W. Rep. 1090), 347.
Fordyce *v.* McCants, (55 Ark. 384; 18 S. W. Rep. 371), 206.
Fordyce *v.* McCants (51 Ark. 509; 11 S. W. Rep. 694), 198.
Fordyce *v.* Merrill (5 S. W. Rep. 329), 625.
Fordyce *v.* Withers (20 S. W. Rep. 766), 184.
Fore *v.* Chicago & Alton R. Co. (114 Mo. App. 551; 89 S. W. Rep. 1034), 269.
Foreman *v.* Pennsylvania R. Co. (159 Pa. St. 541; 28 Atl. Rep. 358), 804.
Forepaugh *v.* Delaware, etc., R. Co. (128 Pa. St. 217; 18 Atl. Rep. 503; 15 Am. St. Rep. 672; 5 L. R. A. 508), 463.
Forsyth *v.* Boston, etc., R. Co. (103 Mass. 510), 793.
Ft. Wayne, etc., R. Co. *v.* Beyerle (110 Ind. 100; 11 N. E. Rep. 6; 28 Am. & Eng. R. Cas. 306), 304.
Ft. Wayne, etc., R. Co. *v.* Gruff (132 Ind. 13; 31 N. E. Rep. 460), 419.
Ft. Worth, etc., R. Co. *v.* Floyd (Texas, 21 S. W. Rep. 544), 60.
Ft. Worth, etc., R. Co. *v.* Gribble (102 S. W. Rep. 157), 559.
Ft. Worth, etc., R. Co. *v.* Mackey (83 Texas 410; 18 S. W. Rep. 949), 470.
Ft. Worth, etc., Ry. Co. *v.* Morris (101 S. W. Rep. 1038), 886.
Ft. Worth, etc., R. Co. *v.* Ramp (70 S. W. Rep. 508), 357.
Ft. Worth, etc., Ry. Co. *v.* Smith (Texas, 87 S. W. Rep. 371), 380.
Ft. Worth, etc., R. Co. *v.* Thompson (2 Texas Civ. App. 170; 21 S. W. Rep. 137), 367.
Ft. Worth, etc., Ry. Co. *v.* Work (100 S. W. Rep. 962), 681.
Fortune *v.* Missouri R. Co. (10 Mo. App. 252), 666.
Foss *v.* Boston, etc., R. Co. (N. H. 21 Atl. Rep. 222; 47 Am. & Eng. R. Cas. 566), 724.
Foster *v.* Chicago, etc., R. Co. (Iowa, 102 N. W. Rep. 422), 375.
Foster *v.* Lake, etc., R. Co. (108 Ill. App. 113), 358.
Foster *v.* Minnesota, etc., R. Co. (14 Minn. 360), 478.
Foster *v.* Missouri Pac. R. Co. (115 Mo. 165; 21 S. W. Rep. 916), 158.
Foster *v.* New York, etc., R. Co. (187 Mass 21; 72 N. E. Rep. 331), 360.
Foulkes *v.* Metropolitan, etc., R. Co. (5 C. P. D. 157; 49 L. J. C. P. D. 361; 42 L. T. 345; 28 W. R. 526), 813.
Fournet *v.* Morgan, etc., R. Co. (43 La. Ann. 1202; 11 So. Rep. 541), 788.
Fowler *v.* Chicago, etc., R. Co. (61 Wis. 159), 492.
Fowler *v.* Sacks (7 Mackey [D. C.] 507; 7 L. R. A. 649), 282.
Fox *v.* Missouri Pacific Ry. Co. (85 Mo. 679), 999.
Fox *v.* Peninsular Lead Works (84 Mich. 676; 48 N. W. Rep. 203), 269.
Fox *v.* Peninsular, etc., Co. (92 Mich. 243; 52 N. W. Rep. 623), 106.
Fox *v.* White Lead Works (84 Mich. 676; 48 N. W. Rep. 203), 309.
Fraker *v.* St. Paul, etc., R. Co. (32 Minn. 54; 19 N. W. Rep. 349; 15 Am. & Eng. R. Cas. 256), 327.
Francis *v.* Kansas City, etc., Ry. Co. (110 Mo. 387; 19 S. W. Rep. 935), 90.
Francis *v.* St. Louis, etc., R. Co. (5 Mo. App. 7), 577.
Frandsen *v.* Chicago, etc., R. Co. (36 Iowa 372), 522.
Frangoise *v.* Horton & Hemenway (26 R. I. 291; 58 Atl. Rep. 949), 355.
Frank Bird Transfer Co. *v.* Krug (30 Ind. App. 602; 65 N. E. Rep. 309), 1047.
Frank *v.* Otis (15 N. Y. St. Rep. 681), 10.
Frank *v.* Transit Co. (99 Mo. App. 323, 73 S. W. Rep. 239), 392.
Franklin *v.* Atlanta, etc., R. Co. (54 S. E. Rep. 578; 74 S. C. 332), 742.
Franklin *v.* Missouri, K. & T. R. Co. (97 Mo. App. 473; 71 S. W. Rep. 540), 154.
Franklyn *v.* Southeastern R. Co. (3 H. & N. 211; 4 Jur. [N. S.] 565; 29 L. J. Ex. 25), 62.
Franklin *v.* Southern R. Co. (85 Cal. 63; 24 Pac. Rep. 723), 580.
Franklin *v.* Winona, etc., R. Co. (37 Minn. 409; 34 N. W. Rep. 898; 5 Am. St. Rep. 856; 31 Am. & Eng. R. Cas. 211), 471.
Fraser *v.* Lumber Co. (42 Minn. 520; 44 N. W. Rep. 878), 255.
Frazer *v.* South, etc., R. Co. (81 Ala. 185; 1 So. Rep. 85; 28 Am. & Eng. R. Cas. 565), 74.
Frazier *v.* Pennsylvania R. Co. (38 Pa. St. 104), 85.
Fredericks *v.* Northern, etc., R. Co. (157 Pa. St. 103; 27 Atl. Rep. 689; 22 L. R. A. 306; 58 Am. & Eng. R. Cas. 91), 764.
Freeman *v.* Detroit, etc., R. Co. (65 Mich. 577; 32 N. W. Rep. 833; 30 Am. & Eng. R. Cas. 623), 686.
Freeman *v.* Duluth, etc., R. Co. (74 Mich. 86; 41 N. W. Rep. 872; 3 L. R. A. 594; 37 Am. & Eng. R. Cas. 501), 938.
Freeman *v.* Illinois, etc., R. Co. (107 Tenn. 340; 64 S. W. Rep. 1), 487.
Freeman *v.* M. & St. P. Ry. Co. (28 Minn. 443; 7 Am. & Eng. R. Cas. 410), 235.
Freemont *v.* Boston, etc., R. Co. (98 N. Y. S. 179; 111 App. Div. 831), 264.
French *v.* Philadelphia, etc., R. Co. (39 Md. 574; 10 Am. Ry. Rep. 474), 1083.
Friar *v.* Orange & N. W. Ry. Co. (101 S. W. Rep. 274), 737.
Frick *v.* St. Louis, etc., R. Co. (75 Mo. 595; 8 Am. & Eng. R. Cas. 280), 880.

[*References are to sections.*]

Friedman *v.* Horn (104 N. Y. S. R. 745), 175.
Friel *v.* Railroad Co. (115 Mo. 503; 22 S. W. Rep. 498), 252.
Frink *v.* Potter (Ill., 9 Am. Neg. Cas. 200; 17 Ill. 406), 614, 653.
Frost *v.* Eastern R. Co. (64 N. H. 220; 9 Atl. Rep. 790; 10 Am. St. Rep. 396), 1073.
Frost *v.* Grand Trunk R. Co. (10 Allen [Mass.] 787), 633.
Frost *v.* Milwaukee, etc., R. Co. (96 Mich. 470; 56 N. W. Rep. 19), 885.
Fry *v.* Dubuque, etc., R. Co. (45 Iowa 416), 183.
Fry *v.* Great Northern Ry. Co. (Minn., 103 N. W. Rep. 733), 271.
Frye *v.* St. Louis, etc., R. Co. (200 Mo. 377; 98 S. W. Rep. 566), 92.
Fuchs *v.* St. Louis (133 Mo. 168; 31 S. W. Rep. 115), 110.
Fugate *v.* Carter (6 Mo. 267), 131.
Fulks *v.* St. Louis, etc., R. Co. (111 Mo. 343; 19 S. W. Rep. 818), 691.
Fuller *v.* Boston, etc., R. Co. (133 Mass. 491; 14 Am. & Eng. R. Cas. 695), 955.
Fuller *v.* Jackson (92 Mich. 197; 52 N. W. Rep. 1075), 185.
Fuller *v.* Jamestown, etc., R. Co. (75 Hun 273; 26 N. Y. Supp. 1078), 92.
Fuller *v.* Jewett (80 N. Y. 46; 1 Am. & Eng. R. Cas. 109), 473.
Fuller *v.* Naugatuck, etc., R. Co. (21 Conn. 557), 582.
Fullerton *v.* Fordyce (121 Mo. 1; 25 S. W. Rep. 587; 42 Am. St. Rep. 516; 144 Mo. 519; 44 S. W. Rep. 1053), 793.
Fullerton *v.* St. Louis, etc., R. Co. (84 Mo. App. 498), 669.
Fulton County, etc., R. Co. *v.* Butler (48 Ill. App. 301), 1031.
Fulton County R. Co. *v.* McConnell (87 Ga. 756); 13 S. E. Rep. 828), 296.
Fulton *v.* Star Mining Co. (133 Fed. Rep. 193), 6.
Fulton *v.* Wilmington, etc., Co. (133 Fed. Rep. 193; 68 L. R. A. 168), 88.
Funston *v.* Chicago, etc., R. Co. (61 Iowa 452; 16 N. W. Rep. 518; 14 Am. & Eng. R. Cas. 640), 324.
Furnish *v.* Missouri Pacific Ry. Co. (102 Mo. 438, 669; 15 S. W. Rep. 315; 13 S. W. Rep. 1044; 22 Am. St. Rep. 781, 800), 764.
Fusili *v.* Missouri Pacific Ry. Co. (45 Mo. App. 535), 943.

G

Gabrial *v.* Chicago & N. W. Ry. Co. (121 Ill. App. 614), 114.
Gabrial *v.* St. Louis, etc., R. Co. (112 S. W. Rep. 713), 800.
Gadsden, etc., R. Co. *v.* Causler (97 Ala. 235; 12 So. Rep. 439; 58 Am. & Eng. R. Cas. 258), 589.
Gaffney *v.* New York, etc., R. Co. (15 R. I. 456; 7 Atl. Rep. 284; 31 Am. & Eng. R. Cas. 265), 499.
Gahagan *v.* Boston, etc., R. Co. (Mass., 1 Allen 187), 99.
Gahagan *v.* New York, etc., R. Co. (1 Allen 187), 414.
Gale *v.* New York, etc., R. Co. (76 N. Y. 594; 13 Hun 1), 903.
Galena, etc., R. Co. *v.* Fay (16 Ill. 558), 457.
Galena, etc., R. Co. *v.* Jacobs (20 Ill. 478), 1062.
Galena, etc., R. Co. *v.* Loomis (13 Ill. 548), 249.
Galena, etc., R. Co. *v.* Yarwood (15 Ill. 468), 792.
Galena, etc., R. Co. *v.* Yarwood (17 Ill. 509), 806.
Gall *v.* Beckstein (173 Ill. 187), 158.
Gallagher *v.* Edison Co. (72 Mo. App. 576), 127.
Galligan *v.* Mfg. Co. (143 Mass. 527; 10 N. E. Rep. 171), 870.
Galligan *v.* Metropolitan R. Co. (33 Misc. 87; 69 N. Y. Supp. 180), 1050.
Gallin *v.* London, etc., R. Co. (10 Q. B. 212; 12 Moak's Eng. 268), 567.
Galloway *v.* Chicago, etc., R. Co. (Iowa, 54 N. W. Rep. 447; 58 Am. & Eng. R. Cas. 245), 791.
Galow *v.* Chicago, etc., R. Co. (131 Fed. Rep. 242), 257.
Galveston, etc., R. Co. *v.* Alberti (103 S. W. Rep. 699), 722.
Galveston, etc., R. Co. *v.* Arispe (81 Tex. 517; 17 S. W. Rep. 47; 48 Am. & Eng. R. Cas. 350), 328.
Galveston, etc., R. Co. *v.* Bean (99 S. W. Rep. 721), 852.
Galveston, etc., R. Co. *v.* Busch (Tex., 65 S. W. Rep. 681), 266.
Galveston, etc., R. Co. *v.* Cassinelli (Tex., 78 S. W. Rep. 247), 328.
Galveston, etc., R. Co. *v.* Chambers (73 Tex. 296; 11 S. W. Rep. 279), 28.
Galveston, etc., R. Co. *v.* Cooper (2 Tex. Civ. App. 42; 20 S. W. Rep. 990), 664.
Galveston Ry. Co. *v.* Crier (100 S. W. Rep. 1177), 592.
Galveston, etc., R. Co. *v.* Croskell (Tex., 251 S. W. Rep. 486), 26.
Galveston, etc., R. Co. *v.* Davis (4 Tex. Civ. App. 468; 45 S. W. Rep. 956; 12 Am. & Eng. R. Cas. [N. S.] 832), 507.
Galveston, etc., R. Co. *v.* Davis (Tex., 65 S. W. Rep. 217), 267.
Galveston, etc., R. Co. *v.* Drew (59 Tex. 10; 46 Am. Rep. 261), 340.
Galveston, etc., R. Co. *v.* Dyncan (88 Tex. 611), 866.
Galveston, etc., R. Co. *v.* Farmer (73 Tex. 85; 11 S. W. Rep. 156), 499.
Galveston, etc., R. Co. *v.* Fink (99 S. W. Rep. 204), 685.
Galveston, etc., R. Co. *v.* Fitzpatrick (Tex., 83 S. W. Rep. 406), 90.
Galveston Ry. Co. *v.* Garcia (100 S. W. Rep. 198), 608.
Galveston, etc., R. Co. *v.* Garrett (73 Tex. 262; 13 S. W. Rep. 62), 245.
Galveston, etc., R. Co. *v.* Gormley (91 Tex. 393; 43 S. W. Rep. 877), 249.
Galveston, etc., R. Co. *v.* Gormley (Tex. Civ. App., 27 S. W. Rep. 1051), 11.

[*References are to sections.*]

Galveston, etc., R. Co. *v.* Hewitt (67 Tex. 473; 3 S. W. Rep. 705), 947.
Galveston, etc., Ry. Co. *v.* Hitzfelder (Tex., 66 S. W. Rep. 707), 379.
Galveston, etc., R. Co. *v.* Kutoc (72 Tex. 643; 11 S. W. Rep. 127; 13 S. W. Rep. 327; 37 Am. & Eng. R. Cas. 470), 64.
Galveston, etc., R. Co. *v.* Lempe (59 Tex. 19), 332.
Galveston, etc., R. Co. *v.* LaGierse (51 Tex. 189), 167.
Galveston, etc., R. Co. *v.* Levy (Tex., 79 S. W. Rep. 879), 88.
Galveston, etc., R. Co. *v.* Manns (Tex., 84 S. W. Rep. 354), 258.
Galveston, etc., R. Co. *v.* Masterson (91 Tex. 385; 51 S. W. Rep. 1091), 493.
Galveston, etc., R. Co. *v.* Matula (79 Tex. 577; 15 S. W. Rep. 573), 197.
Galveston & S. A. Ry. Co. *v.* Matzdorf (107 S. W. Rep. 882), 621.
Galveston, etc., R. Co. *v.* Metula (Tex., 19 S. W. Rep. 376), 994.
Galveston & S. A. Ry. Co. *v.* Murray (99 S. W. Rep. 144), 989.
Galveston H. N. R. Co. *v.* Newport (Tex., 65 S. W. Rep. 657), 258.
Galveston, etc., R. *v.* Nolan (53 Tex., 139; 3 Am. & Eng. R. Cas. 387), 69.
Galveston, etc., R. Co. *v.* Parish (Tex., 93 S. W. Rep. 682), 268.
Galveston, etc., R. Co. *v.* Porfert (72 Tex. 344; 37 Am. & Eng. R. Cas. 540; 10 S. W. Rep. 207), 1017.
Galveston, etc., R. Co. *v.* Polk (63 S. W. Rep. 343), 65.
Galveston, etc., R. Co. *v.* Quay (Tex., 66 S. W. Rep. 219), 273.
Galveston, etc., R. Co. *v.* Sanchez (Tex., 65 S. W. Rep. 893), 387.
Galveston, etc., R. Co. *v.* Scott (18 Tex. Civ. App. 321; 44 S. W. Rep. 589), 29.
Galveston, etc., R. Co. *v.* Smith (Tex., 93 S. W. Rep. 184; 98 S. W. Rep. 240), 79.
Galveston, etc., R. Co. *v.* Smith (59 Tex. 406), 789.
Galveston, etc., R. Co. *v.* Smith (76 Tex. 611; 13 S. W. Rep. 562; 44 Am. & Eng. R. Cas. 598), 473.
Galveston, etc., R. Co. *v.* Still (100 S. W. Rep. 176), 184.
Galveston, etc., R. Co. *v.* Sullivan (29 Tex. Unrep. Cas. 315), 406.
Galveston, etc., Co. *v.* Thompson (76 Tex. 235; 13 S. W. Rep. 60), 311.
Galveston, etc., R. Co. *v.* Thornberry (Tex., 17 S. W. Rep. 521), 822.
Galveston, etc., Ry. Co. *v.* Tuckett (Tex., 25 S. W. Rep. 150), 663.
Galveston, etc., R. Co. *v.* Walker (Tex., 76 S. W. Rep. 228), 342.
Galveston, etc., R. Co. *v.* Walker (106 S. W. Rep. 705), 922.
Galveston, etc., R. Co. *v.* Welsh (Tex., 22 S. W. Rep. 957), 661.
Galveston, etc., R. Co. *v.* Young (100 S. W. Rep. 993), 655.
Gamel *v.* Monfort (Tex., 81 S. W. Rep. 1029), 99.
Gann *v.* Railroad (101 Tenn. 380), 158.
Gannon *v.* Gas Co. (145 Mo. 502; 46 S. W. Rep. 968; 47 S. W. Rep. 907; 43 L. R. A. 505), 119.
Gardner *v.* Bennett (6 J. & S. [N. Y.] 197), 91.
Garldner *v.* Chicago, etc., R. R. Co. (17 Ill. App. 262), 453.
Gardner *v.* Detroit, etc., R. Co. (97 Mich. 240; 56 N. W. Rep. 603), 1003.
Gardner *v.* Michigan Central R. Co. (58 Mich. 584; 26 N. W. Rep. 301), 354.
Gardner *v.* New Haven, etc., R. Co. (Conn., 18 Am. & Eng. R. Cas. 170), 571.
Gardner *v.* New York, etc., R. Co. (17 R. I. 790), 45.
Gardner *v.* Railway Co. (150 U. S. 349), 311.
Gardner *v.* Waycross R. Co. (94 Ga. 538; 19 S. E. Rep. 757), 667.
Garland *v.* Chicago, etc., R. Co. (8 Ill. App. 571), 1020.
Garrahy *v.* Kansas City, etc., R. Co. (25 Fed. Rep. 258), 479.
Garrett *v.* People's Ry. Co. (64 Atl. Rep. 254), 393.
Garrow *v.* Miller (72 Vt. 284; 47 Atl. Rep. 1087), 255.
Garteiser *v.* Galveston, etc., R. Co. (2 Tex. Civ. App. 230; 21 S. W. Rep. 631), 1049.
Gartland *v.* Toledo, etc., R. Co. (67 Ill. 498), 465.
Gartridge *v.* Railway Co. (105 Mo. 520; 16 S. W. Rep. 943), 256.
Garvik *v.* Burlington, etc., Ry. Co. (108 N. W. Rep. 327), 738.
Gassaway *v.* Georgia Southern Ry. Co. (69 Ga. 347), 272.
Gasway *v.* Atlantic, etc., R. Co. (58 Ga. 215; 16 Am. Ry. Rep. 99), 177.
Gates *v.* Burlington, etc., R. Co. (39 Iowa 45), 392.
Gates *v.* Chicago, etc., R. Co. (2 S. Dakota 422; 50 N. W. Rep. 907; 53 Am. & Eng. R. Cas. 245), 461.
Gates *v.* Quincey C. Ry. Co. (102 S. W. Rep. 50), 555.
Gates *v.* St. Paul, etc., R. Co. (28 Minn. 110; 2 Am. & Eng. R. Cas. 237), 32.
Gaudet *v.* Stansfield (182 Mass. 451; 65 N. E. Rep. 850), 308.
Gaulden *v.* Kansas City S. Ry. Co. (106 La. 409; 30 So. Rep. 889), 252.
Gavett *v.* Manchester, etc., R. Co. (16 Gray [Mass.] 501), 788.
Gavigan *v.* Lake Shore, etc., R. Co. (110 Mich. 71; 67 N. W. Rep. 1097; 5 Am. & Eng. R. Cas. [N. S.] 523, 495.
Gayle *v.* Missouri, etc., Co. (177 Mo. 427; 76 S. W. Rep. 987), 161.
Gayner *v.* Old Colony R. Co. (100 Mass. 208), 557.
Geart *v.* Metropolitan R. Co. (84 App. Div. 514; 82 N. Y. Supp. 1016; 177 N. Y. 535; 69 N. E. Rep. 1123), 1050.
Gee *v.* Metropolitan, etc., R. Co. (21 W. R. 584; L. R. 8 Q. B. 161; 42 L. J. Q. B. 105; 28 L. T. 282), 799.
Gee *v.* Northern Pac. R. Co. (30 Wash. 654; 71 Pac. Rep. 182), 38.

[*References are to sections.*]

Gehring *v.* Atlantic City R. Co. (68 Atl. Rep. 61), 992.
Geis *v.* Tennessee Coal, Iron, etc., R. Co. (Ala., 39 So. Rep. 301), 357.
Geoghagan *v.* Atlas Steamship Co. (51 N. Y. S. R. 868; 22 N. Y. Supp. 749), 54.
Georgia, etc., R. Co. *v.* Blanton (84 Ala. 154; 4 So. Rep. 621), 971.
Georgia, etc., R. Co. *v.* Brooks (84 Ala. 138; 4 So. Rep. 289), 512.
Georgia, etc., R. Co. *v.* Cartledge (116 Ga. 164; 42 S. E. Rep. 405; 59 L. R. A. 118), 29.
Georgia, etc., R. Co. *v.* Cox (61 Ga. 455), 962.
Georgia, etc., R. Co. *v.* Daniels (89 Ga. 463; 15 S. E. Rep. 538), 965.
Georgia, etc., R. Co. *v.* Davis (92 Ala. 300; 9 So. Rep. 252), 258.
Georgia Pac. R. Co. *v.* Dooley (86 Ga. 294; 12 S. E. Rep. 923; 48 Am. & Eng. R. Cas. 437), 99.
Georgia, etc., R. Co. *v.* Evans (87 Ga. 673; 13 S. E. Rep. 580), 883.
Georgia, etc., R. Co. *v.* Friddell (70 Ga. 489; 7 S. E. Rep. 214), 230.
Georgia R. & B. Co. *v.* Garr (57 Ga. 277), 60.
Georgia, etc., R. Co. *v.* George (92 Ga. 760; 19 S. E. Rep. 813), 29.
Georgia, etc., R. Co. *v.* Homer (73 Ga. 251; 27 Am. & Eng. R. Cas. 186), 578.
Georgia, etc., R. Co. *v.* Hughes (87 Ala. 610; 6 So. Rep. 413; 39 Am. & Eng. R. Cas. 674), 1043.
Georgia R. Co. *v.* Ivey (73 Ga. 499; 28 Am. & Eng. R. Cas. 392), 519.
Georgia Pacific R. Co. *v.* Lee (92 Ala. 262; 9 So. Rep. 230), 1020.
Georgia R. & Co. *v.* Lloyd (59 S. E. Rep. 801), 632.
Georgia Ry. Co. *v.* McAllister (54 S. E. Rep. 957), 710.
Georgia, etc., R. Co. *v.* McCurdy (45 Ga. 288), 791.
Georgia, etc., R. Co. *v.* Murden (86 Ga. 434; 12 S. E. Rep. 630), 659.
Georgia, etc., R. Co. *v.* Nelms (83 Ga. 70; 9 S. E. Rep. 1049; 39 Am. & Eng. R. Cas. 355; 29 Cent. L. J. 352), 97.
Georgia, etc., R. Co. *v.* Oaks (52 Ga. 410; 7 Am. Ry. Rep. 143), 40.
Georgia Pacific R. Co. *v.* O'Shields (90 Ala. 29; 8 So. Rep. 248), 1005.
Georgia, etc., R. Co. *v.* Pittman (73 Ga. 325; 26 Am. & Eng. R. Cas. 474), 196.
Georgia Pac. Ry. Co. *v.* Propst (83 Ala. 518; 3 So. Rep. 764), 253.
Georgia Ry. Co. *v.* Reeves (123 Ga. 697; 51 S. E. Rep. 610), 125.
Georgia, etc., R. Co. *v.* Rhodes (56 Ga. 645), 372.
Georgia, etc., R. Co. *v.* Robinson (68 Miss. 643; 10 So. Rep. 60), 687.
George *v.* St. Louis, etc., R. Co. (34 Ark. 613; 1 Am. & Eng. R. Cas. 294), 768.
Georgia, etc., R. Co. *v.* Underwood (90 Ala. 49; 8 So. Rep. 116; 44 Am. & Eng. R. Cas. 367), 802.
Georgia, etc., R. Co. *v.* West (66 Miss. 310; 6 So. Rep. 207), 789.
Georgia, etc., R. Co. *v.* Wynn (42 Ga. 331), 61.
Georgia, etc., R. Co. *v.* Williams (59 S. E. Rep. 846), 976.
Georgia, etc., R. Co. *v.* Williams (74 Ga. 723), 968.
Gerety *v.* Philadelphia, etc., R. Co. (81 Pa. St. 274; 16 Am. Ry. Rep. 164), 1029.
Gerhart *v.* Wabash Ry. Co. (110 Mo. App. 105), 625.
Gerlach *v.* Edelmeyer (88 N. Y. 645), 120.
Germain *v.* Montreal, etc., R. Co. (6 Low. Can. 172), 640.
German *v.* Brooklyn, etc., R. Co. (95 N. Y. S. 557), 121.
German *v.* Suburban Transit Co. (13 N. Y. Supp. 897; 37 N. Y. S. R. 360), 411.
Gerstle *v.* Union Pacific R. Co. (23 Mo. App. 361), 801.
Gerstner *v.* New York, etc., R. Co. (80 N. Y. S. R. 1063; 81 App. Div. 562), 338.
Gerstner *v.* New York, etc., R. Co. (178 N. Y. 627; 71 N. E. Rep. 1131), 267.
Gesas *v.* Oregon Short Line R. Co. (93 Pac. Rep. 274), 1028.
Gessley *v.* Missouri Pacific Ry. Co. (32 Mo. App. 413), 866.
Geyeke *v.* Grand Rapids, etc., R. Co. (57 Mich. 589; 24 N. W. Rep. 675; 22 Am. & Eng. R. Cas. 551), 171.
Gheer *v.* Union Ry. Co. (103 N. Y. S. R. 88), 167.
Giacomo *v.* New York, etc., R. Co. (81 N. E. Rep. 899), 916.
Gibney *v.* Transit Co. (103 S. W. Rep. 43), 175.
Gibson *v.* Erie, etc., R. Co. (63 N. Y. 449; 20 Am. Rep. 552), 326.
Gibson *v.* Midland R. Co. (2 Ont. 658; 15 Am. & Eng. R. Cas. 507), 64.
Gibson *v.* Northern, etc., R. Co. (22 Hun N. Y. 289), 494.
Gibson *v.* Oregon, etc., R. Co. (23 Oregon 493; 32 Pac. Rep. 295), 416.
Gibson *v.* Pacific R. Co. (46 Mo. 163), 482.
Gidionsen *v.* Union Depot R. Co. (129 Mo. 392; 31 S. W. Rep. 800), 661.
Gila Valley, etc., R. Co. *v.* Lyon (Ariz., 71 Pac. Rep. 957), 154.
Gilberson *v.* Bangor, etc., R. Co. (89 Me. 337; 36 Atl. Rep. 400), 115.
Gilbert *v.* Burlington, etc., R. Co. (128 Fed. Rep. 529), 358.
Gilbert *v.* North London R. Co. (1 C. & E. 31), 642.
Gill *v.* Rochester, etc., R. Co. (37 Hun [N. Y.] 107), 731.
Gillan *v.* Railroad Co. (93 Me. 80; 44 Atl. Rep. 363), 356.
Gillenwater *v.* Madison, etc., R. Co. (5 Ind. 339), 589.
Gillespie *v.* St. Louis, etc., R. Co. (6 Mo. App. 554), 604.
Gillett *v.* Western R. Corp. (8 Allen [Mass.] 560), 905.

[References are to sections.]

Gilliland *v.* Chicago, etc., R. Co. (19 Mo. App. 411), 25.
Gillin *v.* Patten, etc., R. Co. (93 Me. 80; 44 Atl. Rep. 361), 325.
Gillingham *v.* Ohio River R. Co. (35 W. Va. 588; 14 S. E. Rep. 243; 14 L. R. A. 798; 51 Am. & Eng. R. Cas. 222), 551.
Gillis *v.* Pennsylvania R. Co. (59 Pa. St. 129), 1074.
Gillshannon *v.* Stony Brook R. Co. (10 Cush. [Mass.] 228), 568.
Gilman *v.* Railroad Co. (13 Allen 433), 85.
Gilmore *v.* Houston Electric Co. (102 S. W. Rep. 168), 573.
Gilmore *v.* Northern Pacific R. Co. (9 Sawy. U. S. 558; 18 Fed. Rep. 866), 477.
Gilmore *v.* Philadelphia, etc., R. Co. (154 Pa. St. 375; 25 Atl. Rep. 774), 630.
Gilson *v.* Jackson County R. Co. (76 Mo. 282; 12 Am. & Eng. R. Cas. 132), 582.
Giordano *v.* Brandywine, etc., Co. (Del., 52 Atl. Rep. 332), 308.
Giraudi *v.* Electric, etc., Co. (107 Cal. 120; 40 Pac. Rep. 108; 24 L. R. A. 596), 113.
Givens *v.* Kentucky & R. Co. (89 Ky. 231; 12 S. W. Rep. 257), 69.
Glang *v.* Alabama, etc., Co. (141 Ala. 537; 37 So. Rep. 784), 94.
Glanz *v.* Chicago & C. R. Co. (Iowa, 93 N. W. Rep. 575), 38.
Glaser *v.* Rothschild (106 Mo. App. 418), 872.
Glasgow *v.* Metropolitan R. Co. (191 Mo. 374; 89 S. W. Rep. 915), 168.
Glass *v.* Memphis, etc., R. Co. (94 Ala. 581; 10 So. Rep. 215), 74.
Glasscock *v.* Central Pacific R. Co. (73 Cal. 137; 14 Pac. Rep. 518), 408.
Glassey *v.* Bentonville, etc., R. Co. (57 Pa. St. 172), 1058.
Glassey *v.* Worcester Con., etc., R. Co. (185 Mass. 315; 70 N. E. Rep. 199), 39.
Gleason *v.* New York, etc., R. Co. (159 Mass. 68; 34 N. E. Rep. 79), 325.
Gleeson *v.* Virginia Midland R. Co. (140 U. S. 435, 445; 35 L. Ed. 458), 608.
Glenn *v.* Columbia, etc., R. Co. (21 S. C. 466), 20.
Glover *v.* Atchison, etc., Ry. Co. (108 S. W. Rep. 105), 733.
Glover *v.* Bolt & Nut Co. (153 Mo. 327; 55 S. W. Rep. 88), 145.
Glushing *v.* Sharp (96 N. Y. 676; 19 Am. & Eng. R. Cas. 372), 1025.
Glynn *v.* Central R. Co. (Mass., 56 N. E. Rep. 698), 231.
Goble *v.* Kansas City (14 Mo. 470; 50 S. W. Rep. 84), 95.
Goddard *v.* Grand Trunk R. Co. (57 Me. 202), 735.
Goddard *v.* Grand Trunk R. Co. (2 Am. Rep. 39), 177.
Godfrey *v.* Illinois Cent. R. Co. (42 So. Rep. 571), 257.
Godfrey *v.* Inman Co. (31 Atl. Rep. 6), 145.
Godfrey *v.* St. Louis Tr. Co. (Mo., 81 S. W. Rep. 1230), 255.
Goetz *v.* Hannibal, etc., R. Co. (50 Mo. 472), 848.
Goff's Admr. *v.* Norfolk & Western R. Co. (36 Fed. Rep. 299), 275.
Goins *v.* Chicago R. I. & Pac. R. Co. 37 Mo. App. 221.
Goldberg *v.* New York, etc., R. Co. (133 N. Y. 561; 30 N. E. Rep. 597; 44 N. Y. S. R. 71), 632.
Goldberg *v.* New York, etc., R. Co. (54 N. Y. S. R. 90; 71 Hun 613; 133 N. Y. 561), 786.
Golden *v.* Clinton (54 Mo. App. 100), 95.
Goldwaithe *v.* R. R. (160 Mass. 564), 311.
Gonzales *v.* New York, etc., R. Co. (39 How. Pr. N. Y. 407), 102.
Good *v.* Johnson (88 Pac. Rep. 439), 291.
Goodes *v.* Railroad Co. (162 Mass. 287; 38 N. E. Rep. 500), 326.
Goodfellow *v.* Boston, etc., R. Co. (106 Mass. 461), 408.
Goodlander, etc., Co. *v.* Standard Oil Co. (63 Fed. Rep. 400; 11 C. C. A. 253; 27 L. R. A. 538), 22.
Goodloe *v.* Memphis, etc., R. Co. (107 Ala. 233; 18 So. Rep. 166; 54 Am. St. Rep. 67; 29 L. R. A. 729), 740.
Goodloe *v.* Metropolitan R. Co. (120 Mo. App. 194), 608.
Goodman *v.* Delaware, etc., Co. (167 Pa. St. 332; 31 Atl. Rep. 670), 487.
Goodrich *v.* Kansas City, etc., R. Co. (152 Mo. 222; 53 S. W. Rep. 917), 229.
Goodrich *v.* New York, etc., R. Co. (116 N. Y. 398; 22 N. E. Rep. 397; 26 N. Y. S. R. 767; 5 L. R. A. 750), 328.
Goodsell *v.* Taylor (41 Minn. 207; 42 N. W. Rep. 873), 74.
Goodwell *v.* Montana, etc., R. Co. (18 Mont. 293; 45 Pac. Rep. 210; 4 Am. & Eng. R. Cas. [N. S.] 419), 495.
Goodwin *v.* Bodcaw, etc., Co. (109 La. 1050; 34 So. Rep. 74), 241.
Goodwin *v.* Boston, etc., R. Co. (84 Me. 203; 24 Atl. Rep. 816), 801.
Goodwin *v.* Chicago, etc., R. Co. (75 Mo. 73; 11 Am. & Eng. R. Cas. 460), 661.
Gordon *v.* Grand St. R. Co. (40 Babr. [N. Y.] 546), 552.
Gorham *v.* Kansas City, etc., R. Co. (113 Mo. 408; 20 S. W. Rep. 1060), 181.
Gorman *v.* Des Moines Brick Co. (99 Iowa 257; 68 N. W. Rep. 674), 145.
Gorman *v.* Hand Brewing Co. (66 Atl. Rep. 209; 28 R. I. 180), 204.
Gorman *v.* Milliken (92 N. Y. S. 1126; 102 App. Div. 617), 127.
Gorman *v.* Railroad (78 Iowa 509; 43 N. W. Rep. 303), 85.
Goronsson *v.* Riter, etc., Co. (186 Mo. 300; 85 S. W. Rep. 338), 120.
Gorton *v.* Erie R. Co. (45 N. Y. 660), 1009.
Gorton *v.* Harmon (116 N. W. Rep. 443; 15 Detroit Leg. N. 250), 987.
Goshen *v.* England (119 Ind. 368; 21 N. E. Rep. 977), 168.

[*References are to sections.*]

Goss *v.* Mo. Pac. Ry. Co. (50 Mo. App. 626), 306.
Gothard *v.* Alabama, etc., R. Co. (67 Ala. 114), 1016.
Gotlieb *v.* New York, etc., R. Co. (100 N. Y. 462; 3 N. E. Rep. 344; 24 Am. & Eng. R. Cas. 421), 370.
Gottlieb *v.* North Jersey Co. (58 Atl. Rep. 1088), 61.
Gould *v.* Railway Co. (66 Iowa 590; 24 N. W. Rep. 227), 258.
Government, etc., R. Co. *v.* Hanlon (53 Ala. 70), 392.
Gowen *v.* Harley (56 Fed. Rep. 973), 323.
Gradin *v.* St. Paul, etc., R. Co. (30 Minn. 217; 14 N. W. Rep. 881; 11 Am. & Eng. R. Cas. 644), 1070.
Graeff *v.* Philadelphia, etc., R. Co. (Pa., 28 Atl. Rep. 1107; 58 Am. & Eng. R. Cas. 431), 590.
Graemlich *v.* Railroad Co. (9 Phila. [Pa.] 78), 872.
Graf *v.* Chicago, etc., R. Co. (94 Mich. 579; 54 N. W. Rep. 388), 883.
Graham *v.* Badger (164 Mass. 42; 41 N. E. Rep. 61), 119.
Graham *v.* Boston, etc., R. Co. (156 Mass. 4; 30 N. E. Rep. 359), 84.
Graham *v.* Chicago, etc., R. Co. (Tex., 91 S. W. Rep. 1081), 338.
Graham *v.* McNeal (20 Wash. 466; 55 Pac. Rep. 631; 43 L. R. A. 300; 12 Am. & Eng. R. Cas. [N. S.] 149), 690.
Graham *v.* Toronto, etc., R. Co. (23 U. C. C. P. 541), 568.
Gram *v.* Northern Pac. R. Co. (1 N. D. 252), 37.
Grand *v.* Railroad Co. (83 Mich. 564; 47 N. W. Rep. 837; 11 L. R. A. 402), 356.
Grandin *v.* Southern Pac. R. Co. (Utah, 85 Pac. Rep. 357), 354.
Grand Rapids, etc., R. Co. *v.* Boyd (65 Ind. 526), 573.
Grand Rapids, etc., R. Co. *v.* Ellison (117 Ind. 234; 20 N. E. Rep. 135; 39 Am. & Eng. R. Cas. 480), 590.
Grand Rapids, etc., R. Co. *v.* Huntley 38 Mich. 537), 578.
Grand Rapids R. Co. *v.* Martin (41 Mich. 667), 186.
Grand Rapids, etc., R. Co. *v.* Petite (27 Ind. App. 120; 60 N. E. Rep. 1000), 508.
Grand Rapids Chair Co. *v.* Runnells (77 Mich. 104; 35 Cent. Law J. 242), 382.
Grand Rapids, etc., R. Co. *v.* Showers (71 Ind. 451; 2 Am. & Eng. R. Cas. 9), 301.
Grand Trunk R. Co. *v.* Cummings (106 U. S. 700), 471.
Grand Trunk R. Co. *v.* Flagg (156 Fed. Rep. 359), 1078.
Grand Trunk Ry. Co. *v.* Ives (144 U. S. 417; 12 Sup. Ct. Rep. 679), 249.
Grand Trunk Co. *v.* Richardson (91 U. S. 454; 23 L. Ed. 357), 99.
Grand Trunk R. Co. *v.* Rosenberg (9 Can. S. C. 311; 19 Am. & Eng. R. Cas. 8; 15 Am. & Eng. R. Cas. 448), 886.
Grand Trunk R. Co. *v.* Sibbald (20 Can. Sup. Ct. 259; 18 Ont. App. 184), 969.
Grand Trunk Ry. Co. *v.* State (82 N. E. Rep. 1017), 932.
Grand Trunk R. Co. *v.* Stevens (95 U. S. 660; 24 L. Ed. 525), 7.
Graney *v.* St. Louis, etc., R. Co. (38 S. W. Rep. 989; 140 Mo. 89; 41 S. W. Rep. 246; 38 L. R. A. 633; 157 Mo. 666; 57 S. W. Rep. 276; 50 L. R. A. 153), 977.
Granger *v.* Boston, etc., R. Co. (146 Mass. 276; 15 N. E. Rep. 619), 999.
Grannis *v.* Chicago, etc., R. Co. (81 Iowa 444; 46 N. W. Rep. 1067), 245.
Grant *v.* Raleigh, etc., R. Co. (108 N. Car. 462; 13 S. E. Rep. 209), 83.
Gratiot *v.* Missouri Pacific R. Co. (116 Mo. 450; 21 S. W. Rep. 1094; 55 Am. & Eng. R. Cas. 108), 953.
Grattis *v.* Kansas City, etc., R. Co. (153 Mo. 380; 55 S. W. Rep. 108; 48 L. R. A. 399; 77 Am. St. Rep. 721), 354.
Gravelle *v.* Minneapolis, etc., R. Co. (3 McCrary, U. S. 352; 10 Fed. Rep. 711), 485.
Graves *v.* Baltimore & N. Y. Ry. Co. (69 Atl. 971), 889.
Graville *v.* Manhattan R. Co. (105 N. Y. 525; 12 N. E. Rep. 51; 34 Am. & Eng. R. Cas. 375), 801.
Gray *v.* Boston, etc., R. Co. (168 Mass. 20; 46 N. E. Rep. 397), 731.
Gray *v.* Cincinnati, etc., R. Co. (11 Fed. Rep. 683), 658.
Gray *v.* Columbia River & O. R. R. Co. (88 Pac. Rep. 297), 552.
Gray *v.* Philadelphia, etc., R. Co. (24 Fed. Rep. 168; 23 Blatchf. U. S. 265; 22 Am. & Eng. R. Cas. 351), 481.
Gray *v.* Rochester City R. Co. (61 Hun 212; 15 N. Y. Supp. 927; 40 N. Y. S. R. 715), 598.
Grayson, etc., Co. *v.* Carter (Ark., 88 S. W. Rep. 597), 352.
Greany *v.* Long Island R. Co. (101 N. Y. 419; 5 N. E. Rep. 425; 24 Am. & Eng. R. Cas. 473), 1004.
Great Northern R. Co. *v.* Harrison (10 Exch. 376), 571.
Great Western R. Co. *v.* Baird (1 M. P. C. C. [N. S.] 101), 585.
Great Western R. Co. *v.* Blake (7 H. & N. 987), 688.
Green *v.* Brainard, etc., Ry. Co. (85 Minn. 318; 88 N. W. Rep. 974), 332.
Green *v.* Cross (79 Tex. 130; 15 S. W. Rep. 220), 341.
Green *v.* Eastern R. Co. (52 Minn. 79; 53 N. W. Rep. 808), 969.
Green *v.* Erie R. Co. (11 Hun 333), 21.
Green *v.* Hudson River R. Co. (2 Abb. App. Dec. N. Y. 277; 16 How. Pr. N. Y. 263; 31 Barb. 260), 61.
Green *v.* Hudson River R. Co. (32 Barb. 25; 30 How. Pr. 592), 197.
Green *v.* Los Angeles, etc., R. Co. (143 Cal. 31), 398.
Green *v.* Louisville, etc., R. Co. (94 Ky. 169), 484.
Green *v.* Metropolitan St. Ry. Co. (99 S. W. Rep. 28), 721.

[References are to sections.]

Green *v.* Missouri Pacific Ry. Co. (192 Mo. l. c. 141; 90 S. W. Rep. 805), 1011.
Green *v.* Missouri, etc., R. Co. (121 Mo. App. 720; 99 S. W. Rep. 28), 854.
Green *v.* Pennsylvania R. Co. (36 Fed. Rep. 66), 173.
Green *v.* Railroad Co. (28 Barb. 9), 61.
Green *v.* Soule (145 Cal. 96; 78 Pac. Rep. 337), 290.
Green *v.* Southern Ry. Co. (72 S. C. 398; 52 S. E. Rep. 45), 127.
Green *v.* Western, etc., Co. (30 Wash. 87; 70 Pac. Rep. 310), 506.
Greenleaf *v.* Dubuque, etc., R. Co. (33 Iowa 52), 397.
Greenleaf *v.* Illinois C. R. Co. (29 Iowa 14), 152.
Greenlee *v.* East Tenn., etc., R. Co. (5 Lea [Tenn.] 418; 4 Am. & Eng. R. Cas. 351), 59.
Greeley *v.* State (88 N. Y. S. 468; 94 App. Div. 605), 32.
Greenwald *v.* Marquette, etc., R. Co. (49 Mich. 197; 13 N. W. Rep. 513; 8 Am. & Eng. R. Cas. 133), 500.
Greenwell *v.* Crow (73 Mo. 638), 99.
Greenwood *v.* Pennsylvania R. Co. (124 Pa. St. 572; 17 Atl. Rep. 186), 1033.
Greer *v.* Louisville, etc., R. Co. (94 Ky. 169; 21 S. W. Rep. 649), 524.
Gregg *v.* Northern Pac. Ry. Co. (94 Pac. Rep. 911), 775.
Gregory *v.* Cleveland, etc., R. Co. (112 Ind. 385; 14 N. E. Rep. 228; 31 Am. & Eng. R. Cas. 440), 1078.
Gregory *v.* New York, etc., R. Co. (8 N. Y. Supp. 525; 28 N. Y. S. R. 726), 182.
Gribben *v.* Yellow Aster, etc., M. Co. (142 Cal. 248; 75 Pac. Rep. 839), 140.
Gross *v.* Missouri Pacific Ry. Co. (109 Mo. App. 716; 84 S. W. Rep. 122), 557.
Grote *v.* Chester, etc., R. Co. (2 Exch. 251; 5 Railw. Cas. 649), 605.
Grows *v.* Maine, etc., R. Co. (67 Me. 100), 661.
Gruber *v.* Washington, etc., R. Co. (92 N. Car. 1; 21 Am. & Eng. R. Cas. 438), 551.
Gruendahl *v.* Consolidated, etc., Co. (108 Ill. App. 644), 161.
Griffin *v.* Boston, etc., R. Co. (148 Mass. 143; 19 N. E. Rep. 166), 393.
Griffin *v.* California Elec. Co. (1 Cal. App. 678; 82 Pac. Rep. 1084), 125.
Griffin *v.* Flank (95 N. Y. S. 546), 127.
Griffin *v.* Ohio, etc., R. Co. (124 Ind. 326; 24 N. E. Rep. 888), 321.
Griffin *v.* Utica, etc., R. Co. (41 Hun 448; 3 N. Y. S. R. 155), 810.
Griffith *v.* Baltimore, etc., R. Co. (44 Fed. Rep. 574; 159 U. S. 603; 16 Sup. Ct. Rep. 105; 40 L. Ed. 274), 1039.
Griffith *v.* Denver Con. Tr. Co. (14 Colo. App. 504), 398.
Griffith *v.* Lexington Ter. R. Co. (124 Ga. 553; 53 S. E. Rep. 97), 358.
Griffith *v.* Missouri, etc., R. Co. (98 Mo. 168; 11 S. W. Rep. 559), 693.
Griffith *v.* Utica, etc., R. Co. (43 N. Y. S. R. 835; 137 N. Y. 566), 100.
Griggs *v.* Fleckenstein (14 Minn. 81; 100 Am. Dec. 199), 1041.
Grill *v.* Iron, etc., Co. (L. C. R., 1 C. P. 160), 4.
Grimes *v.* Louisville, etc., R. Co. (3 Ind. App. 573; 30 N. E. Rep. 200), 26.
Grimes *v.* Pennsylvania R. Co. (136 Fed. Rep. 72), 102.
Grimsley *v.* Atlantic Coast Line R. Co. (57 S. E. Rep. 943), 591.
Grippen *v.* New York, etc., R. Co. (40 N. Y. 46), 945.
Griswold *v.* Chicago, etc., R. Co. (64 Wis. 652; 26 N. W. Rep. 101, 23 Am. & Eng. R. Cas. 463), 570.
Griswold *v.* New York, etc., R. Co. (44 Hun 236; 115 N. Y. 61), 183.
Griswold *v.* New York, etc., R. Co. (53 Conn. 371; 4 Atl. Rep. 261; 55 Am. Rep. 115; 26 Am. & Eng. R. Cas. 280), 851.
Guenther *v.* St. Louis, etc., R. Co. (108 Mo. 18; 18 S. W. Rep. 846), 411.
Guffey *v.* Hannibal, etc., R. Co. (53 Mo. App. 462), 670.
Guggenheim *v.* Lake Shore, etc., R. Co. (57 Mich. 488; 24 N. W. Rep. 827; 22 Am. & Eng. R. Cas. 546), 1020.
Guggenheim *v.* Lake Shore, etc., R. Co. (66 Mich. 150; 43 N. W. Rep. 161; 32 Am. & Eng. R. Cas. 89), 933.
Guild *v.* Pringle (130 Fed. Rep. 419), 91.
Gulf, etc., R. Co. *v.* Anderson (76 Tex. 244; 13 S. W. Rep. 196; 42 Am. & Eng. R. Cas. 160), 1018.
Gulf, etc., R. Co. *v.* Baird (75 Tex. 263; 40 Am. & Eng. R. Cas. 160), 847.
Gulf, etc., R. Co. *v.* Blockman (39 So. Rep. 479), 528.
Gulf, etc., R. Co. *v.* Blohn (73 Tex. 637; 11 S. W. Rep. 867; 4 L. R. A. 764), 461.
Gulf, etc., Ry. Co. *v.* Booth (97 S. W. Rep. 128), 721.
Gulf, etc., Ry. Co. *v.* Boyce (87 S. W. Rep. 395), 83.
Gulf, etc., R. Co. *v.* Brentford (79 Tex. 619; 15 S. W. Rep. 561), 376.
Gulf, etc., R. Co. *v.* Butcher (83 Tex. 309; 18 S. W. Rep. 583), 620.
Gulf, etc., R. Co. *v.* Calvert (11 Tex. Civ. App. 297; 32 S. W. Rep. 246), 499.
Gulf, etc., R. Co. *v.* Campbell (76 Tex. 174; 13 S. W. Rep. 19; 41 Am. & Eng. R. Cas. 100), 562.
Gulf, C. & S. F. Ry. Co. *v.* Coleman (112 S. W. Rep. 690), 1032.
Gulf, etc., R. Co. *v.* Compton (75 Tex. 667; 13 S. W. Rep. 667; 44 Am. & Eng. R. Cas. 637), 64.
Gulf, etc., R. Co. *v.* Coon (69 Tex. 730; 7 S. W. Rep. 492), 168.
Gulf, etc., R. Co. *v.* Cooper (Tex., 77 S. W. Rep. 263), 269.
Gulf, etc., R. Co. *v.* Darby (28 Tex. Civ. App. 413; 67 S. W. Rep. 446), 243.
Gulf, etc., Ry. Co. *v.* Davis (Tex., 80 S. W. Rep. 253), 372.

[*References are to sections.*]

Gulf, etc., R. Co. *v.* Dawkins (77 Tex. 228; 13 S. W. Rep. 982), 559.
Gulf, etc., R. Co. *v.* Dorsey (66 Tex. 148; 25 Am. & Eng. R. Cas. 446), 230.
Gulf, etc., R. Co. *v.* Ellis (165 U. S. 150), 504.
Gulf, etc., R. Co. *v.* Evansick (63 Tex. 54), 97.
Gulf, etc., R. Co. *v.* Flake (1 Tex. Civ. App. 99), 283.
Gulf, etc., R. Co. *v.* Fox (Tex., 6 S. W. Rep. 569; 33 Am. & Eng. R. Cas. 543), 691.
Gulf, etc., R. Co. *v.* Gordon (70 Tex. 80; 7 S. W. Rep. 695), 184.
Gulf, etc., R. Co. *v.* Greenlee (62 Tex. 344; 23 Am. & Eng. R. Cas. 322), 917.
Gulf, etc., R. Co. *v.* Harriett (80 Tex. 73; 15 S. W. Rep. 556), 100.
Gulf, etc., Ry. Co. *v.* Hays (Tex., 89 S. W. Rep. 29), 85.
Gulf, etc., R. Co. *v.* Hulett (92 S. W. Rep. 454), 317.
Gulf, etc., R. Co. *v.* Johnson (1 Tex. Civ. App. 103; 20 S. W. Rep. 1123), 203.
Gulf, etc., R. Co. *v.* Johnson (83 Tex. 628; 19 S. W. Rep. 151), 471.
Gulf, etc., R. Co. *v.* Jones (76 Tex. 350; 13 S. W. Rep. 374), 301.
Gulf, Colorado & Santa Fe R. Co. *v.* Josey (Tex., 95 S. W. Rep. 688), 26.
Gulf, etc., R. Co. *v.* Killebrew (Tex., 20 S. W. Rep. 182), 802.
Gulf, etc., R. Co. *v.* Larkin (Tex., 80 S. W. Rep. 94), 266.
Gulf, etc., R. Co. *v.* Levy (59 Tex. 563), 166.
Gulf, etc., R. Co. *v.* Looney (85 Tex. 158; 19 S. W. Rep. 1039; 52 Am. & Eng. R. Cas. 197), 847.
Gulf, etc., R. Co. *v.* McGowan (65 Tex. 640; 26 Am. & Eng. R. Cas. 274), 850.
Gulf, etc., R. Co. *v.* Montgomery (85 Tex. 64; 19 S. W. Rep. 1015), 92.
Gulf, etc., R. Co. *v.* McMannewitz (70 Tex. 73; 8 S. W. Rep. 66; 34 Am. & Eng. R. Cas. 428), 837.
Gulf, etc., R. Co. *v.* McWhirter (77 Tex. 356; 14 S. W. Rep. 26; 19 Am. St. Rep. 755), 1073.
Gulf, etc., R. Co. *v.* Miller (79 S. W. Rep. 709), 229.
Gulf, etc., R. Co. *v.* Newman (Tex., 64 S. W. Rep. 790), 270.
Gulf, etc., R. Co. *v.* Norfleet (78 Tex. 321; 14 S. W. Rep. 703; 45 Am. & Eng. R. Cas. 207), 93.
Gulf, etc., R. Co. *v.* Pendry (87 Tex. 553; 47 Am. St. Rep. 125; 29 S. W. Rep. 1038), 1045.
Gulf, etc., R. Co. *v.* Pomeroy (67 Tex. 498; 3 S. W. Rep. 722), 603.
Gulf & Ry. Co. *v.* Redeker (100 S. W. Rep. 362), 662.
Gulf, etc., R. Co. *v.* Redeker (75 Tex. 310; 12 S. W. Rep. 855; 41 Am. & Eng. R. Cas. 296), 301.
Gulf, etc., R. Co. *v.* Ryan (69 Tex. 665; 7 S. W. Rep. 83; 33 Am. & Eng. R. Cas. 289), 640.
Gulf, etc., R. Co. *v.* Schreider (88 Tex. 152; 30 S. W. Rep. 902; 28 L. R. A. 538), 115.
Gulf, etc., Ry. Co. *v.* Schwab (Tex., 21 S. W. Rep. 706), 261.
Gulf, etc., R. Co. *v.* Shelton (72 S. W. Rep. 165), 230.
Gulf, etc., R. Co. *v.* Lilliphant (70 Tex. 623; 8 S. W. Rep. 673), 360.
Gulf, etc., R. Co. *v.* Smith (Tex., 11 S. W. Rep. 1104), 823.
Gulf, etc., R. Co. *v.* Wallen (65 Tex. 568; 26 Am. & Eng. R. Cas. 219), 792.
Gulf, etc., R. Co. *v.* Walters (107 S. W. Rep. 369), 869.
Gulf, etc., R. Co. *v.* Warner (89 Tex. 475; 35 S. W. Rep. 364), 493.
Gulf, etc., R. Co. *v.* Warner (22 Tex. Civ. App. 167; 54 S. W. Rep. 1064), 367.
Gulf, etc., R. Co. *v.* Wells (Tex., 16 S. W. Rep. 1025), 345.
Gulf, etc., Ry. Co. *v.* Whisenhunt (81 S. W. Rep. 332), 384.
Gulf, etc., R. Co. *v.* Williams (72 Tex. 159; 12 S. W. Rep. 172; 39 Am. & Eng. R. Cas. 292), 338.
Gulf, etc., R. Co. *v.* Willoughby (Tex., 81 S. W. Rep. 829), 91.
Gulf, etc., R. Co. *v.* Wilson (79 Tex. 371; 15 S. W. Rep. 280), 555.
Gumb *v.* Twenty-third St. R. Co. (114 N. Y. 411; 21 N. E. Rep. 993; 43 Am. & Eng. R. Cas. 315), 185.
Gumz *v.* Chicago, etc., R. Co. (52 Wis. 672; 10 N. W. Rep. 11; 5 Am. & Eng. R. Cas. 583), 549.
Gunderman *v.* Missouri, etc., R. Co. (58 Mo. App. 380, 381), 868.
Gunn *v.* New York, etc., R. Co. (171 Mass. 417; 50 N. E. Rep. 1031), 512.
Gunther *v.* St. Louis, etc., R. Co. (95 Mo. 286; 8 S. W. Rep. 371; 34 Am. & Eng. R. Cas. 47), 876.
Gurley *v.* Missouri Pacific Ry. Co. (104 Mo. 211; 16 S. W. Rep. 11), 874.
Gurney *v.* Grand Trunk R. Co. (37 N. Y. S. R. 557; 138 N. Y. 638), 47.
Gustafson *v.* Young (86 N. Y. S. 851; 91 App. Div. 433), 97.
Gutridge *v.* Missouri Pacific Ry. Co. (105 Mo. 520; 16 S. W. Rep. 943), 84.
Guyer *v.* Missouri Pacific Ry. Co. (174 Mo. 344; 73 S. W. Rep. 584), 1014.
Gwyn *v.* Cincinnati, etc., R. Co. (155 Fed. Rep. 88), 724.
Gyles *v.* Southern Ry. Co. (60 S. E. Rep. 433; 79 S. C. 176), 692.

H

Haas *v.* Buffalo, etc., R. Co. (40 Hun [N. Y.] 145), 325.
Haas *v.* Chicago, etc., R. Co. (41 Wis. 44), 984.
Haas *v.* Chicago B. & Q. R. Co. (97 Ill. App. 624), 252.
Haas *v.* Grand Rapids, etc., R. Co. (47 Mich. 401; 11 N. W. Rep. 216; 8 Am. & Eng. R. Cas. 268), 917.
Haase *v.* Oregon, etc., R. Co. (19 Oregon 354; 24 Pac. Rep. 238; 44 Am. & Eng. R. Cas. 360), 782.

[*References are to sections.*]

Haas *v.* St. Louis & S. F. R. Co. (106 S. W. Rep. 599), 651.
Haas *v.* St. Louis, etc., R. Co. (111 Mo. App. 706; 90 S. W. Rep. 1155), 119.
Hach *v.* St. Louis I. M. & S. Ry. Co. (117 Mo. App. 11; 93 S. W. Rep. 825), 267.
Hackett *v.* Western Union Tel. Co. (80 Wis. 187; 49 N. W. Rep. 822), 296.
Hackford *v.* New York, etc., R. Co. (53 N. Y. 654), 1035.
Haden *v.* Sioux City, etc., R. Co. (Iowa, 48 N. W. Rep. 733), 408.
Hadencamp *v.* Second Avenue R. Co. (1 Sweeney [N. Y.] 490), 646.
Hafner *v.* Transit Co. (197 Mo. 196; 94 S. W. Rep. 291), 775.
Hagan *v.* Chicago, etc., R. Co. (59 Wis. 139; 17 N. W. Rep. 632; 15 Am. & Eng. R. Cas. 439), 875.
Hagan *v.* Philadelphia, etc., R. Co. (5 Phila. [Pa.] 179), 982.
Hagan *v.* Providence R. Co. (3 R. I. 88), 178.
Hagar *v.* Terminal R. Ass'n (105 S. W. Rep. 744), 326.
Haggblad *v.* Brooklyn Heights R. Co. (102 N. Y. S. 1039), 534.
Haggerty *v.* Chicago, etc., Ry. Co. (141 Fed. Rep. 966; 73 C. C. A. 282), 342.
Haggerty *v.* Ry. Co. (100 Mo. App. 424; 74 S. W. Rep. 456), 129.
Haigh *v.* Royal Mail Steam Packet Co. (52 L. J. Q. B. D. 640; 49 L. T. 802), 57.
Hailey *v.* Texas, etc., Ry. Co. (La. Ann., 37 So. Rep. 131), 366.
Hajsek *v.* Chicago, etc., R. Co. (68 Neb. 539; 94 N. W. Rep. 609), 1053.
Hajsek *v.* Chicago, etc., R. Co. (5 Neb. 67; 97 N. W. Rep. 327), 1039.
Haldan *v.* Great Western R. Co. (30 U. C. C. P. 89), 779.
Haley *v.* Chicago & Northwestern Ry. Co. (21 Iowa 15), 39.
Haley *v.* Mobile, etc., R. Co. (7 Baxt. 239; 8 Am. & Eng. R. Cas. 541), 200.
Halferty *v.* Wabash R. Co. (82 Mo. 90), 947.
Hall *v.* Brown (54 N. H. 495; 11 Am. Ry. Rep. 231), 928.
Hall *v.* Chicago, etc., Ry. Co. (149 Fed. Rep. 564), 449.
Hall *v.* Galveston, etc., R. Co. (39 Fed. Rep. 18), 489.
Hall *v.* McFadden (19 New Brun. 340), 686.
Hall *v.* Missouri Pacific Ry. Co. (74 Mo. 298; 8 Am. & Eng. R. Cas. 106), 475.
Hall *v.* Northeastern R. Co. (L. R., 10 Q. B. 437), 850.
Hall *v.* Northern Pac. Ry. Co. (111 N. W. Rep. 609), 788.
Hallihan *v.* Hannibal, etc., R. Co. (71 Mo. 117; 11 Am. & Eng. R. Cas. 117), 408.
Hallower *v.* Henley (6 Cal. 209), 10.
Halton *v.* Southern R. Co. (127 N. C. 255; 37 S. E. Rep. 262), 491.
Ham *v.* Delaware, etc., R. Co. (155 Pa. St. 548; 20 L. R. A. 682), 731.
Hamblin *v.* New York, etc., R. Co. (81 N. E. Rep. 258), 1025.
Hamilton *v.* Galveston, etc., R. Co. (54 Tex. 556; 4 Am. & Eng. R. Cas. 528), 301.
Hamilton *v.* Hannibal, etc., R. Co. (39 Kan. 56; 18 Pac. Rep. 57), 56.
Hamilton *v.* Iron Mountain R. Co. (4 Mo. App. 564), 485.
Hamilton *v.* Kansas City & Southern Ry. Co. (100 S. W. Rep. 671), 118.
Hamilton *v.* Louisiana, etc., Ry. Co. (La., 41 So. Rep. 560), 259.
Hamilton *v.* Mendota, etc., Co. (Iowa, 94 N. W. Rep. 282), 156.
Hamilton *v.* Metropolitan St. R. Co. (114 Mo. App. 504; 89 S. W. Rep. 893), 125.
Hamilton *v.* Michigan Cent. R. Co. (Mich., 97 N. W. Rep. 392), 257.
Hamilton *v.* Morgen's, etc., R. Co. (42 La. Ann. 824; 8 So. Rep. 586), 166.
Hamilton *v.* Richmond, etc., R. Co. (83 Ga. 346; 9 S. E. Rep. 670), 418.
Hamilton *v.* St. Louis, etc., Ry. Co. (118 Fed. Rep. 92), 506.
Hamilton *v.* Texas, etc., R. Co. (64 Tex. 251), 570.
Hamman *v.* Coal, etc., Co. (156 Mo. 232; 56 S. W. Rep. 1091), 162.
Hammet *v.* Chicago, etc., R. Co. (89 Mo. App. 354), 529.
Hammond, etc., Ry. Co. *v.* Antonia (83 N. E. Rep. 766), 718.
Hammond *v.* Chicago, etc., R. Co. (83 Mich. 334; 47 N. W. Rep. 965; 48 Am. & Eng. R. Cas. 377),
Hammond *v.* Northeastern R. Co. (6 So. Car. 130), 563.
Hampel *v.* Detroit, etc., R. Co. (138 Mich. 1; 100 N. W. Rep. 1002; 108 Am. St. Rep. 275), 1059.
Hancock *v.* Norfolk, etc., R. Co. (124 N. Car. 222; 32 S. E. Rep. 679), 504.
Hand *v.* Mississippi Central R. R. Co. (50 Miss. 178), 3.
Handelun *v.* Burlington, etc., R. Co. (72 Iowa 709; 32 N. W. Rep. 4), 522.
Handley *v.* Houston, etc., R. Co. (2 Tex. Unr. Cas. 282), 1070.
Haney *v.* Pittsburg, etc., R. Co. (38 W. Va. 570; 18 S. W. Rep. 748), 490.
Hanheide *v.* Transit Co. (104 Mo. App. 323; 78 S. W. Rep. 820), 392.
Hankins *v.* New York, etc., R. Co. (142 N. Y. 416; 37 N. E. Rep. 466; 59 N. Y. S. R. 802; 25 L. R. A. 396), 488.
Hanks *v.* Boston, etc., R. Co. (147 Mass. 495; 18 N. E. Rep. 218; 35 Am. & Eng. R. Cas. 321), 1020.
Hanks *v.* Chicago, etc., Ry. Co. (60 Mo. App. 274), 695.
Hanley *v.* Grand Trunk R. Co. (62 N. H. 274), 139.
Hanlon *v.* Central R. Co. (79 N. E. Rep. 846; 187 N. Y. 73), 713.
Hanlon *v.* Missouri Pacific R. Co. (104 Mo. 381; 16 S. W. Rep. 233), 1094.
Hanna *v.* Grand Trunk R. Co. (41 Ill. App. 116), 48.
Hanna *v.* Granger (18 R. I. 507), 158.

[*References are to sections.*]

Hanna *v.* Railroad Co. (32 Ind. 113), 55.
Hannibal, etc., Co. *v.* Fox (31 Kan. 586; 3 Pac. Rep. 320; 15 Am. & Eng. R. Cas. 325), 485.
Hannibal, etc., R. R. Co. *v.* Kanaley (39 Kan. 1; 17 Pac. Rep. 324), 263.
Hannibal, etc., R. Co. *v.* Martin (111 Ill. 219; 11 Ill. App. 386), 666.
Hanover R. Co. *v.* Coyle (55 Pa. St. 396), 91.
Hanrathy *v.* Northern C. R. Co. (46 Md. 280; 18 Am. Ry. Rep. 188), 349.
Hansell, etc., Co. *v.* Clark (214 Ill. 399; 73 N. E. Rep. 787), 360.
Hansley *v.* Jamesville, etc., R. Co. (115 N. C. 602; 117 N. C. 565; 23 S. E. Rep. 443; 32 L. R. A. 543), 593.
Hanson *v.* Mansfield, etc., R. Co. (38 La. Ann. 111; 58 Am. Rep. 162), 590.
Hanson *v.* Minneapolis, etc., R. Co. (37 Minn. 355; 34 N. W. Rep. 223; 32 Am. & Eng. R. Cas. 13), 1036.
Hard *v.* Vermont R. Co. (32 Vt. 473), 461.
Harden *v.* New York, etc., R. Co. (17 J. & S. [N. Y.] 503), 418.
Hardenburgh *v.* St. Paul, etc., R. Co. (39 Minn. 3; 38 N. W. Rep. 625; 12 Am. St. Rep. 610; 34 Am. & Eng. R. Cas. 359), 690.
Hardin *v.* Ft. Worth, etc., Ry. Co. (100 S. W. Rep. 995), 669.
Harding *v.* Transfer Co. (80 Minn. 504; 83 N. W. Rep. 395), 355.
Hardt *v.* Chicago M. & St. P. Ry. Co. (110 N. W. Rep. 427), 386.
Hardy *v.* North Carolina R. Co. (74 N. Car. 734; 13 Am. Ry. Rep. 121), 601.
Harkins *v.* Pennsylvania R. Co. (15 Phila. [Pa.] 286), 64.
Harkins *v.* Pullman Car Co. (52 Fed. Rep. 724), 196.
Harlan *v.* St. Louis, etc., R. Co. (64 Mo. 480; 17 Am. Ry. Rep. 300), 1034.
Harley *v.* Aurora, etc., Ry. Co. (128 Ill. App. 643), 659.
Harold *v.* Great Western R. Co. (14 L. T. [N. S.] 440), 787.
Harper *v.* Indianapolis, etc., R. Co. (47 Mo. 580), 158.
Harper *v.* Indianapolis, etc., R. Co. (44 Mo. 488), 502.
Harper *v.* Newport News, etc., R. Co. (Ky., 13 S. W. Rep. 346; 44 Am. & Eng. R. Cas. 653), 228.
Harper *v.* Pittsburg & R. Co. (68 Atl. Rep. 831; 219 Pa. 368), 689.
Harper *v.* Railroad Co. (90 Ky. 359; 14 S. W. Rep. 346), 229.
Harr *v.* New York & H. R. R. Co. (13 N. Y. St. Rep. 227), 10.
Harrill *v.* South Carolina & G. R. Co. (135 N. C. 601; 47 S. E. Rep. 730), 283.
Harrill *v.* South Carolina Ry. Co. (132 N. Car. 655; 44 S. E. Rep. 109), 47.
Harriman *v.* Pittsburg, etc., R. Co. (Ohio, 32 Am. & Eng. R. Cas. 37), 5.
Harriman *v.* Railroad Co. (45 Ohio St. 11; 12 N. E. Rep. 451), 25.
Harrington *v.* Los Angeles, etc., R. Co. (140 Cal. 514), 398.
Harrington *v.* Railroad (104 Mo. App. 663; 78 S. W. Rep. 662), 339.
Harris *v.* Hannibal, etc., R. Co. (89 Mo. 233; 1 S. W. Rep. 325; 58 Am. Rep. 111), 670.
Harris *v.* Missouri Pacific Ry. Co. (40 Mo. App. 255), 265.
Harris *v.* Norfolk, etc., R. Co. (88 Va. 560; 14 S. E. Rep. 535), 491.
Harrison *v.* Alabama Mid. R. Co. (144 Ala. 246; 40 So. Rep. 394), 243.
Harrison *v.* Central R. Co. (31 N. J. L. 293), 139.
Harrison *v.* Denver, etc., R. Co. (7 Utah 523; 27 Pac. Rep. 728), 378.
Harrison *v.* Detroit, etc., R. Co. (79 Mich. 409; 44 N. W. Rep. 1034; 41 Am. & Eng. R. Cas. 398), 500.
Harrison *v.* London, etc., R. Co. (1 C. & E. 540), 61.
Harrison *v.* Northeastern R. Co. (22 W. R. 335; 29 L. T. 844), 874.
Harrison *v.* Sutter, etc., R. Co. (134 Cal. 549; 66 Pac. Rep. 787; 55 L. R. A. 608), 26.
Harrold *v.* Great Western R. Co. (14 L. T. 440), 602.
Harwich *v.* Hawes (202 Ill. 334; 67 N. E. Rep. 13), 162.
Harshman *v.* Northern Pac. R. Co. (103 N. W. Rep. 412), 62.
Hart *v.* Chicago, etc., R. Co. (56 Iowa 166; 7 N. W. Rep. 9), 935.
Hart *v.* Devereux (41 Ohio St. 565), 997.
Hart *v.* Naumberg (123 N. Y. 641; 25 N. E. Rep. 385), 256.
Hart *v.* West Side R. Co. (86 Wis. 483; 57 N. W. Rep. 91), 732.
Hartan *v.* Eastern R. Co. (114 Mass. 44), 810.
Hartfield *v.* Roper (21 Wend. 615; 34 Am. Dec. 273), 1058.
Hartford Deposit Co. *v.* Sollitt (172 Ill. 222; 50 N. E. Rep. 178; 64 Am. St. Rep. 35), 120.
Hartford *v.* Northern Pac. R. Co. (91 Wis. 374; 64 N. W. Rep. 1033), 227.
Hartman *v.* Chicago G. W. Ry. Co. (110 N. W. Rep. 10), 987.
Hartman *v.* Clark (93 N. Y. S. 314; 104 App. Div. 62), 33.
Hartwell *v.* Northern Pacific Co. (5 Dakota 463; 41 N. W. Rep. 732; 3 L. R. A. 342; 37 Am. & Eng. R. Cas. 635), 848.
Hartwig *v.* Chicago, etc., R. Co. (49 Wis. 358; 1 Am. & Eng. R. Cas. 65), 700.
Harty *v.* Central R. Co. (42 N. Y. 471), 951.
Hartzig *v.* Lehigh Valley R. Co. (154 Pa. St. 364; 26 Atl. Rep. 310), 787.
Harvet *v.* New York, etc., R. Co. (32 N. Y. S. R. 817; 57 Hun 589), 469.
Harvey *v.* Eastern R. Co. (116 Mass. 269), 783.
Harvey *v.* New York, etc., R. Co. (19 Hun [N. Y.] 556), 94.
Harvey *v.* Terre Haute, etc., R. Co. (74 Mo. 541), 850.
Haskin *v.* New York, etc., R. Co. (65 Barb. 129; 56 N. Y. 608), 483.

[*References are to sections.*]

Haskins *v.* St. Louis, etc., R. Co. (58 Mo. 302), 74.
Hassenger *v.* Michigan Central R. Co. (48 Mich. 205; 12 N. W. Rep. 155; 42 Am. Rep. 470; 6 Am. & Eng. R. Cas. 59), 392.
Hathaway *v.* East Tennessee, etc., R. Co. (29 Fed. Rep. 489), 133.
Hathaway *v.* Railway Co. (51 Mich. 253; 16 N. W. Rep. 634), 268.
Hatter *v.* Illinois C. R. Co. (69 Miss. 642; 13 So. Rep. 827), 327.
Haughey *v.* Pittsburg Rys. Co. (210 Pa. 367; 59 Atl. Rep. 112), 58.
Haurahan *v.* Manhattan, etc., R. Co. (24 N. Y. S. R. 790; 53 Hun 420; 130 N. Y. 658; 29 N. E. Rep. 1033), 97.
Hauser *v.* Central R. Co. (147 Pa. St. 440; 23 Atl. Rep. 766), 408.
Havens *v.* Rhode Island, etc., R. Co. (26 R. I. 48; 58 Atl. Rep. 247), 92.
Haviland *v.* Kansas City, etc., R. Co. (172 Mo. 106; 72 S. W. Rep. 515), 339.
Hawes *v.* Boston Elevated Ry. Co. (78 N. E. Rep. 480), 651.
Hawes *v.* Kansas City, etc., R. Co. (103 Mo. 60; 15 S. W. Rep. 751), 164.
Hawk *v.* Chicago, etc., R. Co. (147 Ill. 399; 35 N. E. Rep. 139), 388.
Hawk *v.* Chicago, etc., R. Co. (108 S. W. Rep. 1119), 562.
Hawk *v.* Pennsylvania R. Co. (Pa., 11 Atl. Rep. 459; 31 Am. & Eng. R. Cas. 268), 321.
Hawkins *v.* Central of Georgia R. Co. (119 Ga. 159; 46 S. E. Rep. 82), 241.
Hawley *v.* Chicago, etc., R. Co. 71 Iowa 717; 29 N. W. Rep. 787), 413.
Haworth *v.* Kansas City, etc., R. Co. (94 Mo. App. 215; 68 S. W. Rep. 111), 495.
Haxton *v.* Kansas City, etc., R. Co. (190 Mo. 53; 88 S. W. Rep. 714), 171.
Hayden *v.* Brooklyn Electric R. Co. (44 N. Y. S. R. 377; 17 N. Y. Supp. 352), 148.
Hayden *v.* Missouri Pacific Ry. Co. (124 Mo. 566; 28 S. W. Rep. 74), 1006.
Hayden *v.* Ry. Co. (124 Mo. 567), 115.
Hayden *v.* Sioux City, etc., R. Co. (Iowa, 48 N. W. Rep. 733), 105.
Hayes *v.* Chicago, M. & St. P. Ry. Co. (Wis., 111 N. W. Rep. 471), 266.
Hayes *v.* M. C. R. Co. (111 U. S. 228; 15 Am. & Eng. R. Cas. 394), 38.
Hayes *v.* New York, etc., R. Co. (105 N. Y. S. 592), 492.
Hayes *v.* New York, etc., Ry. Co. (187 Mass. 182; 72 N. E. Rep. 841), 255.
Hayes *v.* St. Louis, etc., R. Co. (15 Mo. App. 583), 180.
Hayes *v.* Western, etc., R. Co. (3 Cush. [Mass.] 270), 491.
Hayne *v.* Union Ry. Co. (189 Mass. 551; 76 N. E. Rep. 219; 3 L. R. A. [N. S.] 605), 740.
Hays *v.* Gainesville, etc., R. Co. (70 Tex. 602; 8 S. W. Rep. 491; 34 Am. & Eng. R. Cas. 97), 398.
Hays *v.* Wabash R. Co. (51 Mo. App. 438), 705.
Haywood *v.* Galveston, etc., R. Co. (Tex., 85 S. W. Rep. 433), 351.
Haywood *v.* New York, etc., R. Co. (35 N. Y. S. R. 748; 59 Hun 617; 13 N. Y. Supp. 177; 128 N. Y. 596), 926.
Hayzel *v.* Columbia, etc., R. Co. (19 App. Cas. [D. C.] 359), 364.
Hazard *v.* Chicago, etc., R. Co. (1 Bliss. U. S. 503), 769.
Head *v.* Georgia, etc., R. Co. (79 Ga. 358), 17.
Heald *v.* Thing (45 Me. 395), 101.
Healey *v.* Buffalo, etc., R. Co. (97 N. Y. S. 801; 111 App. Div. 618), 267.
Heaney *v.* Long Island R. Co. (9 N. Y. S. R. 707), 931.
Heaney *v.* Long Island R. Co. (112 N. Y. 122; 19 N. E. Rep. 422; 37 Am. & Eng. R. Cas. 529), 940.
Hearne *v.* Southern Pacific R. Co. (50 Cal. 482; 12 Am. Ry. Rep. 181), 996.
Heath *v.* Glenn Falls R. Co. (90 Hun 560; 71 N. Y. S. R. 29; 36 N. Y. Supp. 22), 806.
Heaton *v.* Kansas City, etc., R. Co. (65 Mo. App. 479), 779.
Heaven *v.* Pender (112 B. D. 507), 4.
Hebblethwaite *v.* Old Colony St. Ry. Co. (78 N. E. Rep. 477), 576.
Hecht *v.* Ohio, etc., R. Co. (132 Ind. 507; 32 N. E. Rep. 302; 54 Am. & Eng. R. Cas. 75), 69.
Heddles *v.* Chicago, etc., R. Co. (77 Wis. 228; 46 N. W. Rep. 115), 883.
Heddles *v.* Chicago, etc., R. Co. (74 Wis. 239; 42 N. W. Rep. 237; 39 Am. & Eng. R. Cas. 645), 933.
Hedge *v.* Williams (131 Cal. 455; 63 Pac. Rep. 721; 82 Am. St. Rep. 366), 298.
Hedges *v.* Kansas City (18 Mo. App. 62), 1056.
Hedlum *v.* Holy Terror Min. Co. (S. D., 92 N. W. Rep. 31), 108.
Hedrick *v.* Ilwaco, etc., R. Co. (4 Wash. 400), 62.
Hedrick *v.* Missouri Pacific Ry. Co. (195 Mo. 104; 93 S. W. Rep. 268), 331.
Hefferman *v.* Northern Pac. R. Co. (45 Minn. 471; 48 N. W. Rep. 1), 327.
Heffernon *v.* North Pac. R. Co. (45 Minn. 471; 48 N. W. Rep. 1), 343.
Heffinger *v.* Minneapolis, etc., R. Co. (43 Minn. 503; 45 N. W. Rep. 1131), 413.
Heggeman *v.* Western R. Co. (13 N. Y. 9; 16 Barb. 353), 640.
Heidelberg *v.* St. Francois County (100 Mo. 74), 959.
Heine *v.* Chicago, etc., R. Co. (58 Wis. 525; 17 N. W. Rep. 420), 484.
Heinlein *v.* Boston, etc., R. Co. (147 Mass. 136), 859.
Heinmiller *v.* Winston (107 N. W. Rep. 1102; 6 L. R. A. [N. S.] 150), 902.
Heinzle *v.* Metropolitan R. Co. (182 Mo. 558; 81 S. W. Rep. 848), 989.
Heiter *v.* East St. Louis, etc., R. Co. (53 Mo. App. 331), 1078.

[*References are to sections.*]

Heldmaier *v.* Cobbs (195 Ill. 172; 62 N. E. Rep. 853), 227.
Hellmuth *v.* Katschke (35 Ill. App. 21), 92.
Helton *v.* Alabama Midland R. Co. (97 Ala. 275; 12 So. Rep. 276), 75.
Hemmingway *v.* Chicago, etc., R. Co. (67 Wis. 668; 31 N. W. Rep. 268; 28 Am. & Eng. R. Cas. 216), 724.
Hempsey *v.* Railroad (88 Mo. 348), 124.
Hempstock *v.* Lackawanna, etc., Co. (90 N. Y. S. 663; 98 App. Div. 332), 157.
Henderson *v.* Coons (31 Ill. App. 75), 325.
Henderson *v.* Dade, etc., Co. (100 Ga. 568; 28 S. E. Rep. 251; 40 L. R. A. 95), 28.
Henderson *v.* Galveston, etc., R. Co. (38 S. W. Rep. 1136), 623.
Henderson *v.* Kansas City (177 Mo. 477; 76 S. W. Rep. 1045), 78.
Henderson *v.* Kentucky, etc., R. Co. (86 Ky. 389; 5 S. W. Rep. 975), 58.
Henderson *v.* Railroad Co. (86 Ky. 389; 5 S. W. Rep. 875), 64.
Henderson *v.* Texas, etc., R. Co. (42 S. W. Rep. 1030), 647.
Henderson *v.* Walker (55 Ga. 481), 519.
Hendricks *v.* W. & A. R. Co. (52 Ga. 467), 451.
Hendrickson *v.* Great Northern R. Co. (49 Minn. 245; 51 N. W. Rep. 1044), 954.
Hendrix *v.* Kansas City, etc., R. Co. (45 Kan. 377; 25 Pac. Rep. 893), 1087.
Hennesy *v.* Brooklyn, etc., R. Co. (73 Hun 569; 26 N. Y. Supp. 321), 1056.
Hennessey *v.* Brooklyn City R. Co. (6 App. Div. 206; 39 N. Y. Supp. 805), 1058.
Hennessy *v.* St. Louis, etc., R. Co. (173 Mo. 86; 73 S. W. Rep. 162), 209.
Henry *v.* Bond (34 Fed. Rep. 101), 335.
Henry *v.* Cleveland, etc., R. Co. (67 Fed. Rep. 426), 4.
Henry *v.* Grand Avenue R. Co. (113 Mo. 525; 21 S. W. Rep. 214), 990.
Henry *v.* Lake Shore, etc., R. Co. (49 Mich. 495; 13 N. W. Rep. 832; 8 Am. & Eng. R. Cas. 110), 468.
Henry *v.* St. Louis, etc., R. Co. (76 Mo. 288; 43 Am. Rep. 762), 1105.
Henry *v.* Sioux City, etc., R. Co. (66 Iowa 52; 23 N. W. Rep. 260; 21 Am. & Eng. R. Cas. 644), 348.
Henry *v.* Southern, etc., R. Co. (50 Cal. 183), 29.
Henry *v.* Staten Island R. Co. (81 N. Y. 373; 2 Am. & Eng. R. Cas. 60), 500.
Henry *v.* Wabash R. Co. (109 Mo. 488; 19 S. W. Rep. 239), 471.
Henson *v.* Armour, etc., Co. (Mo., 88 S. W. Rep. 166), 319.
Henze *v.* St. Louis, etc., R. Co. (71 Mo. 636), 1016.
Herbert *v.* Delaware, etc., R. Co. (136 N. Y. 655; 32 N. E. Rep. 1016; 49 N. Y. S. R. 916; 41 N. Y. S. R. 860; 62 Hun 618; 16 N. Y. Supp. 561), 142.
Herbert *v.* Mound City, etc., Co. (90 Mo. App. 305), 308.
Herbert *v.* Northern Pac. R. Co. (3 Dak. 38; 13 N. W. Rep. 349; 8 Am. & Eng. R. Cas. 85), 321.
Hermann *v.* New York, etc., R. Co. (137 N. Y. 558; 33 N. E. Rep. 337), 946.
Herrick *v.* Minneapolis, etc., R. Co. (31 Minn. 11), 48.
Herring *v.* Galveston & Ry. Co. (108 S. W. Rep. 977), 562.
Herring *v.* Wabash R. Co. (80 Mo. App. 562), 950.
Herring *v.* Wilmington, etc., R. Co. (10 Ired. [No. Car.] 402; 51 Am. Dec. 395), 1084.
Hershey *v.* Mill Creek Township (Pa., 9 Atl. Rep. 452; 6 Sadler 459), 1039.
Hesse *v.* National, etc., Co. (66 N. J. L. 652; 52 Atl. Rep. 384), 310.
Hestonville Pass. R. Co. *v.* Connell (88 Pa. St. 520), 1084.
Hetherington *v.* Northeastern R. Co. (L. R., 9 Q. B. D. 160; 6 Am. & Eng. R. Cas. 490), 189.
Hewitt *v.* Flint, etc., R. Co. (67 Mich. 61; 34 N. W. Rep. 659; 31 Am. & Eng. R. Cas. 249), 406.
Hicke *v.* Taffe (99 N. Y. 204; 1 N. E. Rep. 685; 52 Am. Rep. 19), 275.
Hickey *v.* Boston, etc., R. Co. (14 Allen 429), 692.
Hickey *v.* Taafe (105 N. Y. 26), 80.
Hickman *v.* Missouri Pacific Ry. Co. (22 Mo. App. 344), 206.
Hickman *v.* Missouri Pacific Ry. Co. (91 Mo. 433; 4 S. W. Rep. 127), 788.
Hickman *v.* Union Depot R. Co. (47 Mo. App. 65), 1034.
Hicks *v.* Citizens R. Co. (124 Mo. 115; 27 S. W. Rep. 542; 25 L. R. A. 508), 1056.
Hicks *v.* Missouri Pacific Ry. Co. (101 Mo. 36; 13 S. W. Rep. 946), 996.
Hicks *v.* Missouri Pacific Ry. Co. (46 Mo. App. 304), 1095.
Hicks *v.* Pacific R. Co. (64 Mo. 430; 17 Am. Ry. Rep. 273), 877.
Hicks *v.* Southern Ry. Co. (63 S. C. 559; 41 S. E. Rep. 753), 381.
Higgins *v.* Central R. Co. (155 Mass. 176; 29 N. E. Rep. 534; 48 Am. & Eng. R. Cas. 512), 47.
Higgins *v.* Cherokee, etc., R. Co. (73 Ga. 149; 27 Am. & Eng. R. Cas. 218), 799.
Higgins *v.* Hannibal, etc., R. Co. (36 Mo. 418), 608.
Higgins *v.* Missouri Pacific R. Co. (104 Mo. 413; 16 S. W. Rep. 409), 483.
Higgins, etc., *v.* O'Keefe (79 Fed. Rep. 900; 51 U. S. App. 74; 25 C. C. A. 220), 307.
Higgins *v.* St. Louis & Sub. Ry. Co. (197 Mo. 301; 95 S. W. Rep. 863), 507.
Higgins *v.* Traction Co. (89 N. Y. S. 76; 96 App. Div. 69), 100.
Higgins *v.* Turnpike Co. (46 N. Y. 27), 735.
High *v.* Carolina R. Co. (112 No. Car. 385; 17 S. E. Rep. 79), 1094.
Highland Avenue R. Co. *v.* Burt (92 Ala. 291; 9 So. Rep. 410; 48 Am. & Eng. R. Cas. 56), 723.

[*References are to sections.*]

Highland Ave. R. Co. *v.* Miller (120 Ala. 535), 369.
Highland Avenue R. Co. *v.* Sampson (91 Ala. 560; 8 So. Rep. 778), 1011.
Highland Ave. R. Co. *v.* Waters (91 Ala. 435; 8 So. Rep. 357), 404.
Highland Avenue R. Co. *v.* Winn (93 Ala. 306; 9 So. Rep. 509), 788.
Higley *v.* Gilmer (3 Mont. 90), 1076.
Hill *v.* Boston, etc., R. Co. (72 N. H. 518; 57 Atl. Rep. 924), 90.
Hill *v.* Chicago City Ry. Co. (126 Ill. App. 152), 834.
Hill *v.* Gust (55 Ind. 45), 308.
Hill *v.* Lake Shore, etc., Ry. Co. (22 Ohio Cir. Ct. Rep. 291; 12 O. C. D. 241), 264.
Hill *v.* Louisville, etc., R. Co. (9 Heisk. 823; 19 Am. Ry. Rep. 400), 1080.
Hill *v.* Port Royal, etc., R. Co. (31 So. Car. 393; 10 S. E. Rep. 91; 39 Am. & Eng. R. Cas. 607; 5 L. R. A. 349), 907.
Hill *v.* St. Louis, etc., Ry. Co. (109 S. W. Rep. 523), 708.
Hill *v.* Scott (38 Mo. App. 370), 119.
Hill *v.* Southern Pac. R. Co. (23 Utah 94; 63 Pac. Rep. 814), 245.
Hill *v.* Street Ry. Co. (109 N. Y. 239), 121.
Hillman *v.* Georgia R., etc., Co. (56 S. E. Rep. 68; 126 Ga. 814), 749.
Hillman *v.* Gray's Point Ter. Ry. Co. (99 Mo. App. 271; 73 S. W. Rep. 220), 149.
Hilts *v.* Railway Co. (55 Mich. 437; 21 N. W. Rep. 878), 85.
Hilz *v.* Missouri Pacific Ry. Co. (101 Mo. 36; 13 S. W. Rep. 946), 951.
Himrod, etc., Co. *v.* Clark (99 Ill. App. 332; 197 Ill. 514), 34.
Hinkle *v.* Richmond, etc., R. Co. (109 No. Car. 472; 13 S. E. Rep. 884), 999.
Hinton *v.* Dibbin (2 Ad. & El. [N. S.] 661), 15.
Hinzeman *v.* Missouri Pacific Ry. Co. (199 Mo. 66), 92.
Hipsley *v.* Kansas City, etc., R. Co. (88 Mo. 348; 27 Am. & Eng. R. Cas. 287), 94.
Hirsch *v.* New York, etc., R. Co. (6 N. Y. Supp. 162; 53 Hun 633; 125 N. Y. 701), 632.
Hirschkovitz *v.* Pennsylvania R. Co. (138 Fed. Rep. 438), 71.
Hissong *v.* Richmond, etc., R. Co. (91 Ala. 514; 8 So. Rep. 776), 510.
Hite *v.* Metropolitan R. Co. (130 Mo. 137; 31 S. W. Rep. 262; 32 S. W. Rep. 33; 51 Am. St. Rep. 555), 641.
Hittie *v.* Republican Valley R. Co. (19 Neb. 620; 29 Am. & Eng. R. Cas. 586), 292.
Hixson *v.* St. Louis, etc., R. Co. (80 Mo. 335), 1019.
Hoag *v.* Lake Shore, etc., R. Co. (85 Pa. St. 293), 23.
Hoag *v.* New York, etc., R. Co. (111 N. Y. 202; 18 N. E. Rep. 648), 1056.
Hoar *v.* Maine Central R. Co. (70 Me. 65), 552.
Hobbitt *v.* London, etc., R. Co. (4 Exch. 254), 278.
Hobbs *v.* Atlantic, etc., R. Co. (107 N. C. 1; 12 S. E. Rep. 124; 44 Am. & Eng. R. Cas. 592), 492.
Hobbs *v.* Eastern R. Co. (66 Me. 572; 19 Am. Ry. Rep. 210), 205.
Hobbs *v.* L. & S. W. Ry. Co. (L. R., 10 Q. B. 111), 39.
Hobbs *v.* McLean (117 U. S. 567; 6 Sup. Ct. Rep. 870), 858.
Hoben *v.* Burlington, etc., R. Co. (20 Iowa 562), 475.
Hobson *v.* New Mexico, etc., R. Co. (Ariz., 11 Pac. Rep. 545; 28 Am. & Eng. R. Cas. 360), 479.
Hocker *v.* Louisville & N. R. Co. (96 S. W. Rep. 526), 1094.
Hodges *v.* St. Louis, etc., R. Co. (71 Mo. 50), 962.
Hodges *v.* Southern Pac. Co. (86 Pac. Rep. 620), 557.
Hodges *v.* Transit Co. (107 No. Car. 576; 12 S. E. Rep. 597), 781.
Hodgkins *v.* Eastern R. Co. (119 Mass. 419; 9 Am. Ry. Rep. 271), 499.
Hodnett *v.* Boston, etc., R. Co. (156 Mass. 86; 30 N. E. Rep. 224), 70.
Hoes *v.* New York, etc., R. Co. (77 N. Y. S. 117; 73 App. Div. 363), 69.
Hoff *v.* Shockley (122 Iowa 720; 98 N. W. Rep. 573; 101 Am. St. Rep. 289; 64 L. R. A. 538), 278.
Hoffbauer *v.* Davenport, etc., R. Co. (52 Iowa 342; 3 N. W. Rep. 121), 658.
Hoffman *v.* Fitchburg, etc., R. Co. (67 Hun [N. Y.] 581; 51 N. Y. S. R. 245; 22 N. Y. Supp. 463), 1019.
Hoffman *v.* Foundry Co. (51 Pac. Rep. 385), 145.
Hoffman *v.* Metropolitan, etc., R. Co. (51 Mo. App. 273), 104.
Hoffman *v.* New York, etc., R. Co. (87 N. Y. 25; 41 Am. Rep. 337; 4 Am. & Eng. R. Cas. 537), 1088.
Hoffman *v.* New York, etc., R. Co. (75 N. Y. 605; 13 Hun 589), 633.
Hoffman *v.* Northern Pac. R. Co. (45 Minn. 53; 47 N. W. Rep. 312), 176.
Hofnagle *v.* New York, etc., R. Co. (55 N. Y. 608), 485.
Hofnauer *v.* White, etc., Co. (186 Mass. 47; 70 N. E. Rep. 1038), 269.
Hogan *v.* Chicago, etc., R. Co. (59 Wis. 139; 15 Am. & Eng. R. Cas. 439; 17 N. W. Rep. 632), 152.
Hogan *v.* Citizens Ry. Co. (150 Mo. 36; 51 S. W. Rep. 473), 404.
Hogan *v.* Northern Pacific Co. (53 Fed. Rep. 519; 53 Am. & Eng. R. Cas. 384), 312.
Hogart *v.* Evansville, etc., R. Co. (3 Ind. App. 437; 29 N. E. Rep. 941), 1021.
Hogue *v.* Chicago, etc., R. Co. (32 Fed. Rep. 365), 910.
Holbrook *v.* Aldrich (168 Mass. 16; 46 N. E. Rep. 115; 60 Am. St. Rep. 364; 36 L. R. A. 493), 1073.
Holbrook *v.* New York, etc., R. Co. (12 N. Y. 236), 599.
Holbrook *v.* Utica, etc., R. Co. (12 N. Y. 236), 601.
Holden *v.* Fitchburg, etc., R. Co. (129 Mass. 268; 37 Am. Rep. 343; 2 Am. & Eng. R. Cas. 94), 467.

[*References are to sections.*]

Holden *v.* James (11 Mass. 404), 504.
Holden *v.* Missouri, etc., R. Co. (177 Mo. 456; 76 S. W. Rep. 1045), 1039.
Hole *v.* Sittingbourne, etc., R. Co. (6 H. & N. 488; 30 L. J. Exch. 81; 3 L. T. Rep. [N. S.] 750), 278.
Holland *v.* Brown (13 Saw. 284), 199.
Holland *v.* Chicago, etc., R. Co. (18 Fed. Rep. 243; 5 McCrary [U. S.] 549), 408.
Holland *v.* Missouri Pac. Ry. Co. (109 S. W. Rep. 19), 977.
Holland *v.* Missouri Pacific Ry. Co. (210 Mo. 338; 112 S. W. Rep. 468), 1006.
Holland *v.* St. Louis, etc., R. Co. (105 Mo. App. 117; 79 S. W. Rep. 508), 655.
Holland *v.* Southern Pacific R. Co. (100 Cal. 240; 34 Pac. Rep. 666), 492.
Holland *v.* Tennessee, etc., R. Co. (91 Ala. 444; 8 So. Rep. 524), 482.
Hollins *v.* New Orleans R. Co. (44 So. Rep. 159), 947.
Hollman *v.* Houston, etc., R. Co. (2 Tex. Unrep. Cas. 557), 778.
Holloway *v.* Kansas City (184 Mo. 35, 39), 101.
Hollweg *v.* Telephone Co. (195 Mo. 149, 157; 93 S. W. Rep. 262), 476.
Holly *v.* Atlantic, etc., R. Co. (61 Ga. 215), 749.
Holmes *v.* Chicago, etc., R. Co. (Neb., 103 N. W. Rep. 77), 364.
Holmes *v.* Hannibal, etc., R. Co. (69 Mo. 536), 845.
Holmes *v.* Leadbetter (95 Mo. App. 419; 69 S. W. Rep. 23), 137.
Holmes *v.* Missouri Pac. Ry. Co. (105 S. W. Rep. 624), 874.
Holmes *v.* Oregon, etc., R. Co. (6 Sawy. [U. S.] 262; 5 Fed. Rep. 75), 805.
Holmes *v.* Pennsylvania R. Co. (66 Atl. Rep. 412), 959.
Holmes *v.* Southern Pacific R. Co. (97 Cal. 161; 31 Pac. Rep. 834), 398.
Holstine *v.* Oregon, etc., R. Co. (8 Oregon 164), 451.
Holt *v.* Southwest Ry. (84 Mo. App. 462), 714.
Holton *v.* London, etc., R. Co. (1 C. & E. 542), 640.
Holtz *v.* Railroad Co. (69 Minn. 524), 159.
Holwerson *v.* St. Louis, etc., R. Co. (157 Mo. 216; 57 S. W. Rep. 770; 50 L. R. A. 850), 808.
Holyoke *v.* Grand Trunk R. Co. (48 N. H. 541), 83.
Holzab *v.* New Orleans, etc., R. Co. (38 La. Ann. 185; 58 Am. Rep. 177), 1045.
Honeyman *v.* Oregon, etc., R. Co. (13 Oregon 352; 25 Am. & Eng. R. Cas. 380), 849.
Hood *v.* Lehigh Valley R. Co. (78 N. E. Rep. 1105), 411.
Hooghkirk *v.* Delaware, etc., Canal Co. (63 How. Pr. [N. Y.] 328), 206.
Hook *v.* Missouri Pacific Ry. Co. (162 Mo. 569; 63 S. W. Rep. 360), 1035.
Hooker *v.* Chicago, etc., R. Co. (76 Wis. 542; 44 N. W. Rep. 1085; 41 Am. & Eng. R. Cas. 498), 92.
Hooper *v.* Bacon (64 Atl. Rep. 950), 29.
Hooper *v.* Boston, etc., R. Co. (81 Me. 260; 17 Atl. Rep. 64; Lindeman *v.* New York, etc., R. Co. (42 Hun 306; 3 N. Y. S. R. 731), 1002.
Hooper *v.* Johnstown, etc., R. Co. (35 N. Y. S. R. 503; 13 N. Y. Supp. 151; 59 Hun 121; 128 N. Y. 613; 28 N. E. Rep. 252), 1086.
Hooper *v.* London, etc., R. Co. (50 L. J. Q. B. 103; 45 J. P. 223; 29 W. R. 241; 43 L. T. 570), 813.
Hoosier, etc., Co. *v.* McCain (133 Ind. 231; 31 N. E. Rep. 956), 322.
Hoover *v.* Beech Creek R. Co. (154 Pa. St. 362; 26 Atl. Rep. 315), 491.
Hoover *v.* Chicago R. I. & C. R. Co. (Tex., 89 S. W. Rep. 1084), 266.
Hopkins *v.* Atlantic, etc., R. Co. (36 N. H. 9), 177.
Hopper *v.* Denver & R. G. Co. (155 Fed. Rep. 273), 576.
Horn *v.* Baltimore, etc., R. Co. (4 C. C. A. 346; 54 Fed. Rep. 301; 6 U. S. App. 381), 1025.
Horn *v.* Southern Ry. (58 S. E. Rep. 963), 586.
Hornsby *v.* Eddy (56 Fed. Rep. 461), 523.
Horstein *v.* United Railways Co. (195 Mo. 440; 92 S. W. Rep. 884; 97 Mo. App. 271), 769.
Horton *v.* Seaboard Air Line Ry. (58 S. E. Rep. 993), 482.
Hosic *v.* Chicago, etc., R. Co. (75 Iowa 683; 37 N. W. Rep. 936), 373.
Hosmer *v.* Old Colony R. Co. (156 Mass. 506; 31 N. E. Rep. 652), 564.
Hot Springs, etc., R. Co. *v.* Delaney (65 Ark. 177; 45 S. W. Rep. 351), 729.
Hot Springs *v.* Hildreth (72 Ark. 572; 82 S. W. Rep. 245), 91.
Hough *v.* Texas, etc., R. Co. (100 U. S. 213; 21 Am. Ry. Rep. 451), 475.
Houghkirk, etc., R. Co. (92 N. Y. 219; 44 Am. Rep. 370), 955.
Houghton *v.* Loma Prieta Co. (93 Pac. Rep. 377), 292.
Houser *v.* Chicago, etc., R. Co. (60 Iowa 230; 14 N. W. Rep. 778; 46 Am. Rep. 65; 8 Am. & Eng. R. Cas. 500), 522.
Housner *v.* Huston, etc., R. Co. (27 N. Y. Supp. 365; 57 N. Y. S. R. 528), 198.
Housman *v.* Hope (20 Mo. App. 193), 131.
Houston, etc., R. Co. *v.* Baker (57 Tex. 419; 11 Am. & Eng. R. Cas. 667), 62.
Houston, etc., R. Co. *v.* Barranger (Tex., 14 S. W. Rep. 242), 348.
Houston, etc., R. Co. *v.* Boozer (2 Tex. Unrep. Cas. 452), 1060.
Houston, etc., R. Co. *v.* Brin (77 Tex. 174; 13 S. W. Rep. 886), 675.
Houston *v.* Brush (66 Vt. 331; 29 Atl. Rep. 380), 119.
Houston, etc., R. Co. *v.* Clemmons (55 Tex. 88; 8 Am. & Eng. R. Cas. 396), 803.
Houston R. Co. *v.* Cluck (Tex., 84 S. W. Rep. 852), 96.

[*References are to sections.*]

Houston, etc., R. Co. *v.* Conrad (62 Tex. 627), 401.
Houston, etc., R. Co. *v.* Corbett (49 Tex. 573), 446.
Houston, etc., R. Co. *v.* Cowser (57 Tex. 295), 178.
Houston, etc., R. Co. *v.* Dial (135 Ala. 168; 33 So. Rep. 268), 154.
Houston, etc., R. Co. *v.* Fanning (Tex., 93 S. W. Rep. 344), 273.
Houston, etc., R. Co. *v.* Fowler (56 Tex. 452; 8 Am. & Eng. R. Cas. 504), 349.
Houston, etc., R. Co. *v.* Gaither (Tex., 43 S. W. Rep. 266), 210.
Houston *v.* Gilmore (62 Tex. 391), 471.
Houston, etc., R. Co. *v.* Hampton (64 Tex. 427; 22 Am. & Eng. R. Cas. 291), 563.
Houston, etc., R. Co. *v.* Harnett (Tex., 48 S. W. Rep. 773), 249.
Houston, etc., R. Co. *v.* Hollis (2 Tex. Civ. App. 169), 187.
Houston, etc., R. Co. *v.* Johnson (103 S. W. Rep. 239), 722.
Houston, etc, R. Co. *v.* Leslie (57 Tex. 83; 9 Am. & Eng. R. Cas. 407), 170.
Houston, etc., R. Co. *v.* McNamara (59 Tex. 255), 372.
Houston, etc., R. Co. *v.* Meador (50 Tex. 77), 282.
Houston, etc., R. Co. *v.* Miller (51 Tex. 270), 301.
Houston, etc., R. Co. *v.* Moore (49 Tex. 31; 30 Am. Rep. 98), 561.
Houston, etc., R. Co. *v.* Myers (55 Tex. 110; 8 Am. & Eng. R. Cas. 114), 343.
Houston, etc., R. Co. *v.* Nixon (52 Tex. 19), 950.
Houston, etc., R. Co. *v.* Norris (Tex., 41 S. W. Rep. 708), 608.
Houston, etc., R. Co. *v.* O'Hara (64 Tex. 600), 352.
Houston, etc., Ry. Co. *v.* Oram (49 Tex. 341), 258.
Houston, etc., R. Co. *v.* Patton (Tex., 9 S. W. Rep. 175), 85.
Houston & G. N. R. Co. *v.* Randall (50 Tex. 261), 164.
Houston R. Co. *v.* Reichart (87 Tex. 539; 29 S. W. Rep. 1040), 1050.
Houston, etc., R. Co. *v.* Richards (59 Tex. 373; 12 Am. & Eng. R. Cas. 70), 1097.
Houston, etc., R. Co. *v.* Rider (67 Tex. 267), 465.
Houston, etc., R. Co. *v.* Schmidt (61 Tex. 282; 21 Am. & Eng. R. Cas. 345), 781.
Houston, etc., R. Co. *v.* Simpkins (54 Tex. 615; 6 Am. & Eng. R. Cas. 11), 1082.
Houston, etc., R. Co. *v.* Smith (52 Tex. 178), 388.
Houston, etc., R. Co. *v.* Stewart (92 Tex. 540; 50 S. W. Rep. 333), 488.
Houston, etc., R. Co. *v.* Talley (Tex., 39 S. W. Rep. 206), 493.
Houston, etc., R. Co. *v.* Turner (Tex., 91 S. W. Rep. 562), 273.
Houston, etc., R. Co. *v.* Turner (Tex., 92 S. W. Rep. 1074), 386.
Houston, etc., R. Co. *v.* Van Bayless (1 Tex. Civ. App. 247), 285.
Houston *v.* Vicksburg, etc., R. Co. (39 La. Ann. 796; 2 So. Rep. 562; 34 Am. & Eng. R. Cas. 76), 661.
Houston, etc., R. Co. *v.* Wilson (60 Tex. 142), 957.
Houts *v.* Transit Co. (108 Mo. App. 686; 84 S. W. Rep. 161), 79.
Hovarka *v.* Transit Co. (191 Mo. 441; 90 S. W. Rep. 1142), 115.
Hoveland *v.* Marine Ry., etc., Co. (41 Wash. 164; 82 Pac. Rep. 1090), 382.
Hover *v.* Pennsylvania R. Co. (25 Ohio St. 667), 47.
Hovins *v.* Cincinnati, etc., R. Co. (107 S. W. Rep. 214), 929.
Howard *v.* Baltimore & O. R. Co. (68 Atl. Rep. 848; 219 Pa. 358), 1036.
Howard *v.* Chesapeake & O. R. Co. (28 Ky. L. R. 891; 90 S. W. Rep. 950), 265.
Howard, etc., Co. *v.* Davis (76 Tex. 630; 13 S. W. Rep. 665), 184.
Howard *v.* Delaware, etc., Co. (40 Fed. Rep. 195; 41 Am. & Eng. R. Cas. 473), 201.
Howard *v.* Denver, etc., R. Co. (26 Fed. Rep. 837; 24 Am. & Eng. R. Cas. 448), 492.
Howard *v.* Illinois Cent. R. Co. (207 U. S. 463; 28 Sup. Ct. Rep. 141), 447.
Howard *v.* Kansas City, etc., R. Co. (41 Kan. 403; 21 Pac. Rep. 267; 37 Am. & Eng. R. Cas. 552), 1028.
Howard *v.* Legg (110 Ind. 479; 11 N. E. Rep. 612), 203.
Howard *v.* McCabe (112 N. W. Rep. 305), 192.
Howard *v.* Northern Central R. Co. (49 Hun 605; 1 N. Y. Supp. 528), 1007.
Howard *v.* Railway Co. (173 Mo. 524; 73 S. W. Rep. 467), 119.
Howard *v.* Savannah, etc., R. Co. (84 Ga. 711; 11 S. E. Rep. 452), 134.
Howd *v.* Mississippi R. Co. (50 Miss. 178), 354.
Howe *v.* Finch (11 Q. B. Div. 187), 512.
Howe *v.* Minneapolis, etc., R. Co. (62 Minn. 71; 64 N. W. Rep. 102; 54 Am. St. Rep. 616; 30 L. R. A. 684), 1056.
Howe *v.* Northern Pac. R. Co. (Texas, 70 S. W. Rep. 335), 116.
Howland *v.* Milwaukee, etc., R. Co. (54 Wis. 226; 11 N. W. Rep. 529; 5 Am. & Eng. R. Cas. 578), 469.
Howland *v.* Railroad (115 Cal. 487; 47 Pac. Rep. 225), 95.
Hoye *v.* Chicago, etc., R. Co. (67 Wis. 1; 29 N. W. Rep. 646), 1036.
Hoye *v.* Chicago, etc., R. Co. (62 Wis. 666; 23 N. W. Rep. 14; 19 Am. & Eng. R. Cas. 347), 953.
Hoye *v.* Great Northern Ry. Co. (120 Fed. Rep. 712), 229.
Hoyt *v.* New York, etc., R. Co. (118 N. Y. 399; 23 N. E. Rep. 565), 991.
Hubbard *v.* Boston, etc., R. Co. (34 N. E. Rep. 459), 971.
Huber *v.* La Crosse, etc., R. Co. (92

[*References are to sections.*]

Wis. 636; 66 N. W. Rep. 708; 31 L. R. A. 583), 28.
Hubener *v.* New Orleans, etc., R. Co. (23 La. Ann. 492), 692.
Huckshold *v.* Hannibal, etc., R. Co. (90 Mo. 548; 2 S. W. Rep. 794; 28 Am. & Eng. R. Cas. 659), 953.
Huckshold *v.* St. Louis, etc., R. Co. (90 Mo. 548; 28 Am. & Eng. R. Cas. 659), 950.
Hudson *v.* Atlantic Coast Line R. Co. (55 S. E. Rep. 103), 28.
Hudson *v.* Ocean Steamship Co. (110 N. Y. 625; 17 N. E. Rep. 342), 354.
Hudson *v.* Wabash R. Co. (32 Mo. App. 667), 989.
Hudson *v.* Wabash R. Co. (101 Mo. 13; 14 S. W. Rep. 15; 123 Mo. 445; 27 S. W. Rep. 717), 414.
Huelsenkamp *v.* Citizens R. Co. (37 Mo. 537; 90 Am. Dec. 399), 657.
Huff *v.* Ames (16 Neb. 139), 19 N. W. Rep. 623; 49 Am. Rep. 716), 1056.
Huff *v.* Austin (46 Ohio St. 386; 21 N. E. Rep. 864; 15 Am. St. Rep. 613), 120.
Huffman *v.* Railway (78 Mo. 50) 261.
Hufford *v.* Grand Rapids R. Co. (64 Mich. 631; 31 N. W. Rep. 544), 659.
Huggart *v.* Missouri Pacific Ry. Co. (134 Mo. 673; 36 S. W. Rep. 220), 1008.
Huggins *v.* Southern Ry. Co. (Ala., 41 So. Rep. 856), 358.
Hughes *v.* Boyer (9 Watts 556), 210.
Hughes *v.* Chicago, etc., R. Co. (Iowa, 55 N. W. Rep. 470), 953.
Hughes *v.* Cincinnati, etc., R. Co. (39 Ohio St. 461; 15 Am. & Eng. R. Cas. 100), 283.
Hughes *v.* Malden, etc., R. Co. (168 Mass. 396), 145.
Hughes *v.* New York, etc., R. Co. (4 J. & S. [N. Y.] 222), 74.
Hughes *v.* St. Louis, etc., R. Co. (127 Mo. 447; 30 S. W. Rep. 127), 677.
Hughes *v.* Winona, etc., R. Co. (27 Minn. 137; 6 N. W. Rep. 553), 399.
Hughson *v.* Richmond, etc., R. Co. (2 App. [D. C.] 98; 22 Wash. L. Rep. 815), 565.
Huhn *v.* Missouri Pacific Ry. Co. (92 Mo. 440; 4 S. W. Rep. 937; 31 Am. & Eng. R. Cas. 221), 419.
Hulbert *v.* New York, etc., R. Co. (40 N. Y. 145), 629.
Hulehan *v.* Green Bay, etc., R. Co. (68 Wis. 520; 32 N. W. Rep. 529), 369.
Hulitt *v.* Railroad (67 Mo. 241), 140.
Hull *v.* Kansas City (54 Mo. 598), 393.
Hull *v.* Northern Pac. Ry. Co. (Wash., 136 Fed. Rep. 153; 69 C. C. A. 151), 354.
Hummer's Adm'r *v.* Louisville, etc., R. Co. (108 S. W. Rep. 885), 987.
Hungerford *v.* Chicago, etc., R. Co. (41 Minn. 444; 43 N. W. Rep. 324; 41 Am. & Eng. R. Cas. 269), 419.
Hunn *v.* Michigan, etc., R. Co. (78 Mich. 513; 44 N. W. Rep. 502; 7 L. R. A. 500; 41 Am. & Eng. R. Cas. 452), 485.
Hunnicutt *v.* Georgia, etc., R. Co. (85 Ga. 195; 11 S. E. Rep. 580), 304.
Hunt *v.* Chicago, etc., R. Co. (26 Iowa 363), 461.
Hunt *v.* Kile (98 Fed. Rep. 49), 135.
Hunt *v.* Missouri R. Co. (14 Mo. App. 160), 150.
Hunt *v.* Pennsylvania R. Co. (51 Pa. St. 475), 297.
Hunt *v.* Railway Co. (14 Mo. App. 160), 119.
Hunter *v.* Cooperstown, etc., R. Co. (112 N. Y. 371; 19 N. E. Rep. 820; 21 N. Y. S. R. 1; 37 Am. & Eng. R. Cas. 74), 784.
Hunter *v.* Railroad Co. (S. Car., 51 S. E. Rep. 860), 647.
Hunter *v.* Stewart (47 Me. 419), 39.
Huntington, etc. R. Co. *v.* Decker (82 Pa. St. 119; 15 Am. Ry. Rep. 425), 482.
Huntoon *v.* Trumbull (12 Fed. Rep. 844), 1056.
Huntzicker *v.* Illinois Cent. R. Co. (129 Fed. Rep. 548), 223.
Hurlburt *v.* Wabash R. Co. (130 Mo. 657; 31 S. W. Rep. 1051), 229.
Hurley *v.* Brewing Co. (13 App Div. [N Y.] 167; 43 N. Y. Supp. 259), 1045.
Hurley *v.* Metropolitan Ry. Co. (120 Mo. App. 262; 96 S. W. Rep. 714), 685.
Hurst *v.* Detroit, etc., R. Co. (84 Mich. 539; 48 N. W. Rep. 44), 198.
Hurst *v.* Kansas City, etc., R. Co. (163 Mo. 309; 63 S. W. Rep. 695), 367.
Hurt *v.* St. Louis, etc., R. Co. (94 Mo. 255; 7 S. W. Rep. 1; 34 Am. & Eng. R. Cas. 422), 392.
Hurt *v.* Southern R. Co. (40 Miss. 391), 556.
Huston City R. Co. *v.* Sciacca (80 Texas 350; 16 S. W. Rep. 31), 198.
Hutchins *v.* St. Paul, etc., R. Co. (44 Minn. 5; 46 N. W. Rep. 79), 44.
Hutchinson *v.* York, etc., R. Co. (5 Ex. 343; 19 L. J. Ex. 296; 6 Ry. Cas. 580), 461.
Hutson *v.* Missouri Pacific Ry. Co. (50 Mo. App. 300), 495.
Hutson *v.* Southern California Ry. Co. (89 Pac. Rep. 1093), 984.
Hyatt *v.* Hannibal & St. Joe R. Co. (19 Mo. App. 287), 274.
Hyde *v.* Missouri Pacific R. Co. (110 Mo. 272; 19 S. W. Rep. 483; 54 Am. & Eng. R. Cas. 157), 873.
Hyde *v.* Wabash, etc., R. Co. (61 Iowa 441; 16 N. W. Rep. 351; 47 Am. Rep. 820; 15 Am. & Eng. R. Cas. 503), 45.
Hydes Ferry Co. *v.* Yates (108 Tenn. 428; 67 S. W. Rep. 69), 1055.
Hynson *v.* St. Louis, etc., R. Co. (Texas, 86 S. W. Rep. 928), 325.

I

Iarussi *v.* Missouri Pac. Ry. Co. (155 Fed. Rep. 654), 523.
Ide *v.* Fratcher (194 Ill. 552; 62 N. E. Rep. 814), 387.
Ihl *v.* Forty Second St. R. Co. (47 N. Y. 317; 2 Am. Ry. Rep. 409), 188.

[*References are to sections.*]

Ilick *v.* Flint, etc., R. Co. (67 Mich. 632; 35 N. W. Rep. 708), 343.
Illinois, etc., R. Co. *v.* Able (59 Ill. 131; 11 Am. Ry. Rep. 154), 790.
Illinois, etc., R. Co. *v.* Ackerman (144 Fed. Rep. 959), 411.
Illinois, etc., R. Co. *v.* Axley (47 Ill. App. 307), 697.
Illinois, etc., R. Co. *v.* Baches (55 Ill. 379; 1 Am. Ry. Rep. 585), 456.
Illinois, etc., R. Co. *v.* Barron (5 Wall. U. S. 90), 815.
Illinois, etc., R. Co. *v.* Beard (49 Ill. App. 232), 1079.
Illinois, etc., R. Co. *v.* Benton (69 Ill. 174), 974.
Illinois, etc., R. Co. *v.* Bentz (99 Fed. Rep. 657; 40 C. C. A. 56), 489.
Illinois, etc., R. Co. *v.* Bishop (76 Miss. 758; 25 So. Rep. 867), 500.
Illinois, etc., R. Co. *v.* Brookshire (3 Ill. App. 225), 451.
Illinois, etc., R. Co. *v.* Browni (5 Wall. 90), 199.
Illinois, etc., R. Co. *v.* Brown (107 Ill. App. 512), 341.
Illinois, etc., R. Co. *v.* Buckner (28 Ill. 299), 1012.
Illinois, etc., R. Co. *v.* Burton (79 S. W. Rep. 502; 25 Ky. L. R. 1916), 265.
Illinois, etc., R. Co. *v.* Cheek (152 Ind. 663; 53 N. E. Rep. 641), 783.
Illinois, etc., R. Co. *v.* Coffee (205 Ill. 206; 63 N. E. Rep. 751), 157.
Illinois, etc., R. Co. *v.* Coley (28 Ky. L. R. 336; 89 S. W. Rep. 234; 1 L. R. A. [N. S.] 370), 233.
Illinois, etc., R. Co. *v.* Cotter (103 S. W. Rep. 279), 692.
Illinois, etc., R. Co. *v.* Coughlin (132 Fed. Rep. 801; 65 C. C. A. 101), 267.
Illinois, etc., R. Co. *v.* Cragin (71 Ill. 177), 49.
Illinois, etc., R. Co. *v.* Crudup (63 Miss. 291), 851.
Illinois, etc., R. Co. *v.* Cruse (96 S. W. Rep. 821), 713.
Illinois, etc., R. Co. *v.* Davenport (177 Ill. 110; 52 N. E. Rep. 66), 733.
Illinois, etc., R. Co. *v.* Davidson (76 Fed. Rep. 517; 46 U. S. App. 300), 626.
Illinois, etc., R. Co. *v.* Dick (91 Ky. 434; 15 S. W. Rep. 665), 1062.
Illinois, etc., R. Co. *v.* Downs (122 Ill. App. 545), 659.
Illinois, etc., R. Co. *v.* Ebert (74 Ill. 399), 937.
Illinois, etc., R. Co. *v.* Emerson (Miss., 40 So. Rep. 818), 341.
Illinois, etc., R. Co. *v.* Frelka (110 Ill. 498), 229.
Illinois, etc., R. Co. *v.* Glover (Ky., 71 S. W. Rep. 630), 718.
Illinois, etc., R. Co. *v.* Goddard (72 Ill. 567), 1005.
Illinois, etc., R. Co. *v.* Godfrey (71 Ill. 500), 1063.
Illinois, etc., R. Co. *v.* Hall (72 Ill. 222), 1095.
Illinois, etc., R. Co. *v.* Hamill (80 N. E. Rep. 745; 226 Ill. 88), 973.
Illinois, etc., R. Co. *v.* Hammar (85 Ill. 526), 451.
Illinois, etc., R. Co. *v.* Hammer (72 Ill. 353), 173.
Illinois, etc., R. Co. *v.* Hetherington (83 Ill. 510), 1065.
Illinois, etc., R. Co. *v.* Hilliard (99 Ky. 684; 37 S. W. Rep. 75), 494.
Illinois, etc., R. Co. *v.* Hosler (45 Ill. App. 205), 492.
Illinois, etc., R. Co. *v.* Houchins (28 Ky. L. R. 499; 89 S. W. Rep. 530; 1 L. R. A. [N. S.] 375), 233.
Illinois, etc., R. Co. *v.* Hunter (70 Miss. 471; 12 So. Rep. 482), 528.
Illinois, etc., R. Co. *v.* Hutchinson (47 Ill. 408), 1084.
Illinois, etc., R. Co. *v.* Johnson (95 Ill. App. 54; 61 N. E. Rep. 334), 379.
Illinois, etc., R. Co. *v.* Johnson (123 Ill. App. 300; 77 N. E. Rep. 592; 221 Ill. 42), 719.
Illinois, etc., R. Co. *v.* Johnson (77 Miss. 727; 28 So. Rep. 753; 51 L. R. A. 837), 67.
Illinois, etc., R. Co. *v.* Jones (11 Ill. App. 324), 340.
Illinois, etc., R. Co. *v.* Jones' Admr. (80 S. W. Rep. 484), 269.
Illinois, etc., R. Co. *v.* Keene (72 Ill. 512), 492.
Illinois, etc., R. Co. *v.* Kerr (125 Ill. App. 363), 734.
Illinois, etc., R. Co. *v.* Langan (76 S. W. Rep. 32; 25 Ky. L. R. 500), 262.
Illinois, etc., R. Co. *v.* Leisure's Admr. (90 S. W. Rep. 269; 28 Ky. L. R. 768), 260.
Illinois, etc., R. Co. *v.* Lence (100 S. W. Rep. 215), 178.
Illinois, etc., R. Co. *v.* Lucas (42 So. Rep. 607), 871.
Illinois, etc., R. Co. *v.* Lutz (84 Ill. 598), 787.
Illinois, etc., R. Co. *v.* McCollum (122 Ill. App. 531), 116.
Illinois, etc., R. Co. *v.* McIntosh (80 S. W. Rep. 494), 269.
Illinois, etc., R. Co. *v.* McLeod (78 Miss. 334; 29 So. Rep. 76; 84 Am. St. Rep. 630; 52 L. R. A. 954), 1039.
Illinois, etc., R. Co. *v.* McMillion (129 Ill. App. 27, 37), 552.
Illinois, etc., R. Co. *v.* Meacham (91 Tenn. 428; 19 S. W. Rep. 232), 1072.
Illinois, etc., R. Co. *v.* Mercer (28 Ky. L. R. 3; 88 S. W. Rep. 1054), 357.
Illinois, etc., R. Co. *v.* Minor (69 Miss. 710; 11 So. Rep. 101; 16 L. R. A. 627; 52 Am. & Eng. R. Cas. 441), 747.
Illinois, etc., R. Co. *v.* Moffitt (67 Ill 431), 451.
Illinois, etc., R. Co. *v.* Morris (28 Ky. L. R. 956; 90 S. W. Rep. 979), 192.
Illinois, etc., R. Co. *v.* Neer (26 Ill. App. 356), 453.
Illinois, etc., R. Co. *v.* Noble (142 Ill. 578), 1063.
Illinois, etc., R. Co. *v.* North (97 Ill. App. 124), 387.
Illinois, etc., R. Co. *v.* Nowickiki (46 Ill. App. 566), 412.

[*References are to sections.*]

Illinois, etc., R. Co. *v.* O'Connell (160 Ill. 636; 43 N. E. Rep. 704), 651.
Illinois, etc., R. Co. *v.* People (143 Ill. 434; 33 N. E. Rep. 173), 686.
Illinois, etc., R. Co. *v.* Pirtle (47 Ill. App. 498), 492.
Illinois, etc., R. Co. *v.* Porter (94 S. W. Rep. 666), 563.
Illinois, etc., R. Co. *v.* Prickett (109 Ill. App. 468; 210 Ill. 140; 71 N. E. Rep. 435), 76.
Illinois, etc., R. Co. *v.* Read (37 Ill. 484), 850.
Illinois, etc., R. Co. *v.* Ring (119 Ill. App. 294), 480.
Illinois, etc., R. Co. *v.* Ruska (200 Ill. 280; 65 N. E. Rep. 734), 308.
Illinois, etc., R. Co. *v.* Satkowski (107 Ill. App. 524), 341.
Illinois, etc., R. Co. *v.* Simmons (38 Ill. 242), 455.
Illinois, etc., R. Co. *v.* Slater (129 Ill. 91; 21 N. E. Rep. 575; 28 Ill. App. 73), 949.
Illinois, etc., R. Co. *v.* Smiesni (104 Ill. App. 194), 31.
Illinois, etc., R. Co. *v.* Smith (111 Ill. App. 177), 100.
Illinois, etc., R. Co. *v.* Stewart (Ky., 53 S. W. Rep. 596), 493.
Illinois, etc., R. Co. *v.* Thompson (112 Ill. App. 463; 210 Ill. 226; 71 N. E. Rep. 328), 377.
Illinois, etc., R. Co. *v.* Warren (149 Fed. Rep. 658), 704.
Illinois, etc., R. Co. *v.* Warriner (82 N. E. Rep. 246; 229 Ill. 91), 1058.
Illinois, etc., R. Co. *v.* Walsh (132 Ill. 490; 31 So. Rep. 470), 509.
Illinois, etc., R. Co. *v.* Welden (52 Ill. 290), 203.
Illinois, etc., R. Co. *v.* Welsh (52 Ill 183), 341.
Illinois, etc., R. Co. *v.* Whitmore (43 Ill. 420), 658.
Illinois, etc., R. Co. *v.* Willis' Admr. (97 S. W. Rep. 21), 966.
Illinois, etc., R. Co. *v.* Young (97 S. W. Rep. 1115), 269.
Ilwaco, etc., R. Co. *v.* Hedrick (1 Wash. 446; 25 Pac. Rep. 335; 22 Am. St. Rep. 169), 1073.
Imhoff *v.* Chicago, etc., R. Co. (20 Wis. 344), 577.
Imhoff *v.* Chicago, etc., R. Co. (22 Wis. 681), 632.
Independence *v.* Missouri Pacific Ry. Co. (86 Mo. App. 585), 903.
Indiana, etc., R. Co. *v.* Barnhart (115 Ind. 399; 16 N. E. Rep. 121), 863.
Indiana, etc., R. Co. *v.* Gray (19 Ind. App. 565; 48 N. E. Rep. 803), 276.
Indiana, etc., R. Co. *v.* Greene (106 Ind. 279; 6 N. E. Rep. 603; 55 Am. Rep. 736; 25 Am. & Eng. R. Cas. 322), 991.
Indiana, etc., R. Co. *v.* Hammock (113 Ind. 1; 14 N. E. Rep. 737; 32 Am. & Eng. Cas. 127), 1009.
Indiana, etc., R. Co. *v.* Mumby (21 Ind. 48), 850.
Indiana Car Co. *v.* Parker (100 Ind. 181), 485.
Indiana, etc., R. Co. *v.* Wheeler (115 Ind. 253; 17 N. E. Rep. 563), 883.
Indianapolis, etc., Co. *v.* Andis (72 N. E. Rep 145), 521.
Indianapolis, etc., R. Co. *v.* Allen (31 Ind. 394), 853.
Indianapolis, etc., R. Co. *v.* Anthony (43 Ind. 188), 736.
Indianapolis, etc., R. Co. *v.* Blackman (63 Ill. 117; 7 Am. Ry. Rep. 56), 974.
Indianapolis, etc., R. Co. *v.* Boettcher (131 Ind. 82; 28 N. E. Rep. 551), 392.
Indianapolis, etc., R. Co. *v.* Boyd (9 Am. Neg. Cas. 289), 653.
Indianapolis, etc., R. Co. *v.* Bush (101 Ind. 582), 187.
Indianapolis, etc., R. Co. *v.* Evans (88 Ill. 63; 21 Am. Ry. Rep. 284), 447.
Indianapolis, etc., R. Co. *v.* Flanigan (77 Ill. 365), 348.
Indianapolis, etc., R. Co. *v.* Foreman (162 Ind. 85; 69 N. E. Rep. 669; 102 Am. St. Rep. 185), 568.
Indianapolis, etc., R. Co. *v.* Hall (106 Ill. 371), 661.
Indianapolis, etc., R. Co. *v.* Hamilton (44 Ind. 76), 946.
Indianapolis, etc., R. Co. *v.* Hendricks (128 Ind. 462; 28 N. E. Rep. 58), 602.
Indianapolis, etc., R. Co. *v.* Horst (93 U. S. 269), 124.
Indianapolis, etc., R. Co. *v.* Houlihan (157 Ind. 494; 60 N. E. Rep. 943), 504.
Indianapolis, etc., R. Co. *v.* Johnson (163 Ind. 518; 72 N. E. Rep. 571), 1056.
Indianapolis St. Ry. Co. *v.* Kane (80 N. E. Rep. 841), 521.
Indianapolis, etc., R. Co. *v.* Lawn (30 Ind. App. 515; 66 N. E. Rep. 508), 77.
Indianapolis, etc., R. Co. *v.* Love (10 Ind. 554), 915.
Indianapolis, etc., R. Co. *v.* McLin (82 Ind. 435; 8 Am. & Eng. R. Cas. 237), 1016.
Indianapolis, etc., R. Co. *v.* Pitzer (109 Ind. 179; 58 Am. Rep. 387; 25 Am. & Eng. R. Cas. 313), 586.
Indianapolis, etc., R. Co. *v.* Rutherford (29 Ind. 82), 802.
Indianapolis, etc., R. Co. *v.* Schmidt (163 Ind. 360; 71 N. E. Rep. 201), 91.
Indianapolis, etc., R. Co. *v.* Smith (78 Ill. 112), 909.
Indianapolis, etc., R. Co. *v.* Staples (62 Ill. 313; 7 Am. Ry. Rep. 365), 957.
Indianapolis, etc., R. Co. *v.* Stout (53 Ind. 143), 1040.
Indianapolis, etc., R. Co. *v.* Taylor (164 Ind. 155; 72 N. E. Rep. 1045), 91.
Indianapolis, etc., R. Co. *v.* Toy (91 Ill. 474), 252.
Indianapolis, etc., R. Co. *v.* Watson (114 Ind. 20; 14 N. E. Rep. 721; 33 Am. & Eng. Cas. 334), 375.

[*References are to sections.*]

Ingalls *v.* Bills (Mass., 9 Am. Neg. Cas. 426), 653.
Ingalls *v.* Bills (9 Metc. [Mass.] 1, 15), 593.
Inge *v.* Murphy (10 Ala. 885), 463.
Ingersol *v.* R. R. Co. (8 Allen 438), 235.
Ingram *v.* Lehigh, etc., R. Co. (148 Pa. St. 177; 23 Atl. Rep. 1001), 410.
In re Lowham's Estate (85 Pac. Rep. 445), 47.
International, etc., R. Co. *v.* Addison 97 S. W. Rep. 1037), 685.
International, etc., R. Co. *v.* Anderson (15 Texas Civ. App. 180; 53 S. W. Rep. 606), 696.
International, etc., R. Co. *v.* Armstrong (Texas, 23 S. W. Rep. 236), 807.
International, etc., R. Co. *v.* Botkin (85 S. W. Rep. 1163), 65.
International & G. N. R. Co. *v.* Bell (75 Tex. 50; 12 S. W. Rep. 321), 249.
International & G. N. R. Co. *v.* Brice (Texas, 97 S. W. Rep. 461), 265.
International, etc., R. Co. *v.* Copeland (60 Texas, 325), 799.
International & G. N. R. Co. *v.* Cruseturner (98 S. W. Rep. 423), 647.
International, etc., R. Co. *v.* Dyer (76 Texas 156; 13 S. W. Rep. 377), 991.
International & G. N. R. Co. *v.* Figures (Texas, 89 S. W. Rep. 780), 339.
International, etc., R. Co. *v.* Folliard (66 Texas 603), 734.
International, etc., R. Co. *v.* Garcia (75 Texas 583; 13 S. W. Rep. 223), 392.
International & G. N. R. Co. *v.* Gilbert (64 Texas 536; 22 Am. & Eng. R. Cas. 405), 165.
International, etc., R. Co. *v.* Gorman (2 Texas Civ. App. 679), 783.
International, etc., R. Co. *v.* Graves (59 Texas 330) 997.
International, etc., R. Co. *v.* Gray (65 Texas 32; 27 Am. & Eng. R. Cas. 318), 674.
International, etc., R. Co. *v.* Halloren (53 Texas 46; 37 Am. Rep. 744; 3 Am. & Eng. R. Cas 343), 603.
International Ry. Co. *v.* Harder (Texas, 81 S. W. Rep. 356), 663.
International, etc., R. Co. *v.* Harrison (97 Texas 611; 80 S. W. Rep. 1139), 647.
International, etc., R. Co. *v.* Hassell (62 Texas 256; 21 Am. & Eng. R. Co. 315), 791.
International, etc., R. Co. *v.* Hawes (Texas, 54 S. W. Rep. 825), 266.
International & G. N. R. Co. *v.* Hays (Texas Civ. App., 98 S. W. Rep. 911), 206.
International, etc., R. Co. *v.* Hester (64 Texas 401; 21 Am. & Eng. R. Cas. 535), 322.
International, etc., R. Co. *v.* Hinzie (82 Texas 623; 18 S. W. Rep. 681), 313.
International & G. N. R. Co. *v.* Howell (105 S. W. Rep. 560), 962.
International, etc., R. Co. *v.* Hugen (100 S. W. Rep. 1000), 582.
International, etc., R. Co. *v.* Irvine (Texas, 23 Am. & Eng. R. Cas. 518), 561.
International & G. N. R. Co. *v.* Jacobs (Texas, 84 S. W. Rep. 288), 273.
International, etc., R. Co. *v.* Johnson (23 Texas Civ. App. 160; 55 S. W. Rep. 772), 368.
International, etc., R. Co. *v.* Johnson (95 S. W. Rep. 595), 622.
International, etc., R. Co. *v.* Jordan (1 Texas Civ. App. 494; 10 Am. & Eng. R. Cas. 801), 1089.
International & G. N. R. Co. *v.* Kernan (78 Texas 294; 9 L. R. A. 703), 246.
International, etc., R. Co. *v.* Keuhn (2 Texas Civ. App. 210; 21 S. W. Rep. 58), 972.
International, etc., R. Co. *v.* Kuehn (70 Texas 582; 8 S. W. Rep. 484; 35 Am. & Eng. R. Cas. 421), 60.
International Nav. Co. *v.* Lindstrom (123 Fed. Rep. 475), 55.
International, etc., R. Co. *v.* McCarthy (64 Texas 632), 336.
International, etc., R. Co. *v.* McDonald (75 Texas 41; 12 S. W. Rep. 860; 42 Am. & Eng. R. Cas. 211), 200.
International, etc., R. Co. *v.* McGhee (Texas, 81 S. W. Rep. 804), 98.
International, etc., R. Co. *v.* McVey (Texas, 81 S. W. Rep. 991; 83 S. W. Rep. 34), 386.
International, etc., R. Co. *v.* Moneyhan (76 S. W. Rep. 803), 368.
International, etc., R. Co. *v.* Ormond (64 Texas 485; 27 Am. & Eng. R. Cas. 139), 203.
International & G. N. R. Co. *v.* Penn (Texas, 79 S. W. Rep. 624), 95.
International, etc., R. Co. *v.* Reeves (Texas, 79 S. W. Rep. 1099), 372.
International, etc., R. Co. *v.* Ryan (82 Texas 565; 18 S. W. Rep. 219), 227.
International & G. N. R. Co. *v.* Sipole (29 S. W. Rep. 686), 38.
International, etc., R. Co. *v.* Smith (Texas, 14 S. W. Rep. 642; 44 Am. & Eng. R. Cas. 324), 92.
International, etc., R. Co. *v.* Smith (62 Texas 252; 19 Am. & Eng. R. Cas. 21), 392.
International, etc., R. Co. *v.* Stephenson (22 Texas Civ. App. 220; 54 S. W. Rep. 1086), 369.
International, etc., R. Co. *v.* Still (88 S. W. Rep. 257), 504.
International, etc., R. Co. *v.* Story (Texas, 62 S. W. Rep. 130), 348.
International, etc., R. Co. *v.* Turner (3 Texas Civ. App. 487; 23 S. W. Rep. 146), 345.
International, etc., R. Co. *v.* Underwood (34 Am. & Eng. R. Cas. 570; 67 Texas 589; 4 S. W. Rep. 216), 824.
International, etc., R. Co. *v.* Underwood (64 Texas 463; 27 Am. & Eng. R. Cas. 240), 835.
International, etc., R. Co. *v.* Welsh (86 Texas 204; 24 S. W. Rep. 390; 58 Am. & Eng. R. Cas. 70), 578.
International, etc., R. Co. *v.* Wilkes (68

[*References are to sections.*]

Texas 617; 34 Am. & Eng. R. Cas. 331), 165.
International, etc., R. Co. *v.* Williams (82 Texas 342; 18 S. W. Rep. 700), 249.
International & G. N. R. Co. *v.* Wray (Texas, 96 S. W. Rep. 74), 208.
Interstate T. R. C. R. Co. *v.* Fox (Kan., 21 Pac. Rep. 797), 270.
Interurban Ry. & Terminal Co. *v.* Hancock (78 N. E. Rep. 964), 578.
Ionnone *v.* New York, etc., R. Co. (21 R. I. 452; 44 Atl. Rep. 592; 79 Am. Rep. 812; 46 L. R. A. 730), 568.
Iowa G. M. Co. *v.* Diefenthaler (76 Pac. Rep. 981), 89.
Irish *v.* Northern, etc., R. Co. (4 Wash. 48; 29 Pac. Rep. 845), 778.
Iron R. Co. *v.* Mowry (36 Ohio St. 418; 38 Am. Rep. 597), 806.
Irvine *v.* Flint, etc., R. Co. (89 Mich. 416; 50 N. W. Rep. 1008; 53 Am. & Eng. R. Cas. 210), 321.
Isaacs *v.* Southern Pac. R. Co. (49 Fed. Rep. 797), 94.
Isaacs *v.* Strainka (95 Mo. 517; 8 S. W. Rep. 427), 106.
Isaacson *v.* New York, etc., R. Co. (94 N. Y. 278), 295.
Isabel *v.* Hannibal, etc., R. Co. (60 Mo. 475), 1058.
Isbell *v.* New York, etc., R. Co. (27 Conn. 393), 398.
Israel *v.* Clark (4 Esp. 259), 680.
Ivens *v.* Cincinnati, etc., R. Co. (103 Ind. 27; 2 N. E. Rep. 134; 23 Am. & Eng. R. Cas. 258), 1080.
Ives *v.* Wisconsin, etc., Ry. Co. (128 Wis. 357; 107 N. W. Rep. 452), 329.
Ivy *v.* East Tennessee, etc., R. Co. (88 Ga. 71; 13 S. E. Rep. 947), 1034.

J

Jackson *v.* Alabama, etc., R. Co. (76 Miss. 703; 25 So. Rep. 353; 14 Am. & Eng. R. Cas. [N. S.] 392), 731.
Jackson *v.* Chicago, etc., R. Co. (52 Wis. 150), 20.
Jackson *v.* Crilly (16 Colo. 103; 26 Pac. Rep. 331), 796.
Jackson, etc., Co. *v.* Cunningham (141 Ala. 206; 37 So. Rep. 445), 95.
Jackson *v.* Galveston, etc., R. Co. (90 Texas 372; 37 S. W. Rep. 786), 25.
Jackson *v.* Grand Avenue Ry. Co. (118 Mo. 199; 24 S. W. Rep. 192), 664.
Jackson *v.* Kansas City, etc., R. Co. (157 Mo. 621; 58 S. W. Rep. 32; 80 Am. St. Rep. 650), 883.
Jackson *v.* Kansas City, etc., R. Co. (31 Kan. 761; 3 Pac. Rep. 501; 15 Am. & Eng. R. Cas. 178), 343.
Jackson *v.* Metropolitan, etc., Ry. Co. (26 W. R. 175; L. R., 2 C. P. D. 125; 46 L. J. C. P. 376; 25 W. R. 661; 36 L. T. 485; L. R., 10 C. P. 49; 44 L. J. C. P. 83; 31 L. T. 475; 23 W. R. 78), 682.
Jackson *v.* Missouri Pacific Ry. Co. (104 Mo. 452; 16 S. W. Rep. 413), 749.
Jackson *v.* Mobile & O. R. Co. (42 So. Rep. 236), 411.
Jackson *v.* North Carolina, etc., R. Co. (13 Lea [Tenn.] 491; 19 Am. & Eng. R. Cas. 433), 39.
Jackson *v.* St. Louis, etc., R. Co. (43 Mo. App. 324), 602.
Jackson *v.* Southern Ry. (58 S. E. Rep. 605; 77 S. C. 550), 482.
Jackson *v.* Street Ry. Co. (118 Mo. 224), 121.
Jacksonville, etc., R. Co. *v.* Galvin (29 Fla. 636; 11 So. Rep. 231; 53 Am. & Eng. R. Cas. 341), 323.
Jacksonville, etc., R. Co. *v.* Southworth (135 Ill. 250; 25 N. E. Rep. 1093), 83.
Jacob *v.* Flint, etc., R. Co. (105 Mich. 450; 63 N. W. Rep. 502), 789.
Jacobs *v.* Louisville R. Co. (10 Bush. Ky. 263), 176.
Jacobsen *v.* Chicago, etc., R. Co. (41 Minn. 206; 42 N. W. Rep. 932), 412.
Jacobsan *v.* St. Paul, etc., R. Co. (41 Minn. 206), 866.
Jacobson *v.* Transit Co. (106 Mo. App. 339; 80 S. W. Rep. 309), 708.
Jacobus *v.* St. Paul, etc., R. Co. (20 Minn. 125), 64.
Jacques *v.* Bridgeport, etc., R. Co. (41 Conn. 61; 6 Am. Ry. Rep. 1), 187.
Jacquin *v.* Grand Avenue R. Co. (57 Mo. App. 320), 664.
James *v.* Christie (18 Mo. 162), 42.
James *v.* Richmond, etc., R. Co. (92 Ala. 231; 9 So. Rep. 335), 201.
Jamison *v.* San Jose, etc., R. Co. (55 Cal. 593; 3 Am. & Eng. R. Cas. 350), 4.
Jancko *v.* West Coast, etc., Co. (34 Wash. 556; 76 Pac. Rep. 78), 307.
Janowicz *v.* Pittsburgh, etc., R. Co. (124 Ill. App. 149), 1078.
Jansen *v.* Southern Pac. Co. (89 Pac. Rep. 616), 393.
Jarman *v.* Chicago, etc., R. Co. (98 Mich. 135; 57 N. W. Rep. 32), 487.
Jarrett *v.* Atlanta, etc., R. Co. (83 Ga. 347; 9 S. E. Rep. 681), 789.
Jefferson & N. W. Ry. Co. *v.* Woods (Texas, 64 S. W. Rep. 830), 258.
Jeffersonville, etc., R. Co. *v.* Goldsmith (47 Ind. 43; 8 Am. Ry. Rep. 315), 1074.
Jeffersonville, etc., R. Co. *v.* Hendricks (26 Ind. 228), 833.
Jeffersonville, etc., R. Co. *v.* Parmalee (51 Ind. 42), 557.
Jeffersonville, etc., R. Co. *v.* Riley (39 Ind. 568; 10 Am. Ry. Rep. 325), 202.
Jeffersonville, etc., R. Co. *v.* Swift (26 Ind. 459), 791.
Jeffrey *v.* Keokuk, etc., R. Co. (56 Iowa 546; 9 N. W. Rep. 884; 5 Am. & Eng. R. Cas. 568), 410.
Jemming *v.* Great Northern Ry. Co. (96 Minn. 302; 104 N. W. Rep. 1079; 1 L. R. A. [N. S.] 696), 527.
Jemnienski *v.* Lobdell Car Wheel Co. (Del., 63 Atl. Rep. 935), 258.
Jennings *v.* Grand Trunk R. Co. (15 Ont. App. 477), 564.
Jennings *v.* Philadelphia & W. Ry. Co. (29 App. [D. C.] 219), 481.
Jennings *v.* St. Louis, etc., R. Co. (99 Mo. 394; 11 S. W. Rep. 999), 918.

[*References are to sections.*]

Jennings *v.* St. Louis, etc., R. Co. (112 Mo. 268; 20 S. W. Rep. 490), 995.
Jennings *v.* Tacoma, etc., R. Co. (7 Wash. 275; 34 Pac. Rep. 937), 419.
Jensen *v.* Chicago, etc., R. Co. (86 Wis. 589; 57 N. W. Rep. 359; 22 L. R. A. 680), 892.
Jensen *v.* Omaha, etc., R. Co. (115 Iowa 404; 88 N. W. Rep. 952), 228.
Jewell *v.* Chicago, etc., R. Co. (54 Wis. 610; 41 Am. Rep. 63; 6 Am. & Eng. R. Cas. 379), 788.
Jewell *v.* Grand Trunk Ry. Co. (55 N. H. 84), 209.
Jewett *v.* Kansas City, etc., R. Co. (50 Mo. App. 547), 74.
Johns *v.* Charlotte, etc., R. Co. (39 So. Car. 162; 17 S. E. Rep. 698; 20 L. R. A. 520), 620.
Johns *v.* Cleveland, etc., R. Co. (23 Ohio Cit. Ct. R. 442), 356.
Johnson *v.* Boston, etc., R. Co. (83 N. E. Rep. 874), 1099.
Johnson *v.* Boston & M. R. Co. (Vt., 4 L. R. A. [N. S.] 856), 259.
Johnson *v.* Chesapeake & O. R. Co. (38 W. Va. 206; 18 S. E. Rep. 573), 399.
Johnson *v.* Chesapeake, etc., R. Co. (36 W. Va. 73; 14 S. E. Rep. 432), 494.
Johnson *v.* Chicago, etc., R. Co. (58 Iowa 348; 12 N. W. Rep. 329; 8 Am. & Eng. R. Cas. 206), 728.
Johnson *v.* Chicago, etc., R. Co. (64 Wis. 423; 25 N. W. Rep. 223; 25 Am. & Eng. R. Cas. 338), 189.
Johnson *v.* Cleveland, etc., R. Co. (11 Ohio C. C. 553), 490.
Johnson *v.* Coal Co. (76 Pac. Rep. 1089), 98.
Johnson *v.* Concord, etc., R. Co. (46 N. H. 213), 99.
Johnson *v.* Guffey Petroleum Co. (83 N. E. Rep. 874), 1099.
Johnson *v.* Great Northern Ry. Co. (94 Pac. Rep. 895), 869.
Johnson *v.* Gulf, etc., R. Co. (2 Texas Civ. App. 139; 21 S. W. Rep. 274), 1059.
Johnson *v.* Interurban St. Ry. Co. (88 N. Y. S. 866), 125.
Johnson *v.* Louisville, etc., R. Co. (91 Ky. 651; 25 S. W. Rep. 754; 13 Am. & Eng. R. Cas. 623), 1012.
Johnson *v.* Manhattan, etc., R. Co. (52 Hun 111), 97.
Johnson *v.* Metropolitan, etc., Ry. Co. (104 Mo. App. 588), 127.
Johnson *v.* Pittsburg, etc., R. Co. (114 Pa. St. 443; 7 Atl. Rep. 184), 261.
Johnson *v.* Railway Co. (36 W. Va. 73; 14 S. E. Rep. 432), 118.
Johnson *v.* Richmond, etc., R. Co. (84 Va. 713; 5 S. E. Rep. 707), 465.
Johnson's Admx. *v.* Richmond, etc., R. Co. (86 Va. 975; 11 S. E. Rep. 829), 506.
Johnson *v.* St. Joseph Terminal Ry. Co. (101 S. W. Rep. 641), 413.
Johnson *v.* St. Paul City R. Co. (67 Minn. 260; 69 N. W. Rep. 900; 36 L. R. A. 586), 1057.
Johnson *v.* Seattle, etc., R. Co. (39 Wash. 211; 81 Pac. Rep. 705), 61.
Johnson *v.* Southern Pacific R. Co. (1 L. R. A. [N. S.] 307), 897.
Johnson *v.* Southern Pac. R. Co. (117 Fed. Rep. 462; 54 C. C. A. 508), 254.
Johnson *v.* Superior Rapid Transit Co. (91 Wis. 233; 64 N. W. Rep. 753), 1053.
Johnson *v.* Texas & G. Ry. Co. (100 S. W. Rep. 206), 878.
Johnson *v.* Union Pac. Co. (28 Utah 46; 76 Pac. Rep. 1089), 98.
Johnson *v.* Atchison, etc., R. Co. (117 Mo. App. 308), 838.
Johnston *v.* Boston, etc., R. Co. (78 Vt. 344; 62 Atl. Rep. 1021), 341.
Johnston *v.* Cleveland, etc., R. Co. (7 Ohio St. 336), 69.
Johnston *v.* Oregon, etc., R. Co. (23 Ore. 94; 31 Pac. Rep. 283), 92.
Johnston *v.* Phœnix Bridge Co. (169 N. Y. 581; 62 N. E. Rep. 1096), 285.
Johnston *v.* Pittsburg, etc., R. Co. (114 Pa. St. 443; 7 Atl. Rep. 184), 461.
Johnston *v.* St. Paul, etc., R. Co. (43 Minn. 53; 44 N. W. Rep. 884; 41 Am. & Eng. R. Cas. 293), 369.
Johnston *v.* Truesdale (46 Minn. 345; 48 N. W. Rep. 1136), 1092.
Johnston *v.* West Chester R. Co. (70 Pa. St. 257), 718.
Johnston *v.* Western, etc., R. Co. (55 Ga. 133), 343.
Johnstown Steel Co. *v.* Shields (146 Ill. 603; 34 N. E. Rep. 234), 118.
Joliet, etc., R. Co. *v.* Call (143 Ill. 177), 93.
Joliet *v.* Seward (86 Ill. 402; 29 Am. Rep. 35), 1056.
Joliet Steel Co. *v.* Shields (146 Ill. 603; 34 N. E. Rep. 1108), 495.
Joliet, etc., E. Co. *v.* Velie (Ill., 26 N. E. Rep. 1086), 375.
Jones *v.* Boyce (1 Starkie 493), 30.
Jones *v.* Chicago, etc., R. Co. (42 Minn. 183; 43 N. W. Rep. 1114; 41 Am. & Eng. R. Cas. 169), 791.
Jones *v.* Grand Trunk R. Co. (18 Can. Sup. Ct. 696; 16 Ont. App. 37), 874.
Jones *v.* Illinois Cent. R. Co. (104 S. W. Rep. 258; 31 Ky. Law. Rep. 825), 1028.
Jones *v.* Kansas City, etc., R. Co. (178 Mo. 528; 77 S. W. Rep. 890), 380.
Jones *v.* Lake Shore, etc., R. Co. (49 Mich. 573; 14 N. W. Rep. 551; 8 Am. & Eng. R. Cas. 221), 378.
Jones *v.* New York, etc., R. Co. (156 N. Y. 187; 90 Hun 605; 50 N. E. Rep. 856; 41 L. R. A. 490), 782.
Jones *v.* Philadelphia Traction Co. (185 Pa. St. 75; 39 Atl. Rep. 889), 286.
Jones *v.* Phillips (39 Ark. 17; 43 Am. St. Rep. 264), 310.
Jones *v.* R. R. (20 R. I. 210), 95.
Jones *v.* St. Louis, etc., R. Co. (125 Mo. 666; 28 S. W. Rep. 883; 46 Am. St. Rep. 514; 26 L. R. A. 718), 565.
Jones *v.* Seligman (N. Y., 3 Am. & Eng. R. Cas. 236), 602.

[References are to sections.]

Jones *v.* Sibley, etc., R. Co. (46 So. Rep. 61), 1077.
Jones *v.* Wabash Ry. Co. (17 Mo. App. 158), 669.
Jordan *v.* Cincinnati, etc., R. Co. (89 Ky. 40; 11 S. W. Rep. 1013), 58.
Jordan *v.* Hannibal (87 Mo. 673), 132.
Jordan *v.* New York, etc., R. Co. (165 Mass. 346; 43 N. E. Rep. 111; 32 L. R. A. 101), 623.
Jordan *v.* St. Louis, etc., R. R. Co. (99 S. W. Rep. 492), 122.
Joseph *v.* Metropolitan R. Co. (129 Mo. App. 603; 111 S. W. Rep. 864), 823.
Joyce *v.* Los Angeles Ry. Co. (147 Cal. 274; 82 Pac. Rep. 204), 125.
Junction Co. *v.* Ench (111 Ill. App. 346), 90.
June *v.* Boston, etc., R. Co. (153 Mass. 79; 26 N. E. Rep. 238), 859.
Justice *v.* Pennsylvania R. Co. (130 Ind. 321; 30 N. E. Rep. 303; 53 Am. & Eng. R. Cas. 604), 139.

K

Kain *v.* Smith (80 N. Y. 458; 2 Am. & Eng. R. Cas. 545), 230.
Kahn *v.* McNulta (147 U. S. 238), 268.
Kahl *v.* Memphis, etc., R. Co. (95 Ala. 337; 10 So. Rep. 661), 49.
Kalbus *v.* Abbott (77 Wis. 621; 46 N. W. Rep. 810), 940.
Kaminski *v.* Tudor Iron Works (167 Mo. 462), 99.
Kane *v.* Boston, etc., R. Co. (192 Mass. 386; 78 N. E. Rep. 485), 1039.
Kane *v.* Erie R. Co. (142 Fed. Rep. 682; 73 C. C. A. 672), 537.
Kane *v.* New York, etc., R. Co. (132 N. Y. 160; 30 N. E. Rep. 256; 43 N. Y. S. R. 494; 56 Hun 648; 31 N. Y. S. R. 741; 9 N. Y. Supp. 879), 921.
Kane *v.* Northern, etc., R. Co. (128 N. S. 91; 9 Sup. Ct. Rep. 16), 419.
Kane *v.* St. Louis, etc., R. Co. (Mo. App., 87 S. W. Rep. 571), 353.
Kane *v.* Savannah, etc., R. Co. (85 Ga. 858; 11 S. E. Rep. 493), 378.
Kankakee, etc., R. Co. *v.* Fitzgerald (17 Ill. App. 525), 169.
Kansas City, etc., S. R. Co. *v.* Allen (67 Pac. Rep. 436), 135.
Kansas City, etc., R. Co. *v.* Becker (53 S. W. Rep. 406), 514.
Kansas, etc., Co. *v.* Brownlie (60 Ark 582), 146.
Kansas City, etc., R. Co. *v.* Butler (Ala. 38 So. Rep. 1024), 100.
Kansas City, etc., R. Co. *v.* Burton (97 Ala. 240; 12 So. Rep. 88; 53 Am. & Eng. R. Cas. 115), 822.
Kansas City, etc., R. Co. *v.* Campbell (6 Kan. App. 417; 48 Pac. Rep. 817), 667.
Kansas City, etc., Ry. Co. *v.* Crocker (95 Ala. 412; 11 So. Rep. 262), 513.
Kansas Pacific R. Co. *v.* Cutter (19 Kan. 83), 196.
Kansas City, etc., R. Co. *v.* Daughtry (88 Tenn. 721; 13 S. W. Rep. 698; 45 Am. & Eng. R. Cas. 69), 200.
Kansas City Southern Ry. Co. *v.* Davis (103 S. W. Rep. 603), 704.
Kansas, etc., R. Co. *v.* Dorough (72 Texas 108; 10 S. W. Rep. 711), 783.
Kansas City *v.* Ferd Heim, etc., Co. (98 Mo. App. 590; 73 S. W. Rep. 302), 132.
Kansas City, etc., R. Co. *v.* Fite (67 Miss. 373; 7 So. Rep. 223), 172.
Kansas, etc., Co. *v.* Fitzsimmons (18 Kan. 34; 15 Am. Ry. Rep. 220), 293.
Kansas City, etc., R. Co. *v.* Fitzsimmons (22 Kan. 686; 31 Am. Rep. 203), 1073.
Kansas City, etc., R. Co. *v.* Flippo (138 Ala. 487; 35 So. Rep. 457), 385.
Kansas City, etc., R. Co. *v.* Kelly (36 Kan. 655; 14 Pac. Rep. 172), 1087.
Kansas City, etc., R. Co. *v.* Kier (41 Kan. 661; 21 Pac. Rep. 770; 38 Am. & Eng. R. Cas. 119), 523.
Kansas, etc., R. Co. *v.* Little (19 Kan. 267; 17 Am. Ry. Rep. 455), 475.
Kansas City & O. Ry. Co. *v.* Loosley (90 Pac. Rep. 990), 276.
Kansas, etc., R. Co. *v.* Lundin (3 Colo. 94), 601.
Kansas City, etc., R. Co. *v.* McGinty (88 S. W. Rep. 1001), 40.
Kansas, etc., R. Co. *v.* Merrill (65 Kan. 436; 70 Pac. Rep. 358; 59 L. R. A. 711), 39.
Kansas, etc., R. Co. *v.* Miller (2 Colo. 442; 20 Am. Ry. Rep. 245), 69.
Kansas City, etc., R. Co. *v.* Orton (67 Kan. 848; 73 Pac. Rep. 63), 656.
Kansas City, etc., R. Co. *v.* Owens (58 Ark. 397; 24 S. W. Rep. 1076), 789.
Kansas, etc., R. Co. *v.* Peavey (34 Kan. 472; 8 Pac. Rep. 780), 483.
Kansas, etc., R. Co. *v.* Peavey (29 Kan. 169; 44 Am. Rep. 630; 11 Am. & Eng. R. Cas. 260), 506.
Kansas City, etc., R. Co. *v.* Phillipps (98 Ala. 159; 13 So. Rep. 65), 172.
Kansas, etc., R. Co. *v.* Pointer (14 Kan. 37), 947.
Kansas, etc., R. Co. *v.* Pointer (9 Kan. 620), 873.
Kansas, etc., R. Co. *v.* Salmon (11 Kan. 83), 461.
Kansas City, etc., R. Co. *v.* Saunders (98 Ala. 293; 13 So. Rep. 57; 58 Am. & Eng. R. Cas. 140), 590.
Kansas City, etc., R. Co. *v.* Simpson (30 Kan. 645; 46 Am. Rep. 104; 16 Am. & Eng. R. Cas. 158), 849.
Kansas City, etc., R. Co. *v.* Stoner (51 Fed. Rep. 649; 2 C. C. A. 437; 52 Am. & Eng. R. Cas. 462; 49 Fed. Rep. 209; 4 U. S. App. 109; 1 C. C. A. 231), 675.
Kansas City, etc., R. Co. *v.* Thornhill (Ala., 37 So. Rep. 412), 379.
Kansas, etc., R. Co. *v.* Twombly (3 Colo. 125; 21 Am. Ry. Rep. 447), 412.
Kansas, etc., R. Co. *v.* Ward (4 Colo. 30), 1095.
Kansas City, etc., R. Co. *v.* Webb (97 Ala. 157; 11 So. Rep. 888), 103.
Kaplowitz *v.* Interborough Rapid Transit Co. (103 N. Y. S. 721), 630.

[References are to sections.]

Karl *v.* Juniata County (206 Pa. St. 633; 56 Atl. Rep. 78), 276.
Karle *v.* Kansas City, etc., R. Co. (55 Mo. 476), 948.
Karn *v.* Illinois Southern Ry. Co. (114 Mo. App. 162; 89 S. W. Rep. 346), 241.
Karr *v.* Milwaukee Traction Co. (113 N. W. Rep. 62), 689.
Kascsak *v.* Central R. Co. (101 N. Y. S. 211), 264.
Kastle *v.* Wabash R. Co. (114 Mich. 43; 72 N. W. Rep. 28), 494.
Katzenberger *v.* Laivo (90 Tenn. 235; 16 S. W. Rep. 611; 50 Am. & Eng. R. Cas. 443), 961.
Kay *v.* Pennsylvania R. Co. (65 Pa. St. 269; 3 Am. Rep. 628), 1058.
Keagy *v.* New York & H. R. Co. (66 Atl. Rep. 1024), 903.
Kean *v.* Baltimore, etc., R. Co. (61 Md. 154; 19 Am. & Eng. R. Cas. 321), 1031.
Keane *v.* Waterford (130 N. Y. 188), 136.
Kearney *v.* Lindell R. Co. (15 Mo. App. 576), 394.
Kearney *v.* Railway (5 Q. B. 411; L. R., 6 Q. B. 759), 129.
Keating *v.* Manhattan R. Co. (97 N. Y. S. 137; 110 App. Div. 108), 264.
Keating *v.* New York, etc., R. Co. (49 N. Y. 673; 3 Lans. 469), 700.
Keck *v.* Philadelphia, etc., R. Co. (206 Pa. 501; 56 Atl. Rep. 47), 229.
Keefe *v.* Boston, etc., R. Co. (142 Mass. 251; 7 N. E. Rep. 874; 27 Am. & Eng. R. Co. 137), 619.
Keefe *v.* New York Cent., etc., R. Co. (95 N. Y. S. 828; 109 App. Div. 180), 482.
Keen *v.* St. Louis, etc., R. Co. (108 S. W. Rep. 1125), 727.
Keep *v.* Indianapolis, etc., R. Co. (3 McCrary [U. S.] 208; 9 Fed. Rep. 625), 584.
Keep *v.* Union, etc., R. Co. (9 Fed. Rep. 625; 3 McCrary [U. S.] 208), 638.
Kehler *v.* Schwenk (144 Pa. St. 348; 22 Atl. Rep. 910), 400.
Kehler *v.* Schwenk (151 Pa. St. 505; 25 Atl. Rep. 130), 302.
Keiley *v.* The Alliance (44 Fed. Rep. 97), 172.
Keim *v.* Union Ry. Co. (90 Mo. 314; 2 S. W. Rep. 427), 977.
Keith *v.* New Haven, etc., R. Co. (140 Mass. 1758; 3 N. E. Rep. 28), 268.
Keith *v.* Wisconsin Cent. R. Co. (Wis., 99 N. W. Rep. 217), 269.
Kellar *v.* Sioux City, etc., R. Co. (27 Minn. 178; 6 N. W. Rep. 486), 708.
Kelleher *v.* Railroad Co. (80 Wis. 586; 50 N. W. Rep. 943), 369.
Keller *v.* Hestonville, etc., R. Co. (149 Pa. St. 65; 24 Atl. Rep. 159), 778.
Keller *v.* Kansas City, St. L., etc., R. Co. (135 Fed. Rep. 202), 235.
Kelley *v.* Missouri Pacific Ry. Co. (101 Mo. 67; 13 S. W. Rep. 806; 43 Am. & Eng. R. Cas. 186), 398.
Kelley *v.* Railroad Co. (35 Minn. 490; 29 N. W. Rep. 173), 348.
Kelley *v.* Washington, etc., Co. (107 Mo. App. 490; 81 S. W. Rep. 631), 1105.
Kellogg *v.* New York, etc., R. Co. (79 N. Y. 72), 1003.
Kellow *v.* Central Iowa R. Co. (68 Iowa 470; 23 N. W. Rep. 740; 21 Am. & Eng. R. Cas. 485), 578.
Kelly *v.* Abbott (63 Wis. 307; 23 N. W. Rep. 890; 53 Am. Rep. 292; 21 Am. & Eng. R. Cas. 633), 335.
Kelly *v.* Baltimore, etc., R. Co. (Pa., 11 Atl. Rep. 659), 369.
Kelly *v.* Chicago, etc., R. Co. (35 Minn. 490; 29 N. W. Rep. 173), 354.
Kelly *v.* Chicago, etc., R. Co. (88 Mo. 534), 1016.
Kelly *v.* Duluth, etc., R. Co. (92 Mich. 19; 52 N. W. Rep. 81), 947.
Kelly *v.* Hannibal, etc., R. Co. (75 Mo. 138; 13 Am. & Eng. R. Cas. 638), 1029.
Kelly *v.* Hannibal, etc., R. Co. (70 Mo. 604), 788.
Kelly *v.* Manhattan R. Co. (112 N. Y. 443; 21 N. Y. S. R. 507; 20 N. E. Rep. 383; 3 L. R. A. 74), 579.
Kelly *v.* Michigan, etc., R. Co. (65 Mich. 186; 31 N. W. Rep. 904; 28 Am. & Eng. R. Cas. 633), 878.
Kelly *v.* New York, etc., R. Co. (109 N. Y. 44; 15 N. E. Rep. 879), 649.
Kelly *v.* Parker-Washington Co. (107 Mo. App. 490; 81 S. W. Rep. 631), 97.
Kelly *v.* Railroad (48 Fed. Rep. 663), 306.
Kelly *v.* St. Paul, etc., R. Co. (29 Minn., 16 Am. & Eng. R. Cas. 93; 11 N. W. Rep. 67), 1028.
Kelly *v.* Twenty-second Street R. Co. (14 Daily 418; 14 N. Y. S. R. 699), 202.
Kelly *v.* Union, etc., R. Co. (11 Mo. App. 1), 412.
Kelsall *v.* New York & H. R. Co. (82 N. E. Rep. 674), 971.
Kelsay *v.* Missouri Pacific Ry. Co. (129 Mo. 362; 30 S. W. Rep. 339), 1003.
Kelton *v.* St. Louis, etc., R. Co. (116 Mo. App. 281; 92 S. W. Rep. 512), 821.
Kendall *v.* Boston (118 Mass. 234), 650.
Kendrick *v.* Chicago, etc., R. Co. (81 Mo. 521), 989.
Kennayde *v.* Pacific R. Co. (45 Mo. 255), 1000.
Kennedy *v.* Chase (119 Cal. 637), 244.
Kennedy *v.* Delaware & C. Co. (58 Atl. Rep. 825), 62.
Kennedy *v.* Kansas City, St. J. & C. B. R. Co. (190 Mo. 424; 89 S. W. Rep. 370), 269.
Kennedy *v.* New York, etc., R. Co. (35 Hun [N. Y.] 186), 64.
Kennedy *v.* Pennsylvania R. Co. (Pa., 17 Atl. Rep. 7), 352.
Kennedy *v.* Rochester, etc., R. Co. (130 N. Y. 654; 29 N. E. Rep. 141), 92.
Kennedy *v.* Central R. Co. (61 Ga. 590), 495.

[*References are to sections.*]

Kenney *v.* Hannibal & St. Joseph Ry. Co. (105 Mo. 270; 15 S. W. Rep. 983; 16 S. W. Rep. 837), 507.
Kenney *v.* Meddaugh (118 Fed. Rep. 209; 55 C. C. A. 115), 260.
Kenney *v.* New York, etc., R. Co. (125 N. Y. 422; 26 N. E. Rep. 626), 564.
Kent *v.* Baltimore, etc., R. Co. (45 Ohio St. 284; 12 N. E. Rep. 798; 31 Am. & Eng. R. Cas. 125), 853.
Kentucky, etc., R. Co. *v.* Ackley (87 Ky. 278; 8 S. W. Rep. 691; 12 Am. St. Rep. 480), 174.
Kentucky, etc., R. Co. *v.* Commonwealth (Ky., 18 S. W. Rep. 368), 934.
Kentucky, etc., R. Co. *v.* McGinty (Ky., 14 S. W. Rep. 601), 62.
Kentucky, etc., R. Co. *v.* Quinkert (2 Ind. App. 244; 28 N. E. Rep. 338), 769.
Kentucky, etc., R. Co. *v.* Thomas (79 Ky. 160), 803.
Kentucky, etc., R. Co. *v.* Wainwright (13 S. W. Rep. 438), 58.
Kentucky *v.* Winchester's Ex'r (105 S. W. Rep. 167), 959.
Keokuk, etc., Co. *v.* Henry (50 Ill. 264), 570.
Kepner *v.* Traction Co. (183 Pa. 24; 38 Atl. Rep. 416), 119.
Kerlin *v.* Chicago, etc., R. Co. (50 Fed. Rep. 185; 53 Am. & Eng. R. Cas. 530), 491.
Kerrigan *v.* Southern Pacific R. Co. (81 Cal. 248; 22 Pac. Rep. 677; 41 Am. & Eng. R. Cas. 28), 809.
Kersey *v.* Kansas City, etc., R. Co. (79 Mo. 362; 17 Am. & Eng. R. Cas. 638), 500.
Kerwhacker *v.* Cleveland, etc., R. Co. (3 Ohio St. 172), 394.
Kesler *v.* Smith (66 N. Car. 154), 191.
Kessler *v.* Brooklyn Heights R. Co. (3 App. Div. 426; 38 N. Y. Supp. 799), 1048.
Kessler *v.* New York, etc., R. Co. (61 N. Y. 538), 295.
Keyes *v.* Pennsylvania R. Co. (Pa., 3 Atl. Rep. 15), 412.
Kibbe *v.* Stevenson Iron Mining Co. (136 Fed. Rep. 147; 69 C. C. A. 145), 504.
Kidwell *v.* Houston, etc., R. Co. (3 Woods [U. S.] 313), 483.
Kilken *v.* New York Central R. Co. (177 N. Y. 566; 69 N. E. Rep. 1125; 78 N. Y. S. R. 568; 76 App. Div. 529), 355.
Killian *v.* Augusta, etc., R. Co. (79 Ga. 234; 4 S. E. Rep. 165), 191.
Killian *v.* Chicago, etc., R. Co. (86 Mo. App. 473), 39.
Killian *v.* Georgia, etc., R. Co. (97 Ga. 727; 25 S. E. Rep. 384), 709.
Killian *v.* Southern, etc., R. Co. (128 N. Car. 261; 38 S. E. Rep. 873), 62.
Killien *v.* Hyde (63 Fed. Rep. 172), 247.
Killilea *v.* Horseshoe Co. (74 Pac. Rep. 157), 145.
Kilpatrick *v.* Choctaw, etc., R. Co. (195 U. S. 624; 49 L. Ed. 349), 252.
Kilpatrick *v.* Pennsylvania R. Co. (140 Pa. St. 502; 21 Atl. Rep. 408), 789.
Kiminitsky *v.* Northeastern R. Co. (25 So. Car. 53), 949.
Kincaid *v.* Kansas City, etc., R. Co. (62 Mo. App. 365), 25.
Kincaid *v.* Railway Co. (22 Or. 35; 29 Pac. Rep. 3), 118.
King *v.* Boston & W. R. Co. (63 Mass. [9 Cush.] 112), 10.
King *v.* Missouri Pacific Ry. Co. (98 Mo. 235; 11 S. W. Rep. 563), 200.
King *v.* New York, etc., R. Co. (66 N. Y. 181; 23 Am. Rep. 37), 288.
King *v.* Ohio, etc., R. Co. (11 Bliss [N. S.] 362; 14 Fed. Rep. 277; 8 Am. & Eng. R. Cas. 119), 477.
King *v.* Ohio, etc., R. Co. (22 Fed. Rep. 413; 18 Am. & Eng. R. Cas. 386), 747.
King *v.* Oregon R. Co. (93 Pac. Rep. 141), 882.
King *v.* Railroad (98 Mo. 235; 11 S. W. Rep. 563), 507.
King *v.* Wabash R. Co. (109 S. W. Rep. 671), 1029.
King *v.* Woodstock Iron Co. (42 So. Rep. 27), 269.
Kinney *v.* Central, etc., Co. (32 N. J. L. 409; 34 N. J. L. 513), 850.
Kinney *v.* Corbin (132 Pa. St. 341; 19 Atl. Rep. 141), 400.
Kinney *v.* Crocker (18 Wis. 74), 937.
Kinney *v.* Louisville, etc., R. Co. (99 Ky. 59; 34 S. W. Rep. 1066), 744.
Kinsley *v.* Boston, etc., R. Co. (125 Mass. 54), 565.
Kinsley *v.* Lake Shore, etc., R. Co. (125 Mass. 54), 736.
Kinzel *v.* Atlanta, etc., Ry. Co. (137 Fed. Rep. 489), 357.
Kirk *v.* Atlanta, etc., R. Co. (N. C., 25 Am. & Eng. R. Cas. 507), 485.
Kirk *v.* Atlanta, etc., R. Co. (94 N. C. 625; 55 Am. Rep. 621), 494.
Kirkland *v.* Charleston, etc., Ry. Co. (60 S. E. Rep. 668), 814.
Kirkpatrick *v.* Choctaw, etc., R. Co. (195 U. S. 624; 49 L. Ed. 349; 121 Fed. Rep. 11; 57 C. C. A. 253), 342.
Kirkpatrick *v.* Grand Trunk R. Co. (Vt., 52 Atl. Rep. 531), 382.
Kissenger *v.* New York, etc., R. Co. (56 N. Y. 538; 6 Am. Ry. Rep. 154), 940.
Kitteringham *v.* Sioux City, etc., R. Co. (62 Iowa 285; 17 N. W. Rep. 585), 406.
Khron *v.* Brock (144 Mass. 516; 11 N. E. Rep. 748), 287.
Klages *v.* Gillett-Herzog Mfg. Co. (86 Minn. 458; 90 N. W. Rep. 1116; 26 Enc. Law & Proc. [Cyc.] 1552), 290.
Klanowski *v.* Grand Trunk R. Co. (57 Mich. 525; 24 N. W. Rep. 801; 21 Am. & Eng. R. Cas. 648), 192.
Klanowski *v.* Grand Trunk R. Co. (64 Mich. 279; 31 N. W. Rep. 275), 983.
Klebe *v.* Parker Distilling Co. (207 Mo. 480; 105 S. W. Rep. 1057; 13 L. R. A. [N. S.] 140), 119.
Klein *v.* Jewett (26 N. J. Eq. 474; 27 N. J. Eq. 550), 580.
Kleiner *v.* Third Ave. R. Co. (36 App.

[*References are to sections.*]

Div. 191; 55 N. Y. Supp. 394; 162 N. Y. 193, 645; 56 N. E. Rep. 497; 57 N. E. Rep. 1114), 1039.
Kline *v.* Central Pacific R. Co. (37 Cal. 400), 392.
Kline *v.* Santa Barbara Consol. Ry. Co. (90 Pac. Rep. 125), 592.
Klingaman *v.* Fish, etc., Co. (S. D., 102 N. W. Rep. 601), 91.
Klinger *v.* United Traction Co. (87 N. Y. S. 864; 92 App. Div. 100), 122.
Klockenbrink *v.* St. Louis, etc., R. Co. (172 Mo. 678; 72 S. W. Rep. 900), 392.
Klockenbrink *v.* St. Louis, etc., R. Co. (81 Mo. App. 351, 409), 29.
Klos *v.* Hudson River, etc., Co. (79 N. Y. S. 156; 77 App. Div. 566), 308.
Knahtla *v.* Oregon, etc., R. Co. (21 Oregon 136; 27 Pac. Rep. 91), 471.
Knapp *v.* Dagg (18 How. Pr. 165), 1057.
Knapp *v.* Sioux City R. Co. (71 Iowa 41; 32 N. W. Rep. 18), 323.
Knapp *v.* Sioux City, etc., R. Co. (65 Iowa 91; 18 Am. & Eng. R. Cas. 60), 38.
Knight *v.* Albert (6 Pa. St. 472; 47 Am. Dec. 478), 1073.
Knight *v.* Cooper (36 W. Va. 232; 14 S. E. Rep. 999), 3.
Knight *v.* Fox (1 E. L. & E. R. 477; 20 L. J. [N. S.] Exch. 65; 14 Jur. 963), 278.
Knight *v.* Ponchartrain & R. Co. (23 La. Ann. 462), 692.
Knight *v.* Portland R. Co. (56 Mo. 234), 557.
Knight *v.* West Jersey R. Co. (108 Pa. St. 250; 26 Am. & Eng. R. Cas. 485), 47.
Knights Templars, etc., Co. *v.* Crayton (209 Ill. 550; 70 N. E. Rep. 1066), 100
Knightstown *v.* Musgrove (116 Ind. 121; 18 N. E. Rep. 452; 9 Am. St. Rep. 827), 1055.
Knisley *v.* Pratt (148 N. Y. 372; 42 N. E. Rep. 986; 32 L. R. A. 367), 356.
Knowlton *v.* Erie R. Co. (19 Ohio St. 260); Alexander *v.* Pennsylvania R. Co. (48 Ohio St. 623), 858.
Knox *v.* Boston, etc., R. Co. (185 Mass. 602); 71 N. E. Rep. 90), 1055.
Knoxville, etc., R. Co. *v.* Acuff (92 Tenn. 26; 20 S. W. Rep. 348), 59.
Koch *v.* Fox (71 N. Y. App. Div. 288; 75 N. Y. Supp. 913), 282.
Koch *v.* Sackmann, etc., Co. (9 Wash. 405; 37 Pac. Rep. 703), 286.
Koegel *v.* Missouri Pacific Ry. Co. (181 Mo. 379; 80 S. W. Rep. 905), 1078.
Koehler *v.* Rochester, etc., R. Co. (66 Hun [N. Y.] 566; 50 N. Y. S. R. 619; 21 N. Y. Supp. 844), 1013.
Kohn *v.* McNulta (147 U. S. 238; 13 Sup. Ct. Rep. 298), 335.
Kohner *v.* Capital Co. (22 App. D. C. 181; 62 L. R. A. 875), 123.
Kolb *v.* Transit Co. (102 Mo. App. 143; 76 S. W. Rep. 1050), 392.
Koons *v.* Railroad Co. (65 Mo. 592), 99.
Koons *v.* St. Louis, etc., R. Co. (65 Mo. 592), 1073.
Kopf *v.* Monroe, etc., Co. (Mich., 95 N. W. Rep. 72), 308.
Koplitz *v.* St. Paul (86 Minn. 373; 90 N. W. Rep. 794; 58 L. R. A. 74), 1048.
Korrady *v.* Lake Shore, etc., R. Co. (131 Ind. 261; 29 N. E. Rep. 1069), 392.
Kostendader *v.* Pierce (37 Iowa 645), 74.
Kowolski *v.* Chicago, etc., R. Co. (84 Fed. Rep. 586; 34 C. C. A. 1; 92 Fed. Rep. 310), 1058.
Kragg *v.* Atlanta, etc., R. Co. (77 Ga. 202; 4 Am. St. Rep. 79), 91.
Kramer *v.* San Francisco, etc., R. Co. (25 Cal. 434), 69.
Kranz *v.* Long Island, etc., R. Co. (33 N. Y. S. R. 46), 365.
Kraus *v.* Pennsylvania R. Co. (139 Pa. St. 272; 20 Atl. Rep. 993), 1020.
Krause *v.* Morgen (52 Ohio St. 325; 40 N. E. Rep. 886), 6.
Kraut *v.* Frankford, etc., R. Co. (160 Pa. 327; 28 Atl. Rep. 783), 26.
Krebbs *v.* Oregon, etc., Ry. Co. (40 Wash. 183; 82 Pac. Rep. 130), 260.
Kreis *v.* Missouri Pac. R. Co. (131 Mo. 533; 33 S. W. Rep. 1150), 1104.
Kreuger *v.* Louisville, etc., R. Co. (111 Ind. 51; 11 N. E. Rep. 957; 31 Am. & Eng. R. Cas. 329), 476.
Kreuziger *v.* Chicago, etc., R. Co. (73 Wis. 158), 186.
Krogg *v.* Atlanta, etc., R. Co. (77 Ga. 202; 4 Am. St. Rep. 79), 485.
Kroy *v.* Chicago, etc., R. Co. (32 Iowa 357; 10 Am. Ry. Rep. 48), 381.
Krueger *v.* Louisville, etc., R. Co. (111 Ind. 51; 11 N. E. Rep. 957; 31 Am. & Eng. R. Cas. 329), 485.
Krumm *v.* St. Louis, etc., R. Co. (71 Ark. 590; 76 S. W. Rep. 1075), 800.
Kuehn *v.* Missouri, etc., R. Co. (10 Tex. Civ. App. 649; 32 S. W. Rep. 88), 1040.
Kuhlen *v.* Boston, etc., R. Co. (Mass., 79 N. E. Rep. 815), 282.
Kuhn *v.* Jewett (34 N. J. Eq. 647), 169.
Kuhns *v.* Wisconsin, etc., R. Co. (70 Iowa 561; 31 N. W. Rep. 868), 343.
Kujawa *v.* Chicago, etc., St. Ry. Co. (116 N. W. Rep. 249), 971.
Kumler *v.* Junction R. Co. (33 Ohio St. 150), 492.
Kummer *v.* Christopher, etc., R. Co. (46 N. Y. S. R. 386; 20 N. Y. S. 116), 106.
Kunz *v.* Oregon R. & Nav. Co. (94 Pac. Rep. 504), 977.
Kurt *v.* Lake Shore & M. S. Ry. Co. (111 N. Y. S. 859), 982.
Kutchera *v.* Goodwillie (93 Wis. 448; 67 N. W. Rep. 729), 307.
Kurtner *v.* Lindell Ry. Co. (29 Mo. App. 502), 1045.
Kwiotkowski *v.* Grand Trunk R. Co. (70 Mich. 549; 38 N. W. Rep. 464), 1003.
Kyne *v.* Wilmington, etc., R. Co. (8 Houst. [Del.] 185; 14 Atl. Rep. 922), 1058.

[*References are to sections.*]

L

Lacey *v.* Louisville & N. R. Co. (152 Fed. Rep. 134), 942.
Lackawanna, etc., R. Co. *v.* Chenoweth (52 Pa. St. 382), 602.
La Croy *v.* New York, etc., R. Co. (132 N. Y. 570; 30 N. E. Rep. 391), 263.
Ladd *v.* Brocton St. Ry. Co. (Mass., 62 N. E. Rep. 730), 326.
Ladd *v.* Foster (12 Sawy. [U. S.] 547; 31 Fed. Rep. 827), 806.
Ladouceur *v.* Northern Pacific R. Co. (6 Wash. 280; 33 Pac. Rep. 556, 1080), 1022.
Laflin *v.* Buffalo, etc., R. Co. (106 N. Y. 140; 12 N. E. Rep. 599), 266.
Lagrone *v.* Mobile, etc., R. Co. (67 Miss. 592; 7 So. Rep. 432), 495.
Lahey *v.* Ottman (25 N. Y. Supp. 897; 56 N. Y. S. R. 109; 73 Hun 63), 92.
Laicher *v.* New Orleans, etc., R. Co. (28 La. Ann. 320), 1098.
Laing *v.* Colder (8 Pa. St. 479), 802.
Laird *v.* Connecticut, etc., R. Co. (62 N. H. 254; 43 Am. & Eng. R. Cas. 63), 47.
Lake Erie, etc., R. Co. *v.* Charman (67 N. E. Rep. 923), 69.
Lake Erie, etc., R. Co. *v.* Craig (73 Fed. Rep. 642; 19 C. C. A. 631), 37.
Lake Erie, etc., R. Co. *v.* Mays (4 Ind. App. 413; 30 N. E. Rep. 1106), 1070.
Lake Erie & W. R. Co. *v.* Moore (81 N. E. Rep. 85), 977.
Lake Erie R. Co. *v.* Mugg (132 Ind. 168; 31 N. E. Rep. 564), 189.
Lake Erie, etc., R. Co. *v.* People (42 Ill. App. 387), 686.
Lake Erie, etc., R. Co. *v.* Pike (31 Ill. App. 90), 1059.
Lake Shore, etc., Co. *v.* Baldwin (10 O. C. D. 333), 302.
Lake Shore, etc., R. Co. *v.* Bangs (47 Mich. 470; 11 N. W. Rep. 276; 3 Am. & Eng. R. Cas. 426), 787.
Lake Shore, etc., R. Co. *v.* Berlink (2 Ill. App. 427), 455.
Lake Shore, etc., R. Co. *v.* Blanchard (15 Ill. App. 582), 1090.
Lake Shore, etc., R. Co. *v.* Boderer (139 Ill. 596; 29 N. E. Rep. 692; 54 Am. & Eng. R. Cas. 177), 1078.
Lake Shore, etc., R. Co. *v.* Boyd (Ind., 43 N. E. Rep. 667), 1053.
Lake Shore, etc., R. Co. *v.* Boynts (16 Ind. App. 640; 45 N. E. Rep. 812), 1055.
Lake Shore, etc., R. Co. *v.* Brown (84 N. E. Rep. 25), 878.
Lake Shore, etc., R. Co. *v.* Brown (123 Ill. 162; 14 N. E. Rep. 197; 31 Am. & Eng. R. Cas. 61), 457.
Lake Shore, etc., R. Co. *v.* Cincinnati R. Co. (30 Ohio St. 604), 976.
Lake Shore, etc., R. Co. *v.* Clark (41 Ill. App. 343), 74.
Lake Shore, etc., R. Co. *v.* Clemens (5 Ill. App. 77), 991.
Lake Shore, etc., R. Co. *v.* Fitzpatrick (31 Ohio St. 479), 153.
Lake Shore, etc., R. Co. *v.* Frantz (127 Pa. St. 297; 18 Atl. Rep. 22; 39 Am. & Eng. R. Cas. 628), 921.
Lake Shore, etc., R. Co. *v.* Hart (87 Ill. 529; 19 Am. & Eng. R. Cas. 249), 1092.
Lake Shore, etc., R. Co. *v.* Johnsen (35 Ill. App. 430; 135 Ill. 641; 26 N. E. Rep. 510), 952.
Lake Shore, etc., R. Co. *v.* Knittal (33 Ohio St. 468), 381.
Lake Shore, etc., R. Co. *v.* Lavellay (36 Ohio St. 221), 263.
Lake Shore, etc., R. Co. *v.* McCormick (74 Ind. 440; 5 Am. & Eng. R. Cas. 474), 377.
Lake Shore, etc., R. Co. *v.* McIntosh (140 Ind. 261; 38 N. E. Rep. 476), 1056.
Lake Shore, etc., R. Co. *v.* Miller (25 Mich. 274; 5 Am. Ry. Rep. 478), 1019.
Lake Shore & Northern R. R. *v.* Norton (24 Pa. St. 465), 451.
Lake Shore, etc., R. Co. *v.* Parker (131 Ill. 557; 33 Ill. App. 405; 23 N. E. Rep. 237; 41 Am. & Eng. R. Cas. 339), 396.
Lake Shore, etc., R. Co. *v.* Patterson (144 Ind. 214; 42 N. E. Rep. 480), 736.
Lake Shore, etc., R. Co. *v.* Pinchin (112 Ind. 592; 13 N. E. Rep. 677; 31 Am. & Eng. R. Cas. 428), 414.
Lake Shore, etc., R. Co. *v.* Prentiss (147 U. S. 101; 58 Am. & Eng. R. Cas. 436), 178.
Lake Shore, etc., R. Co. *v.* Rosenweig (113 Pa. St. 519; 6 Atl. Rep. 545), 177.
Lake Shore, etc., R. Co. *v.* Ryan (70 Ill. App. 45), 243.
Lake Shore, etc., R. Co. *v.* Spangler (44 Ohio St. 471; 8 N. E. Rep. 467; 28 Am. & Eng. R. Cas. 319), 472.
Lake Shore, etc., R. Co. *v.* Stupak (123 Ind. 210; 23 N. E. Rep. 246; 41 Am. & Eng. R. Cas. 382), 483.
Lake Shore, etc., R. Co. *v.* Whidden (23 Ohio Cir. Ct. R. 85), 341.
Lakin *v.* Oregon, etc., R. Co. (15 Oregon 220; 15 Pac. Rep. 641; 34 Am. & Eng. R. Cas. 500), 590.
Lalor *v.* Chicago, etc., R. Co. (52 Ill. 401), 379.
Lapsley *v.* Union Pacific R. Co. (50 Fed. Rep. 172; 51 Fed. Rep. 174), 945.
Lamb *v.* Missouri Pacific Ry. Co. (147 Mo. 171; 48 S. W. Rep. 659; 51 S. W. Rep. 81), 1104.
Lambert *v.* Pulp Co. (72 Vt. 278; 47 Atl. Rep. 1085), 255.
Lambeth *v.* North Carolina R. Co. (66 N. Car. 494), 578.
Lambkin *v.* Southeastern R. Co. (5 App. Cas. 552), 82.
Lamkin *v.* Vicksburg, etc., R. Co. (42 La. Ann. 997; 8 So. Rep. 530), 732.
Lammers *v.* Great Northern R. Co. (82 Minn. 120; 84 N. W. Rep. 728), 1056.
Lammert *v.* Chicago, etc., R. Co. (9 Ill. App. 388), 824.

[*References are to sections.*]

Lancaster *v.* Connecticut, etc., Co. (92 Mo. 460; 5 S. W. Rep. 23; 1 Am. St. Rep. 739), 286.
Landon *v.* Chicago, etc., R. Co. (92 Ill. App. 216), 1046.
Lane *v.* Choctaw, etc., R. Co. (91 Pac. Rep. 883), 646.
Lane *v.* Missouri Pacific Ry. Co. (132 Mo. 4; 33 S. W. Rep. 1128), 1022.
Lane *v.* New York, etc., R. Co. (94 N. Y. S. 988; 107 App. Div. 166), 264.
Lane *v.* Ohio & M. R. Co. (6 Ohio 39), 12.
Lang *v.* Haliday, etc., R. Co. (49 Iowa 469), 917.
Lang *v.* New York, etc., R. Co. (125 N. Y. 656), 736.
Langan *v.* St. Louis, etc., R. Co. (72 Mo. 392; 3 Am. & Eng. R. Cas. 355), 408.
Langan *v.* Tyler (114 Fed. Rep. 716), 223.
Langhoff *v.* Milwaukee, etc., R. Co. (19 Wis. 489), 984.
Langley *v.* Metropolitan Ry. Co. (74 N. Y. S. 857), 125.
Langley *v.* R. R. Co. (10 Gray 103), 235.
Langlois *v.* Buffalo, etc., R. Co. (19 Barb. [N. Y.] 364), 602.
Langlois *v.* Maine Central R. Co. (84 Me. 161; 24 Atl. Rep. 804, 482.
Laning *v.* New York, etc., R. Co. (49 N. Y. 521), 344.
Lanning *v.* Chicago Great Western Ry. Co. (94 S. W. Rep. 491), 500.
Larabee *v.* New York, etc., R. Co. (182 Mass. 348; 66 N. E. Rep. 1032), 335.
Larkin *v.* Burlington, etc., R. Co. (85 Iowa 492; 52 N. W. Rep. 480), 1043.
Larkin *v.* New York, etc., R. Co. (138 N. Y. 634; 33 N. E. Rep. 1084; 46 N. Y. S. R. 658; 19 N. Y. Supp. 479), 1062.
Larkin *v.* O'Neill (48 Hun 591; 1 N. Y. Supp. 232), 95.
Larkin *v.* Williamette Valley R. Co. (13 Oregon 436; 11 Pac. Rep. 68; 57 Am. Rep. 25; 26 Am. & Eng. R. Cas. 611), 295.
Larmore *v.* Crown Point, etc., Co. (101 N. Y. 391; 56 Am. Rep. 718), 860.
Larow *v.* New York, etc., R. Co. (61 Hun [N. Y.] 11; 40 N. Y. S. R. 26; 15 N. Y. Supp. 384), 141.
Larson *v.* American, etc., Co. (40 Wash. 224; 82 Pac. Rep. 294; 111 Am. St. Rep. 904), 290.
Larson *v.* Metropolitan, etc., R. Co. (110 Mo. 234; 19 S. W. Rep. 416; 16 L. R. A. 330; 33 Am. St. Rep. 439), 279.
Larson *v.* Pittsburg, etc., Co. (71 Mo. App. 512), 320.
Larson *v.* St. Paul, etc., R. Co. (43 Minn. 423; 45 N. W. Rep. 722; 44 Am. & Eng. R. Cas. 529), 343.
Larson *v.* Salt Lake City (97 Pac. Rep. 483), 93.
Lary *v.* Cleveland, etc., R. Co. (78 Ind. 323; 41 Am. Rep. 572; 3 Am. & Eng. R. Cas. 498), 1069.
Lasalle *v.* Kostka (190 Ill. 130; 60 N. E. Rep. 72), 319.
Lasky *v.* Canadian Pacific R. Co. (83 Me. 461; 22 Atl. Rep. 367), 488.
Latham *v.* Staten Island Ry. Co. (150 Fed. Rep. 235), 932.
Latimer *v.* Metropolitan R. Co. (103 S. W. Rep. 1102), 186.
Latremonville *v.* Bennington, etc., R. Co. (63 Vt. 336; 48 Am. & Eng. R. Cas. 265; 22 Atl. Rep. 656), 133.
Lathrop *v.* Fitchburg R. Co. (150 Mass. 423), 335.
Laub *v.* Chicago, etc., R. Co. (118 Mo. App. 488; 94 S. W. Rep. 550), 557.
Laubheim *v.* Royal Netherland Co. (107 N. Y. 228; 13 N. E. Rep. 781), 298.
Laughlin *v.* Grand Rapids, etc., R. Co. (62 Mich. 220; 28 N. W. Rep. 873; 26 Am. & Eng. R. Cas. 377), 83.
Laughlin *v.* State (105 N. Y. 159), 507.
Laughran *v.* Brewer (113 Ala. 509; 21 So. Rep. 415), 508.
Lauterer *v.* Manhattan R. Co. (128 Fed. Rep. 540), 715.
Lavelle *v.* St. Paul, etc., R. Co. (40 Minn. 249; 41 N. W. Rep. 974; 38 Am. & Eng. R. Cas. 115), 527.
Lawler *v.* Androscoggin R. Co. (62 Me. 463), 476.
Lawless *v.* Connecticut, etc., R. Co. (136 Mass. 1; 18 Am. & Eng. R. Cas. 96), 491.
Lawrenceburg, etc., R. Co. *v.* Montgomery (7 Ind. 474), 771.
Lawson *v.* Chicago, etc., R. Co. (64 Wis. 447; 24 N. W. Rep. 618; 54 Am. Rep. 634; 21 Am. & Eng. R. Cas. 249), 196.
Lay *v.* Richmond, etc., R. Co. (106 No. Car. 404; 11 S. E. Rep. 412; 42 Am. & Eng. R. Cas. 110), 1077.
Leach *v.* Oregon, etc., R. Co. (29 Utah 285; 81 Pac. Rep. 90), 91.
Leahey *v.* Cas Avenue, etc., R. Co. (97 Mo. 165; 10 S. W. Rep. 58), 92.
Leake *v.* Rio Grande, etc., R. Co. (9 Utah 246; 33 Pac. Rep. 1045), 1036.
Leary *v.* Boston, etc., R. Co. (139 Mass. 580; 2 N. E. Rep. 115; 52 Am. Rep. 733; 23 Am. & Eng. R. Cas. 383), 345.
Leavenworth *v.* Hatch (57 Kan. 57; 45 Pac. Rep. 65; 57 Am. St. Rep. 309), 1053.
Leavenworth, etc., R. Co. *v.* Rice (10 Kan. 426), 995.
Leavitt *v.* Bangor, etc., R. Co. (89 Me. 509; 36 Atl. Rep. 998; 36 L. R. A. 382), 278.
Leavitt *v.* Terre Haute, etc., R. Co. (5 Ind. App. 513), 934.
Leazott *v.* Boston, etc., R. Co. (70 N. H. 5; 45 Atl. Rep. 1084), 348.
LeBarron *v.* East Boston Co. (11 Allen 316), 610.
Leduc *v.* Northern Pac. R. Co. (Minn., 100 N. W. Rep. 108), 263.
Lee *v.* Atlantic Coast Line R. Co. (54 S. E. Rep. 678), 254.
Lee *v.* Central & R. Co. (86 Ga. 231; 12 S. E. Rep. 307), 325.
Lee *v.* Chesapeake & Ohio R. Co. (Ky., 1 Am. Neg. Rep. 60), 339.
Lee *v.* Chicago, etc., R. Co. (80 Iowa

[*References are to sections.*]

172; 45 N. W. Rep. 739; 45 Am. & Eng. R. Cas. 157), 974.
Lee *v.* Detroit, etc., R. Co. (62 Mo. 565), 158.
Lee *v.* Market St. R. Co. (135 Cal. 293), 398.
Lee *v.* Michigan, etc., R. Co. (87 Mich. 574; 49 N. W. Rep. 909; 48 Am. & Eng. R. Cas. 356), 483.
Lee *v.* Missouri Pacific Ry. Co. (195 Mo. 400; 92 S. W. Rep. 614), 463.
Lee *v.* Northern Pac. Ry. Co. (Wash., 81 Pac. Rep. 834), 323.
Lee *v.* R. R. Co. (1 Am. Neg. Rep. 60), 339.
Lee *v.* St. Louis, etc., R. Co. (112 Mo. App. 372; 87 S. W. Rep. 12), 266.
Legge *v.* New York & H. R. Co. (83 N. E. Rep. 367), 557.
Leggett *v.* Western, etc., R. Co. (143 Pa. St. 39; 21 Atl. Rep. 996), 708.
Lehigh Valley R. Co. *v.* Brandmaier (113 Pa. St. 610; 6 Atl. Rep. 238), 963.
Lehigh Valley R. Co. *v.* Delachesa (145 Fed. Rep. 617), 242.
Lehigh Iron Co. *v.* Rupp (100 Pa. St. 95; 7 Am. & Eng. R. Cas. 25), 63.
Lehman *v.* Louisiana, etc., R. Co. (37 La. Ann. 705), 704.
Lehr *v.* Steinway, etc., R. Co. (118 N. Y. 556; 44 Hun 627; 23 N. E. Rep. 889), 575.
Leishman *v.* Union Iron Works (83 Pac. Rep. 30), 515.
Leitner *v.* Grieb (104 Mo. App. 173; 77 S. W. Rep. 764), 339.
LeMay *v.* Missouri Pacific Ry. Co. (105 Mo. 361; 16 S. W. Rep. 1049) 1062.
Lemon *v.* Chansler (68 Mo. 340; 30 Am. Rep. 799), 567.
Lenix *v.* Missouri Pacific Ry. Co. (76 Mo. 86), 994.
Lennox *v.* Interurban R. Co. (93 N. Y. S. R. 230; 104 App. Div. 110), 182.
Lent *v.* New York, etc., R. Co. (120 N. Y. 467; 24 N. E. Rep. 653; 31 N. Y. S. R. 538; 44 Am. & Eng. R. Cas. 373), 774.
Leonard *v.* Columbia, etc., Co. (84 N. Y. 48), 47.
Leonard *v.* New York, etc., R. Co. (10 J. & S. [N. Y.] 225), 1027.
Lepalla *v.* Cleveland, etc., Co. (Mich., 81 N. W. Rep. 558), 358.
Le Pierre *v.* Chicago, etc., R. Co. (99 Mich. 212), 484.
Lesan *v.* Maine, etc., R. Co. (77 Me. 85; 23 Am. & Eng. R. Cas. 245), 883.
Leslie *v.* Rich Hill, etc., Co. (110 Mo. 31; 19 S. W. Rep. 308), 14.
Leslie *v.* Wabash R. Co. (88 Mo. 50; 26 Am. & Eng. R. Cas. 229), 573.
Levelsmeyer *v.* St. Louis, etc., R. Co. (114 Mo. App. 412), 1094.
Levey *v.* Bigelow (6 Ind. App. 677; 34 N. E. Rep. 128), 145.
Lewes *v.* Crane & Sons (78 Vt. 216; 62 Atl. Rep. 60), 184.
Lewin *v.* Lehigh Valley R. Co. (41 App. Div. 89; 58 N. Y. Supp. 113), 1056.
Lewis *v.* Baltimore, etc., R. Co. (38 Md. 588; 10 Am. Ry. Rep. 521), 1028.
Lewis *v.* Delaware, etc., R. Co. (145 N. Y. 508; 40 N. E. Rep. 248), 789.
Lewis *v.* Eastern R. Co. (40 N. H. 187), 886.
Lewis *v.* Flint, etc., R. Co. (54 Mich. 55; 19 N. W. Rep. 744; 52 Am. Rep. 790; 18 Am. & Eng. R. Cas. 263), 577.
Lewis *v.* London, etc., R. Co. (L. R., 9 Q. B. 66; 43 L. J. Q. B. 8; 30 L. T. [N. S.] 844), 704.
Lewis *v.* Long Island, etc., R. Co. (162 N. Y. 52; 56 N. E. Rep. 548), 1051.
Lewis *v.* Mayesville, etc., R. Co. (25 Ky. L. R. 948; 76 S. W. Rep. 526), 235.
Lewis *v.* New York, etc., R. Co. (123 N. Y. 496; 26 N. E. Rep. 357; 52 Hun 614), 961.
Lewis *v.* St. Louis, etc., R. Co. (59 Mo. 495; 8 Am. Ry. Rep. 450), 495.
Lewis *v.* Seifert (116 Pa. St. 628; 11 Atl. Rep. 514), 263.
Lewis *v.* Vicksburg, etc., R. Co. (114 La. 161; 38 So. Rep. 92), 273.
Lexington Ry. Co. *v.* Herring (96 S. W. Rep. 558), 552.
Leyh *v.* Newburg, etc., R. Co. (N. Y., 6 Am. Neg. Rep. 361), 649.
Libby *v.* Maine Central R. Co. (85 Me. 34; 26 Atl. Rep. 943; 58 Am. & Eng. R. Cas. 81), 603.
Lierman *v.* Chicago, etc., R. Co. (82 Wis. 286; 52 N. W. Rep. 91), 196.
Limerick Bank *v.* Howard (71 N. H. 13; 51 Atl. Rep. 641; 93 Am. St. Rep. 489), 463.
Lien *v.* Chicago, etc., R. Co. (79 Mo. App. 475), 1014.
Lightfoot *v.* Winnebago Traction Co. (123 Wis. 479; 102 N. W. Rep. 30), 1053.
Limekiller *v.* Hannibal, etc., R. Co. (33 Kan. 83; 5 Pac. Rep. 401; 19 Am. & Eng. R. Cas. 184), 71.
Lincoln Ry. Co. *v.* Cox (48 Neb. 807; 67 N. W. Rep. 740), 118.
Lincoln *v.* Saratoga, etc., R. Co. (23 Wend. 425), 172.
Lincoln Traction Co. *v.* Shepard (Neb., 104 N. W. Rep. 882), 125.
Lindeman *v.* New York, etc., R. Co. (46 Hun 679; 11 N. Y. S. R. 837), 919.
Linder *v.* Transit Co. (103 Mo. App. 574; 77 S. W. Rep. 997), 838.
Lindsay *v.* New York, etc., Ry. Co. (112 Fed. Rep. 384; 50 C. C. A. 298), 342.
Lindsay *v.* Norfolk & S. R. Co. (N. C., 43 S. E. Rep. 511), 260.
Lindsay *v.* Oregon Short Line R. Co. (90 Pac. Rep. 984), 739.
Lindsay *v.* Tioga, etc., Co. (108 La. 468; 32 So. Rep. 464), 308.
Lindsey *v.* Pennsylvania R. Co. (26 App. Div. 503), 563.
Lindvall *v.* Woods (41 Minn. 212; 4 L. R. A. 793; 42 N. W. Rep. 1020; 39 Am. & Eng. R. Cas. 339), 480.
Ling *v.* St. Paul, etc., R. Co. (50 Minn. 160; 52 N. W. Rep. 378), 467.
Lining *v.* Illinois & R. Co. (81 Iowa 246), 29.

[*References are to sections.*]

Link *v.* Louisville, etc., R. Co. (107 Ky. 370; 54 S. W. Rep. 184), 492.
Linnehan *v.* Rollins (137 Mass. 123; 50 Am. Rep. 287), 283.
Linton Coal, etc., Co. *v.* Persons (15 Ind. App. 69; 43 N. E. Rep. 651), 319.
Lipschulz *v.* Ross (84 N. Y. S. 632), 108.
Little *v.* Central, etc., Tel. Co. (213 Pa. St. 229; 62 Atl. Rep. 848), 1048.
Little *v.* Hackett (116 U. S. 366; 29 L. Ed. 652; 6 Sup. Ct. Rep. 391), 1047.
Little *v.* Southern Ry. Co. (120 Ga. 347; 47 S. E. Rep. 953), 263.
Littlejohn *v.* Central R. Co. (74 Ga. 396), 413.
Littlejohn *v.* Fitchburg R. Co. (148 Mass. 478; 20 N. E. Rep. 103), 811.
Little Miami R. Co. *v.* Fitzpatrick (42 Ohio St. 318), 461.
Little Miami R. Co. *v.* Stevens (20 Ohio St. 415), 491.
Little Miami R. Co. *v.* Wetmore (19 Ohio St. 110), 786.
Little Rock, etc., R. Co. *v.* Askins (46 Ark. 423), 789.
Little Rock, etc., R. Co. *v.* Barker (33 Ark. 350), 206.
Little Rock, etc., R. Co. *v.* Barry (58 Ark. 198; 23 S. W. Rep. 1097; 25 L. R. A. 386), 488.
Little Rock, etc., R. Co. *v.* Cavenesse (48 Ark. 106; 2 S. W. Rep. 505), 769.
Little Rock, etc., R. Co. *v.* Cullen (54 Ark. 431; 16 S. W. Rep. 169), 1029.
Little Rock, etc., R. Co. *v.* Duffey (35 Ark. 602; 4 Am. & Eng. R. Cas. 637), 461.
Little Rock, etc., R. Co. *v.* Eubanks (48 Ark. 460; 3 S. W. Rep. 808; 31 Am. & Eng. R. Cas. 176), 325.
Little Rock, etc., R. Co. *v.* Harrell (58 Ark. 454; 25 S. W. Rep. 117), 1041.
Little Rock, etc., R. Co. *v.* Haynes (47 Ark. 497; 1 S. W. Rep. 774; 28 Am. & Eng. R. Cas. 572), 1078.
Little Rock, etc., R. Co. *v.* Hopkins (54 Ark. 213), 599.
Little Rock, etc., R. Co. *v.* Lawton (55 Ark. 428; 18 S. W. Rep. 543; 52 Am. & Eng. R. Cas. 260), 570.
Little Rock, etc., R. Co. *v.* Leverett (48 Ark. 333; 3 S. W. Rep. 50; 28 Am. & Eng. R. Cas. 459), 374.
Little Rock, etc., R. Co. *v.* Miles (40 Ark. 298; 48 Am. Rep. 10; 13 Am. & Eng. R. Cas. 10), 578.
Little Rock, etc., R. Co. *v.* Mosely (56 Fed. Rep. 109), 374.
Little Rock, etc., R. Co. *v.* Tankersly (54 Ark. 25; 14 S. W. Rep. 1099), 788.
Little Rock, etc., R. Co. *v.* Townsend (41 Ark. 382; 21 Am. & Eng. R. Cas. 619), 322.
Little Rock, etc., R. Co. *v.* Wilson (90 Tenn. 271; 16 S. W. Rep. 613), 952.
Livingston *v.* Wabash R. Co. (170 Mo. 452; 71 S. W. Rep. 136), 883.
Lochat *v.* Lutz (Ky., 22 S. W. Rep. 218), 372.
Lochbaum *v.* Oregon, etc., R. Co. (104 Fed. Rep. 852; 44 C. C. A. 220), 495.
Locke *v.* St. Paul, etc., R. Co. (15 Minn. 350), 962.
Locke *v.* Sioux City, etc., R. Co. (46 Iowa 109), 202.
Lockhart *v.* Lichtenthaler (46 Pa. St. 151), 1044.
Lockhart *v.* Little Rock, etc., R. Co. (40 Fed. Rep. 631), 230.
Lockwood *v.* Belle City R. Co. (92 Wis. 97; 65 N. W. Rep. 866), 1057.
Lockwood *v.* Chicago, etc., R. Co. (55 Wis. 50), 245.
Lockwood *v.* New York, etc., R. Co. (98 N. Y. 523), 188.
Loeffler *v.* Missouri Pacific Ry. Co. (96 Mo. 267; 9 S. W. Rep. 580), 410.
Loehring *v.* Westlake Const. Co. (118 Mo. App. 163; 94 S. W. Rep. 747), 276.
Logan *v.* Metropolitan R. Co. (183 Mo. 582; 82 S. W. Rep. 126), 95.
Lombard *v.* Chicago, etc., R. Co. (47 Iowa 494), 522.
Lomer *v.* Segal (30 Vt. 66), 43.
London, etc., R. Co. *v.* Hellawell (26 L. T. 557), 664.
Long *v.* Chicago, etc., R. Co. (48 Kan. 28; 28 Pac. Rep. 977; 15 L. R. A. 319; 53 Am. & Eng. R. Cas. 45), 741.
Long *v.* Chicago, etc., Ry. Co. (57 S. W. Rep. 802), 543.
Long *v.* Coronado R. Co. (96 Cal. 269; 31 Pac. Rep. 170), 139.
Long *v.* Horne (1 Car. & P. 612), 680.
Long *v.* Lehigh Valley R. Co. (130 Fed. Rep. 870), 852.
Long *v.* Milford (137 Pa. St. 122; 20 Atl. Rep. 425), 446.
Long *v.* Moon (107 Mo. 334; 17 S. W. Rep. 810), 276.
Long *v.* Pacific Ry. Co. (65 Mo. 225), 494.
Longabaugh *v.* Virginia City R. Co. (9 Nev. 271), 892.
Longmore *v.* Great Western R. Co. (19 C. B. [N. S.] 183), 630.
Long's Admr. *v.* Illinois Cent. R. Co. (24 Ky. L. R. 567; 58 L. R. A. 237; 68 S. W. Rep. 1095), 379.
Lookout Mt., etc., Co. *v.* Lea (Ala., 39 So. Rep. 1017), 481.
Looram *v.* Second Avenue, etc., R. Co. (11 N. Y. S. R. 652), 172.
Loranger *v.* Lake Shore, etc., R. Co. (104 Mich. 80; 62 N. W. Rep. 137), 500.
Lord *v.* Boston & M. R. Co. (65 Atl. Rep. 111), 270.
Lord *v.* Pueblo, etc., R. Co. (12 Colo. 390; 21 Pac. Rep. 148), 411.
Lorentz *v.* Robinson (61 Md. 64), 3.
Loring *v.* Kansas City, etc., R. Co. (128 Mo. 359; 31 S. W. Rep. 6), 412.
Lorsbee *v.* New York, etc., R. Co. (182 Mass. 348; 66 N. E. Rep. 1032), 385.
Loso *v.* Lancaster County (Neb., 109 N. W. Rep. 752; 8 L. R. A. [N. S.] 618), 1048.
Loucks *v.* Chicago, etc., R. Co. (31 Minn. 526; 19 Am. & Eng. R. Cas. 305; 18 N. W. Rep. 651), 946.

[*References are to sections.*]

Louisville, etc., R. Co. *v.* Ader (110 Ind. 376; 11 N. E. Rep. 437), 395.
Louisville, etc., R. Co. *v.* Allen (47 Ill. App. 465), 343.
Louisville, etc., R. Co. *v.* Allen (78 Ala. 494; 28 Am. & Eng. R. Cas. 514), 513.
Louisville, etc., R. Co. *v.* Armstrong (105 S. W. Rep. 473), 1049.
Louisville, etc., R. Co. *v.* Ballard (85 Ky. 307; 3 S. W. Rep. 530; 7 Am. St. Rep. 600; 28 Am. & Eng. R. Cas. 135), 590.
Louisville, etc., R. Co. *v.* Bates (146 Ind. 564; 45 N. E. Rep. 108), 494.
Louisville, etc., R. Co. *v.* Berry (2 Ind. App. 427; 28 N. E. Rep. 714), 344.
Louisville, etc., R. Co. *v.* Bisch (120 Ind. 549; 33 N. E. Rep. 204; 41 Am. & Eng. R. Cas. 89), 669.
Louisville, etc., R. Co. *v.* Black (89 Ala. 313; 8 So. Rep. 246; 45 Am. & Eng. R. Cas. 38), 1083.
Louisville & N. R. Co. *v.* Bodine (59 S. W. Rep. 740), 269.
Louisville, etc., R. Co. *v.* Boland (96 Ala. 626; 11 So. Rep. 667; 53 Am. & Eng. R. Cas. 169), 348.
Louisville & N. R. Co. *v.* Bouldin (121 Ala. 197; 25 So. Rep. 903), 269.
Louisville & N. R. Co. *v.* Breeden's Admr. (23 Ky. L. R. 1021, 1763; 64 S. W. Rep. 667), 232.
Louisville & N. R. Co. *v.* Brice (84 Ky. 298; 1 S. W. Rep. 483), 254.
Louisville, etc., R. Co. *v.* Brooks (83 Ky. 129), 462, 492.
Louisville, etc., R. Co. *v.* Buck (116 Ind. 566; 19 N. E. Rep. 453; 2 L. R. A. 520; 38 Am. & Eng. R. Cas. 152), 374.
Louisville, etc., R. Co. *v.* Burke (6 Coldw. [Tenn.] 45), 404.
Louisville & N. Ry. Co. *v.* Campbell (97 Ala. 147; 12 So. Rep. 574), 119.
Louisville, etc., R. Co. *v.* Case (9 Bush. [Ky.] 728), 1045.
Louisville, etc., R. Co. *v.* Cavens (9 Bush. [Ky.] 559), 462.
Louisville, etc., R. Co. *v.* Chaffin (84 Ga. 519; 11 S. E. Rep. 891), 69.
Louisville & N. R. Co. *v.* Cheatham (100 S. W. Rep. 902), 282.
Louisville, etc., R. Co. *v.* Christian Moe Brewing Co. (43 So. Rep. 723), 985.
Louisville, etc., R. Co. *v.* Coleman (86 Ky. 556; 6 S. W. Rep. 875; 31 Am. & Eng. R. Cas. 390), 1083.
Louisville, etc., R. Co. *v.* Collins (2 Duv. [Ky.] 114), 461.
Louisville, etc., R. Co. *v.* Commonwealth (80 Ky. 143; 44 Am. Rep. 468; 14 Am. & Eng. R. Cas. 613), 982.
Louisville, etc., R. Co. *v* Connor (9 Heisk. [Tenn.] 19; 19 Am. Ry. Rep. 368), 69.
Louisville, etc., R. Co. *v.* Connor (2 Baxt. 382; 21 Am. Ry. Rep. 194), 193.
Louisville, etc., R. Co. *v.* Cooper (68 Miss. 368; 8 So. Rep. 747), 1096.
Louisville, etc., R. Co. *v.* Cooper (Ky., 6 Am. & Eng. R. Cas. 5), 1085.
Louisville, etc., R. Co. *v.* Conroy (63 Miss. 562), 311.
Louisville, etc., R. Co. *v.* Coppage (Ky., 13 S. W. Rep. 1086), 62.
Louisville, etc., R. Co. *v.* Cottengim (104 S. W. Rep. 280; 31 Law Rep. 871), 555.
Louisville, etc., R. Co. *v.* Crank (119 Ind. 542; 21 N. E. Rep. 31; 4 Am. & Eng. R. Cas. 158), 570.
Louisville, etc., R. Co. *v.* Creek (130 Ind. 139; 29 N. E. Rep. 481; 14 L. R. A. 733), 1056.
Louisville, etc., R. Co. *v.* Crunk (119 Ind. 542; 21 N. E. Rep. 31; 41 Am. & Eng. R. Cas. 158), 789.
Louisville, etc., R. Co. *v.* Dancy (Ala., 11 So. Rep. 796), 724.
Louisville & St. L. R. Co. *v.* Davis (106 S. W. Rep. 304), 877.
Louisville & N. R. Co. *v.* Deason (96 S. W. Rep. 1115), 722.
Louisville & N. R. Co. *v.* Dickey (104 S. W. Rep. 329), 185.
Louisville, etc., R. Co. *v.* Dillard (114 Tenn. 240; 86 S. W. Rep. 313), 354.
Louisville, etc., R. Co. *v.* Dougherty (108 S. W. Rep. 336), 631.
Louisville, etc., R. Co. *v.* Douglas (69 Miss. 723; 11 So. Rep. 938; 30 Am. St. Rep. 582), 740.
Louisville, etc., R. Co. *v.* Earl (94 Ky. 368; 22 S. W. Rep. 607), 91.
Louisville, etc., R. Co. *v.* Ellis (97 Ky. 330; 30 S. W. Rep. 979), 730.
Louisville, etc., R. Co. *v.* Eves (1 Ind. App. 224; 27 N. E. Rep. 580), 394.
Louisville, etc., R. Co. *v.* Falvey (104 Ind. 409; 3 N. E. Rep. 489; 23 Am. & Eng. R. Cas. 522), 168.
Louisville & N. R. Co. *v.* Farris (100 S. W. Rep. 870), 866.
Louisville, etc., R. Co. *v.* Faylor (126 Ind. 126; 25 N. E. Rep. 869), 851.
Louisville, etc., R. Co. *v.* Finn (16 Ky. L. R. 57), 744.
Louisville, etc., R. Co. *v.* Fleming (14 Lea. [Tenn.] 128; 18 Am. & Eng. R. Cas. 347), 586.
Louisville, etc., R. Co. *v.* Fox (11 Bush. [Ky.] 495), 83.
Louisville, etc., R. Co. *v.* Frawley (110 Ind. 18; 9 N. E. Rep. 594; 28 Am. & Eng. R. Cas. 308), 359.
Louisville, etc., R. Co. *v.* French (69 Miss. 121; 12 So. Rep. 338), 961.
Louisville, etc., R. Co. *v.* Gardner (1 Lea [Tenn.] 688), 973.
Louisville, etc., R. Co. *v.* Goetz (79 Ky. 442; 42 Am. Rep. 227; 14 Am. & Eng. R. Cas. 627), 955.
Louisville, etc., R. Co. *v.* Goodykoontz (119 Ind. 111), 62.
Louisville, etc., R. Co. *v.* Goss (137 Ala. 319; 34 So. Rep. 1007), 513.
Louisville & N. R. Co. *v.* Goulding (42 So. Rep. 854), 980.
Louisville, etc., R. Co. *v.* Gower (85 Tenn. 465; 3 S. W. Rep. 824; 31 Am. & Eng. R. Cas. 168), 332.
Louisville, etc., R. Co. *v.* Graham (124 Ind. 89; 24 N. E. Rep. 668), 475.

[*References are to sections.*]

Louisville, etc., R. Co. *v.* Guinan (11 Lea [Tenn.] 98; 47 Am. Rep. 279; 13 Am. & Eng. R. Cas. 37), 176.
Louisville, etc., R. Co. *v.* Hairston (97 Ala. 351; 12 So. Rep. 299), 1063.
Louisville, etc., R. Co. *v.* Hale (102 Ky. 600; 44 S. W. Rep. 213; 42 L. R. A. 293; 10 Am. & Eng. R. Cas. [N. S.] 73), 690.
Louisville, etc., R. Co. *v.* Hall (87 Ala. 708; 6 So. Rep. 277; 4 L. R. A. 710; 39 Am. & Eng. R. Cas. 298), 399.
Louisville, etc., R. Co. *v.* Hall (91 Ala. 112; 8 So. Rep. 371; 48 Am. & Eng. R. Cas. 170), 406.
Louisville, etc., R. Co. *v.* Hanning (131 Ind. 528; 31 N. E. Rep. 187; 53 Am. & Eng. R. Cas. 452), 321.
Louisville, etc., Co. *v.* Hart (92 S. W. Rep. 951), 98.
Louisville, etc., R. Co. *v.* Hawthorne (45 Ill. App. 635), 479.
Louisville, etc., R. Co. *v.* Hawthorne (147 Ill. 226; 35 N. E. Rep. 534), 492.
Louisville, etc., R. Co. *v.* Head (80 Ind. 117; 4 Am. & Eng. R. Cas. 619), 947.
Louisville, etc., R. Co. *v.* Heck (151 Ind. 292; 50 N. E. Rep. 988; 11 Am. & Eng. R. Cas. [N. S.] 382), 488.
Louisville & N. R. Co. *v.* Helm (89 S. W. Rep. 709; 28 Ky. L. R. 603), 495.
Louisville, etc., R. Co. *v.* Hendricks (128 Ind. 462; 28 N. E. Rep. 58), 104.
Louisville, etc., R. Co. *v.* Henley (92 Tenn. 208; 721 S. W. Rep. 326), 376.
Louisville, etc., R. Co. *v.* Hine (121 Ala. 234; 14 Am. & Eng. R. Cas. [N. S.] 382), 39.
Louisville, etc., R. Co. *v.* Hocker (111 Ky. 707; 64 S. W. Rep. 638; 65 S. W. Rep. 119), 414.
Louisville, etc., R. Co. *v.* Hoskin's Admr. (108 S. W. Rep. 305), 875.
Louisville, etc., R. Co. *v.* Howard (82 Ky. 212; 19 Am. & Eng. R. Cas. 98), 861.
Louisville & N. R. Co. *v.* Hubbard (41 So. Rep. 814), 903.
Louisville, etc., R. Co. *v.* Jackson (106 Tenn. 438; 61 S. W. Rep. 771), 499.
Louisville, etc., R. Co. *v.* Johnson (108 Ala. 62; 19 So. Rep. 511; 31 L. R. A. 372), 730.
Louisville, etc., R. Co. *v.* Johnson (92 Ala. 204; 9 So. Rep. 269; 47 Am. & Eng. R. Cas. 611), 1070.
Louisville, etc., R. Co. *v.* Johnson (44 Ill. App. 56), 453.
Louisville, etc., R. Co. *v.* Johnson (81 Fed. Rep. 679; 53 U. S. App. 381), 136.
Louisville & N. R. Co. *v.* Jones (Fla., 34 So. Rep. 246), 56.
Louisville, etc., R. Co. *v.* Jones (83 Ala. 376; 3 So. Rep. 902; 34 Am. & Eng. R. Cas. 417), 639.
Louisville, etc., R. Co. *v.* Jones (108 Ind. 551), 608.
Louisville, etc., R. Co. *v.* Joshlin (110 S. W. Rep. 382), 950.
Louisville, etc., R. Co. *v.* Katzenberger (16 Lea [Tenn.] 380; 26 Am. St. Rep. 334), 565.
Louisville, etc., R. Co. *v.* Keefer (146 Ind. 21; 44 N. E. Rep. 796; 38 L. R. A. 93), 564.
Louisville, etc., R. Co. *v.* Kelly (92 Ind. 371; 47 Am. Rep. 149; 13 Am. & Eng. R. Cas. 1), 690.
Louisville, etc., R. Co. *v.* Kenley (92 Tenn. 207; 21 S. W. Rep. 326), 474.
Louisville, etc., R. Co. *v.* Lahr (86 Tenn. 335; 6 S. W. Rep. 663), 476.
Louisville, etc., R. Co. *v.* Lawler (107 S. W. Rep. 702), 689.
Louisville, etc., R. Co. *v.* Lee (47 Ill. App. 384), 965.
Louisville, etc., R. Co. *v.* Lee (97 Ala. 325; 12 So. Rep. 48), 790.
Louisville, etc., R. Co. *v.* Logan (88 Ky. 232; 10 S. W. Rep. 655), 730.
Louisville, etc., R. Co. *v.* Long (Ky., 22 S. W. Rep. 747), 674.
Louisville & N. R. Co. *v.* Lowe (80 S. W. Rep. 768), 269.
Louisville & N. R. Co. *v.* Lowe (Ky., 6 S. W. Rep. 736), 273.
Louisville, etc., R. Co. *v.* Lucas' Admr. (98 S. W. Rep. 308), 478.
Louisville, etc., R. Co. *v.* Lucas (119 Ind. 583; 21 N. E. Rep. 968), 710.
Louisville, etc., R. Co. *v.* Mahoney (7 Bush. [Ky.] 235.
Louisville, etc., R. Co. *v.* Marriott (Ky., 19 Am. & Eng. R. Cas. 509), 104.
Louisville, etc., R. Co. *v.* Martin (87 Tenn. 398; 10 S. W. Rep. 772; 3 L. R. A. 282), 469.
Louisville, etc., R. Co. *v.* Mask (64 Miss. 738; 2 So. Rep. 360), 708.
Louisville, etc., R. Co. *v.* McCoy (81 Ky. 403; 15 Am. & Eng. R. Cas. 277), 406.
Louisville, etc., R. Co. *v.* McNary's Admr. (108 S. W. Rep. 898), 983.
Louisville & N. R. Co. *v.* Mertz (Ala., 40 So. Rep. 60), 126.
Louisville, etc., R. Co. *v.* Miller (Ind., 37 N. E. Rep. 343; 58 Am. & Eng. R. Cas. 304), 105.
Louisville, etc., R. Co. *v.* Minogue (90 Ky. 369; 14 S. W. Rep. 357), 582.
Louisville, etc., R. Co. *v.* Mitchell (87 Ky. 327), 491.
Louisville, etc., R. Co. *v.* Molloy (Ky., 91 S. W. Rep. 685), 1039.
Louisville, etc., R. Co. *v.* Mothershed (97 Ala. 261; 12 So. Rep. 714), 105.
Louisville & N. R. Co. *v.* Mulder (42 So. Rep. 742), 682.
Louisville, etc., R. Co. *v.* Murphy (9 Bush. [Ky.] 522), 1058.
Louisville & N. R. Co. *v.* Neltschi's Exrs. (97 S. W. Rep. 14), 983.
Louisville & Nashville R. Co. *v.* Nitsche (126 Ind. 229; 26 N. E. Rep. 51), 37.
Louisville, etc., R. Co. *v.* Orr (91 Ala. 548; 8 So. Rep. 360), 400.
Louisville, etc., R. Co. *v.* Orr (94 Ala. 602; 10 So. Rep. 167), 90.
Louisville, etc., R. Co. *v.* Patterson (69 Miss. 421; 13 So. Rep. 697), 690.
Louisville, etc., R. Co. *v.* Payne (104 S. W. Rep. 752), 706.

[*References are to sections.*]

Louisville, etc., R. Co. *v.* Pearson (97 Ala. 211; 12 So. Rep. 176), 400.
Louisville, etc., R. Co. *v.* Pedigo (108 Ind. 481; 8 N. E. Rep. 627; 27 Am. & Eng. R. Cas. 310), 605.
Louisville, etc., R. Co. *v.* Petty (67 Miss. 255; 7 So. Rep. 351; 41 Am. & Eng. R. Cas. 444), 354.
Louisville, etc., R. Co. *v.* Phillipps (112 Ind. 59; 13 N. E. Rep. 132; 31 Am. & Eng. R. Cas. 432), 882.
Louisville, etc., R. Co. *v.* Potts (92 Ky. 30; 17 S. W. Rep. 185), 408.
Louisville & N. R. R. Co. *v.* Reagan (96 Tenn. [12 Pickle] 128; 33 S. W. Rep. 1050), 41.
Louisville, etc., R. Co. *v.* Reynolds (24 Ky. L. R. 1402; 71 S. W. Rep. 516), 759.
Louisville, etc., R. Co. *v.* Richardson (100 Ala. 232; 14 So. Rep. 209), 492.
Louisville, etc., R. Co. *v.* Ricketts (Ky., 19 S. W. Rep. 182), 786.
Louisville, etc., R. Co. *v.* Ritter (85 Ky. 368; 3 S. W. Rep. 591; 28 Am. & Eng. R. Cas. 167), 611.
Louisville, etc., R. Co. *v.* Robertson (9 Heisk. [Tenn.] 276), 404.
Louisville, etc., R. Co. *v.* Robinson (Ala., 37 So. Rep. 431), 55.
Louisville, etc., R. Co. *v.* Rush (127 Ind. 545; 26 N. E. Rep. 1010), 198.
Louisville, etc., R. Co. *v.* Sandford (117 Ind. 265; 19 N. E. Rep. 770), 341.
Louisville, etc., R. Co. *v.* Sawyer (86 S. W. Rep. 386), 901.
Louisville, etc., R. Co. *v.* Schmetzer (Ky., 22 S. W. Rep. 603), 97.
Louisville, etc., R. Co. *v.* Schmidt (134 Ind. 16; 33 N. E. Rep. 774; 55 Am. & Eng. R. Cas. 128), 886.
Louisville, etc., R. Co. *v.* Schmidt (8 Am. & Eng. R. Cas. 248), 886.
Louisville, etc., R. Co. *v.* Schuster (Ky., 35 Am. & Eng. R. Cas. 407; 7 S. W. Rep. 874), 1034.
Louisville, etc., R. Co. *v.* Shanks (94 Ind. 598; 19 Am. & Eng. R. Cas. 28), 173.
Louisville, etc., R. Co. *v.* Sheets (Ky., 13 S. W. Rep. 248; 41 Am. & Eng. R. Cas. 470), 477.
Louisville, etc., R. Co. *v.* Shire's Admr. (108 Ill. 617), 451.
Louisville, etc., R. Co. *v.* Sickings (5 Bush. [Ky.] 1), 173.
Louisville & N. R. Co. *v.* Simpson's Admr. (23 Ky. L. R. 1075; 64 S. W. Rep. 750), 273.
Louisville, etc., R. Co. *v.* Smith (129 Ala. 53; 30 So. Rep. 571), 323.
Louisville, etc., R. Co. *v.* Snyder (117 Ind. 435; 20 N. E. Rep. 284; 3 L. R. A. 434; 37 Am. & Eng. R. Cas. 137), 605.
Louisville, etc., R. Co. *v.* Southwick (16 Ind. App. 486; 44 N. E. Rep. 263), 491.
Louisville, etc., R. Co. *v.* Stacker (86 Tenn. 343; 6 S. W. Rep. 737; 6 Am. St. Rep. 840), 568.
Louisville, etc., R. Co. *v.* Stewart (56 Fed. Rep. 808), 92.
Louisville, etc., R. Co. *v.* Stommel (126 Ind. 35; 25 N. E. Rep. 863), 1009.
Louisville, etc., R. Co. *v.* Sullivan (81 Ky. 624; 16 Am. & Eng. R. Cas. 390), 390.
Louisville & N. R. Co. *v.* Survant (44 S. W. Rep. 88), 269.
Louisville, etc., R. Co. *v.* Taylor (126 Ind. 126; 25 N. E. Rep. 869), 674.
Louisville & N. R. Co. *v.* Thomas (87 Miss. 600; 40 So. Rep. 257), 258.
Louisville, etc., R. Co. *v.* Thompson (107 Ind. 442; 8 N. E. Rep. 18; 57 Am. Rep. 120; 27 Am. & Eng. R. Cas. 88), 851.
Louisville, etc., R. Co. *v.* Thompson (64 Miss. 584; 1 So. Rep. 840; 30 Am. & Eng. R. Cas. 541), 631.
Louisville, etc., R. Co. *v.* Tow (Ky., 63 S. W. Rep. 27; 66 L. R. A. 941), 283.
Louisville, etc., R. Co. *v.* Trammel (93 Ala. 350), 194.
Louisville, etc., R. Co. *v.* Treadway (142 Ind. 475; 40 N. E. Rep. 807), 625.
Louisville, etc., R. Co. *v.* Tucker's Admr. (23 Ky. L. R. 1929; 65 S. W. Rep. 453), 366.
Louisville, etc., R. Co. *v.* Utz (133 Ind. 265; 32 N. E. Rep. 881), 1.
Louisville & N. R. Co. *v.* Vincent (95 S. W. Rep. 179), 263.
Louisville, etc., R. Co. *v.* Wade (35 So. Rep. 863), 518.
Louisville, etc., R. Co. *v.* Wagner (153 Ind. 420; 53 N. E. Rep. 927; 14 Am. & Eng. R. Cas. [N. S.] 706), 508.
Louisville, etc., R. Co. *v.* Wallace (90 Tenn. 53; 15 S. W. Rep. 921), 398.
Louisville, etc., R. Co. *v.* Watkins (Ky., 12 Am. & Eng. R. Cas. 89), 1093.
Louisville, etc., R. Co. *v.* Webb (90 Ala. 185; 8 So. Rep. 518; 49 Am. & Eng. R. Cas. 427), 943.
Louisville & C. B. Co. *v.* Wiesan (21 Fla. 700), 27.
Louisville, etc., R. Co. *v.* Willis (83 Ky. 57), 304.
Louisville & N. R. Co. *v.* Wilson (100 S. W. Rep. 302), 924.
Louisville, etc., R. Co. *v.* Wolfe (80 Ky. 82), 626.
Louisville, etc., R. Co. *v.* Wood (113 Ind. 544; 14 N. E. Rep. 572; 16 N. E. Rep. 197), 664.
Louisville, etc., R. Co. *v.* Wright (115 Ind. 378; 16 N. E. Rep. 145; 38 Am. & Eng. R. Cas. 41), 97.
Louisville & N. R. Co. *v.* York (128 Ala. 305; 30 So. Rep. 676), 264.
Loushay *v.* Erie R. Co. (88 N. Y. S. R. 446; 95 App. Div. 102), 338.
Lovejoy *v.* Boston, etc., R. Co. (125 Mass. 79), 326.
Lovell *v.* Kansas City So. Ry. Co. (121 Mo. App. 466; 97 S. W. Rep. 193), 866.
Lowden *v.* Pennsylvania Co. (82 N. E. Rep. 941), 991.
Lowell *v.* Boston, etc., R. Co. (23 Pick. [Mass.] 24; 34 Am. Dec. 23), 282.
Lowenstein *v.* Missouri Pacific Ry. Co. (110 Mo. App. 689; 117 Mo. App. 372), 881.

[References are to sections.]

Lowenstein *v.* Missouri Pacific Ry. Co. (Mo. App., 113 S. W. Rep. 1012), 1069.
Lowery *v.* Ry. Co. (99 N. Y. 158), 38.
Loyd *v.* Hannibal, etc., R. Co. (53 Mo. 509; 12 Am. Ry. Rep. 474), 833.
Lucas *v.* Milwaukee, etc., R. Co. (33 Wis. 41), 561.
Lucas *v.* New Bedford R. Co. (6 Gray [Mass.] 64), 570.
Luce *v.* Minneapolis, etc., R. Co. (67 Iowa 75; 24 N. W. Rep. 600), 504.
Luebke *v.* Chicago, etc., R. Co. (59 Wis. 127; 17 N. W. Rep. 870; 48 Am. Rep. 483; 15 Am. & Eng. R. Cas. 183), 475.
Luebke *v.* Railway Co. (63 Wis. 91; 23 N. W. Rep. 136), 263.
Luman *v.* Golden Ancient Channel Min. Co. (74 Pac. Rep. 30), 98.
Lung Chung *v.* Northern Pac. R. Co. (19 Fed. Rep. 254; 10 Saw. [N. S.] 17; 16 Am. & Eng. R. Cas. 548), 52.
Lunt *v.* London, etc., R. Co. (1 Q. B. 277; 12 Jur. [N. S.] 409; 35 L. J. Q. B. 105; 14 W. R. 497; 14 L. T. 225), 929.
Lutz *v.* Atlantic, etc., R. Co. (N. Mex., 30 Pac. Rep. 912; 53 Am. & Eng. R. Cas. 478), 139.
Lusby *v.* Atchison, etc., R. Co. (41 Fed. Rep. 181; 41 Am. & Eng. R. Cas. 93), 651.
Luse *v.* Union Pacific R. Co. (57 Kan. 361; 46 Pac. Rep. 768), 708.
Lustig *v.* New York, etc., R. Co. (48 N. Y. S. R. 916), 188.
Lyman *v.* Boston, etc., R. Co. (N. H., 20 Atl. Rep. 976; 45 Am. & Eng. R. Cas. 163), 104.
Lynch *v.* Boston, etc., R. Co. (159 Mass. 536; 34 N. E. Rep. 1072), 265.
Lynch *v.* Chicago, etc., R. Co. (106 S. W. Rep. 68), 492.
Lynch *v.* Mayor, etc. (47 Hun [N. Y.] 524; 15 N. Y. S. R. 103), 405.
Lynch *v.* Metropolitan Ry. Co. (112 Mo. 433; 20 S. W. Rep. 642), 1000.
Lynch *v.* St. Joseph, etc., R. Co. (111 Mo. 601; 19 S. W. Rep. 1114), 1063.
Lynfield *v.* Old Colony R. Co. (64 Mass. 562; 57 Am. Dec. 124), 946.
Lyon *v.* Boston, etc., R. Co. (107 Fed. Rep. 386), 50.
Lyon *v.* Charleston, etc., Ry. (58 S. E. Rep. 12; 77 S. C. 328), 496.
Lyon *v.* Cumberland Valley R. Co. (23 Pa. St. 384), 469.
Lyon *v.* St. Louis, etc., R. Co. (6 Mo. App. 516, 517), 912.
Lyons *v.* Erie R. Co. (57 N. Y. 489), 29.
Lyttle *v.* Chicago, etc., Ry. Co. (84 Mich. 289; 47 N. W. Rep. 573), 269.

M

Mabry *v.* North Carolina R. Co. (139 N. C. 388; 52 S. E. Rep. 124), 535.
McAdoo *v.* Richmond, etc., R. Co. (105 No. Car. 140; 11 S. E. Rep. 316; 41 Am. & Eng. R. Cas. 524), 1092.
McAfee *v.* Vicksburg, etc., R. Co. (42 La. Ann. 790; 7 So. Rep. 720), 593.
McAllister *v.* Burlington, etc., R. Co. (64 Iowa 395; 19 Am. & Eng. R. Cas. 108), 1095.
McAuley *v.* New York Cent. R. Co. (97 N. Y. S. 631; 111 App. Div. 117), 258.
McAunich *v.* Mississippi, etc., R. Co. (20 Iowa 338), 504.
McBride *v.* Berman (Ark., 94 S. W. Rep. 913), 68.
McBride *v.* Des Moines, etc., R. Co. (Iowa, 109 N. W. Rep. 618), 1043.
McBride *v.* Indianapolis, etc., R. Co. (5 Ind. App. 482; 32 N. E. Rep. 579), 419.
McBride *v.* Northern Pacific R. Co. (19 Oregon 64; 23 Pac. Rep. 814; 42 Am. & Eng. R. Cas. 146), 1016.
McCabe *v.* Chicago, etc., R. Co. (88 Wis. 531; 60 N. W. Rep. 260), 359.
McCabe *v.* Dry Dock, etc., R. Co. (15 Daly 504; 8 N. Y. Supp. 336; 28 N. Y. S. R. 879), 92.
McCabe *v.* Montana Cent. R. Co. (Mont., 76 Pac. Rep. 701), 249.
McCabe & Steen Const. Co. *v.* Wilson (87 Pac. Rep. 320), 252.
McCafferty *v.* Pennsylvania R. Co. (193 Pa. St. 339; 44 Atl. Rep. 435), 593.
McCafferty *v.* Spuyton-Duville, etc., R. Co. (61 N. Y. 178), 291.
McCaffrey *v.* Delaware, etc., Co. (41 N. Y. S. R. 221; 16 N. Y. Supp. 495; 137 N. Y. 568; 33 N. E. Rep. 339), 1052.
McCaffrey *v.* Delaware, etc., R. Co. (137 N. Y. 568; 33 N. E. Rep. 339; 62 Hun 618),
McCall *v.* New York, etc., R. Co. (54 N. Y. 642), 1025.
McCallum *v.* Long Island R. Co. (38 Hun [N. Y.] 569), 1045.
McCann *v.* Kings County R. Co. (46 N. Y. S. R. 327; 19 N. Y. Supp. 668), 294.
McCarragher *v.* Rogers (120 N. Y. 526; 24 N. E. 812), 95.
McCarthy *v.* Chicago, etc., R. Co. (18 Kan. 46), 49.
McCarthy *v.* Muir (50 Ill. App. 510), 255.
MacCarthy *v.* Whitcomb (110 Wis. 113; 85 N. W. Rep. 707), 139.
McCarty *v.* Railway Co. (105 Mo. App. 596; 80 S. W. Rep. 7), 119.
McCaslin *v.* Lake Shore, etc., R. Co. (93 Mich. 553; 52 Am. & Eng. R. Cas. 290; 53 N. W. Rep. 724), 790.
McCauley *v.* Tennessee, etc., R. Co. (93 Ala. 356; 9 So. Rep. 611; 47 Am. & Eng. R. Cas. 580), 568.
McCawley *v.* Furness R. Co. (L. R., 8 Q. B. 57), 850.
McCawley *v.* Ry. Co. (4 Moak's Eng. 218; L. R., 8 Q. B. 57), 567.
McChesney *v.* Panama R. Co. (49 N. Y. S. R. 148; 21 N. Y. Supp. 207), 488.
McClanahan *v.* Vicksburg, etc., R. Co. (111 La. Ann. 781), 398.
McClaren *v.* Chicago, etc., Ry. Co. (80 Wis. 280; 49 N. W. Rep. 963), 258.

[*References are to sections.*]

McClaren *v.* Indianapolis, etc., R. Co. (83 Ind. 319; 8 Am. & Eng. R. Cas. 217), 1074.
McClary *v.* Sioux City R. Co. (3 Neb. 44), 610.
McClellan *v.* Long Island R. Co. (20 J. & S. [N. Y.] 22; 107 N. Y. 623; 13 N. E. Rep. 939.
McClelland *v.* Louisville, etc., R. Co. (94 Ind. 276; 18 Am. & Eng. R. Cas. 260), 39.
McClintock *v.* Pennsylvania, etc., R. Co. (21 W. N. C. 133), 715.
McCook *v.* Dublin R. Co. (58 S. E. Rep. 491), 555.
McCool *v.* Lucas, etc., Co. (30 W. N. C. 251; 24 Atl. Rep. 350), 303.
McCombs *v.* Ry. Co. (130 Pa. St. 182; 18 Atl. Rep. 613), 252.
McCorkle *v.* Chicago, etc., Ry. Co. (Iowa, 18 Am. & Eng. R. Cas. 156), 567.
McCormick *v.* Kansas City, etc., R. Co. (50 Mo. App. 109), 106.
McCormick *v.* Nassau, etc., R. Co. (18 App. Div. 333; 46 N. Y. Supp. 230), 1050.
McCoy *v.* Kansas City, etc., R. Co. (36 Mo. App. 445), 815.
McCoy *v.* Central of Georgia Ry. Co. (62 S. E. Rep. 297), 962.
McCoy *v.* Westborough (172 Mass. 504; 52 N. E. Rep. 1064), 509.
McCrary *v.* Illinois Central R. Co. (3 Neb. 44), 32.
McCray *v.* Galveston, etc., R. Co. (89 Tex. 168; 34 S. W. Rep. 35; 3 Am. & Eng. R. Cas. [N. J.] 276), 110.
McCreary *v.* Boston, etc., R. Co. (156 Mass. 316; 31 N. E. Rep. 126), 1078.
McDade *v.* Washington, etc., R. Co. (5 Mackey [D. C.] 144; 26 Am. & Eng. R. Cas. 325), 151.
McDaniel *v.* Highland Avenue R. Co. (90 Ala. 64; 8 So. Rep. 41), 772.
McDermon *v.* Southern Pacific R. Co. (122 Fed. Rep. 669), 529.
McDermott *v.* Chicago, etc., R. Co. (82 Wis. 246; 52 N. W. Rep. 85), 785.
McDermott *v.* Hannibal, etc., R. Co. (87 Mo. 285; 28 Am. & Eng. R. Cas. 528; 73 Mo. 516; 2 Am. & Eng. R. Cas. 85; 39 Am. Rep. 526), 483.
McDermott *v.* Iowa Falls R. Co. (Iowa, 47 N. W. Rep. 1037), 302.
McDermott *v.* New York, etc., R. Co. (28 Hun 325; 97 N. Y. 654), 862.
McDermott *v.* Pacific R. Co. (30 Mo. 115), 139.
McDermott *v.* Railway Co. (73 Mo. 516), 261.
McDonald *v.* Boston, etc., R. Co. (87 Me. 466; 32 Atl. Rep. 1010; 2 Am. & Eng. R. Cas. [N. S.] 293), 789.
McDonald *v.* Chicago, etc., R. Co. (41 Minn. 439; 43 N. W. Rep. 380), 406.
McDonald *v.* Chicago, etc., R. Co. (26 Iowa 124), 782.
McDonald *v.* Covington, etc., R. Co. (107 S. W. Rep. 726), 916.
McDonald *v.* Illinois R. Co. (88 Iowa 345; 55 N. W. Rep. 102), 625.
McDonald *v.* International, etc., R. Co. (22 S. W. Rep. 939; 86 Tex. 1; 55 Am. & Eng. R. Cas. 280), 446.
McDonald *v.* Kansas. City, etc., R. Co. (127 Mo. 38; 29 S. W. Rep. 848), 789.
McDonald *v.* Long Island R. Co. (116 N. Y. 546; 22 N. E. Rep. 1068; 43 Hun 637), 708.
McDonald *v.* Metropolitan St. Ry. Co. (93 App. Div. [N. Y.] 238), 398.
McDonald *v.* New York, etc., R. Co. (186 Mass. 474; 72 N. E. Rep. 55), 106.
McDonald *v.* New York, etc., R. Co. (Mass., 78 N. E. Rep. 548), 358.
Mac Donald *v.* New York, etc., R. Co. (63 Hun 587; 45 N. Y. S. R. 711), 492.
McDonald *v.* Pittsburg, etc., R. Co. (144 Ind. 459; 43 N. E. Rep. 447; 32 L. R. A. 309; 55 Am. St. Rep. 185), 69.
McDonnell *v.* New York, N. H. & H. R. R. (78 N. E. Rep. 548), 255.
McDowell *v.* Georgia R. Co. (60 Ga. 320), 62.
McElroy *v.* Nashua & Lowell R. Co. (4 Cush. 403), 17.
McFadden *v.* Santa Anna, etc., R. Co. (11 L. R. A. 252; 87 Cal. 464; 25 Pac. Rep. 681), 1056.
McFee *v.* Vicksburg, etc., R. Co. (42 La. Ann. 790; 7 So. Rep. 720), 600.
McGee *v.* Missouri Pacific Ry. Co. (92 Mo. 208; 4 S. W. Rep. 739; 31 Am. & Eng. R. Cas. 1), 562.
McGeehan *v.* Lehigh Valley R. Co. (149 Pa. St. 188; 24 Atl. Rep. 205; 50 Am. & Eng. R. Cas. 32), 795.
McGhee *v.* Willis (Ala., 32 So. Rep. 301; 134 Ala. 281), 238.
McGill *v.* Michigan & C. Co. (144 Fed. Rep. 788), 23.
McGill *v.* Pittsburg, etc., R. Co. (152 Pa. St. 331; 25 Atl. Rep. 540), 1014.
McGinney *v.* Canadian Pacific R. Co. (7 Man. 151), 785.
McGinnis *v.* Canadian So. R. Co. (49 Mich. 466; 13 N. W. Rep. 819; 8 Am. & Eng. R. Cas. 135), 301.
McGinnis *v.* Chicago, R. I., etc., R. Co. (Mo., 98 S. W. Rep. 590), 234.
McGinnis *v.* Missouri Car, etc., Co. (174 Mo. 225; 73 S. W. Rep. 586; 97 Am. St. Rep. 553), 49.
McGinnis *v.* Mo. Pac. Ry. Co. (21 Mo. App. 399), 737.
McGinnis *v.* Rigby, etc., Co. (Mo., 99 S. W. Rep. 4), 388.
McGoffin *v.* Missouri Pac. Ry. Co. (Mo., 47 Am. & Eng. R. Cas. 491), 563.
McGovern *v.* Central, etc., R. Co. (123 N. Y. 280; 25 N. E. Rep. 373; 53 Hun 635), 360.
McGovern *v.* Interurban R. Co. (Iowa, 111 N. W. 412; 13 L. R. A. [N. S.] 476), 710.
McGovern *v.* New York, etc., R. Co. (67 N. Y. 417; 15 Am. Ry. Rep. 119), 1003.
McGovern *v.* Railway Co. (123 N. Y. 280; 25 N. E. Rep. 373), 263.
McGowan *v.* International, etc., R. Co.

[References are to sections.]

(85 Tex. 289; 20 S. W. Rep. 80), 194.
McGowan *v.* La Plata Min. & Sm. Co. (9 Fed. Rep. 861), 269.
McGowen *v.* St. Louis, etc., R. Co. (61 Mo. 532), 474.
McGrath *v.* Hudson River R. Co. (19 How. Pr. [N. Y.] 211; 32 Barb. 144), 1007.
McGrath *v.* New York, etc., R. Co. (59 N. Y. 468), 932.
McGrath *v.* New York, etc., R. Co. (1 T. & C. [N. Y.] 243), 944.
McGrath *v.* St. Louis Transit Co. (94 S. W. Rep. 872), 113.
McGregor *v.* Pennsylvania R. Co. (212 Pa. 482; 61 Atl. Rep. 1017), 252.
McGuire *v.* Chicago & E. I. R. Co. (120 Ill. App. 111), 861.
McGuire *v.* Chicago, etc., R. Co. (108 N. W. Rep. 902), 504.
McGuire *v.* Vicksburg, etc., R. Co. (46 La. Ann. 1543; 16 So. Rep. 457), 1040.
McGuirk *v.* Shattuck (160 Mass. 45; 35 N. E. Rep. 110; 39 Am. St. Rep. 454), 568.
McHugh *v.* Manhattan R. Co. (179 N. Y. 378; 72 N. E. Rep. 312), 534.
McHugh *v.* Transit Co. (190 Mo. 85; 88 S. W. Rep. 853), 91.
McIntire, etc., Ry. Co. *v.* Bolton (43 Ohio St. 224), 569.
McIntire *v.* New York, etc., R. Co. (37 N. Y. 295), 197.
McIntosh *v.* Missouri, K. & T. R. Co. (103 Mo. 340), 42.
McKaig *v.* Northern Pacific R. Co. (42 Fed. Rep. 288), 489.
McKee *v.* Chicago, etc., R. Co. (83 Iowa 616; 48 Am. & Eng. R. Cas. 154), 340.
McKeen *v.* Citizens R. Co. (42 Mo. 79), 173.
McKeigue *v.* Janesville (68 Wis. 50; 31 N. W. Rep. 298), 189.
McKelvy *v.* Burlington, etc., R. Co. (84 Iowa 455; 51 N. W. Rep. 172; 49 Am. & Eng. R. Cas. 477), 909.
McKenley *v.* Chicago, etc., R. Co. (43 Iowa 641; 14 Am. Ry. Rep. 495), 930.
McKenna *v.* Hudson R. Co. (64 N. J. L. 106; 45 Atl. Rep. 776), 685.
McKenna *v.* Missouri Pacific Ry. Co. (54 Mo. App. 161), 413.
McKernan *v.* Detroit, etc., Ry. Co. (138 Mich. 519; 101 N. W. Rep. 812; 68 L. R. A. 347), 1050.
McKimble *v.* Boston, etc., R. Co. (139 Mass. 542; 2 N. E. Rep. 97; 21 Am. & Eng. R. Cas. 213), 557.
McKimble *v.* Boston, etc., R. Co. (141 Mass. 463), 787.
McKinley *v.* Chicago, etc., R. Co. (40 Mo. App. 449), 279.
McKivergan *v.* Alexander, etc., Lumber Co. (102 N. W. Rep. 332), 549.
McKnight *v.* Iowa, etc., R. Co. (43 Iowa 709; 32 N. W. Rep. 4), 522.
McKune *v.* California, etc., R. Co. (66 Cal. 302; 17 Am. & Eng. R. Cas. 589), 488.
McLain *v.* Brooklyn, etc., R. Co. (116 N. Y. 459; 22 N. E. Rep. 1062; 40 Am. & Eng. R. Cas. 254), 186.
McLain *v.* Chicago & N. W. Ry. Co. (121 Ill. App. 614), 874.
McLain *v.* St. Louis, etc., Ry. Co. (Mo. App., 111 S. W. Rep. 835), 737.
McLaren *v.* Boston Elevated Ry. Co. (83 N. E. Rep. 1088), 630.
McLaren *v.* Williston (48 Minn. 299; 51 N. W. Rep. 373), 348.
McLarin *v.* Atlanta, etc., R. Co. (85 Ga. 504; 11 S. E. Rep. 840), 789.
McLean *v.* Burbank (11 Minn. 277), 634.
McLean *v.* Pere Marquette R. Co. (Mich., 100 N. W. Rep. 748; 11 Detroit Leg. News 358), 369.
McLeod *v.* Chicago, etc., Ry. Co. (125 Iowa 270; 101 N. W. Rep. 77), 522.
McLeod *v.* Connecticut, etc., R. Co. (58 Vt. 727; 28 Am. & Eng. R. Cas. 644), 47.
McLeod *v.* Ginther (80 Ky. 399; 8 Am. & Eng. R. Cas. 162), 92.
McLeod *v.* New York, etc., R. Co. (191 Mass. 389; 77 N. E. Rep. 715), 326.
McMahon *v.* Davidson (12 Minn. 357), 1041.
McMahon *v.* Northern R. Co. (39 Md. 438), 1028.
McMahon *v.* Walsh (43 N. Y. Sup. Ct. (11 J. & S. 36), 3.
McManus *v.* Crickett (1 East. 106), 727.
McManus *v.* Oregon Short Line R. Co. (94 S. W. Rep. 743), 364.
McManamee *v.* Missouri Pacific Ry. Co. (135 Mo. 440; 37 S. W. Rep. 119), 1095.
McMarshall *v.* Chicago, etc., R. Co. (80 Iowa 757; 45 N. W. Rep. 1065), 408.
McMaster *v.* Illinois, etc., R. Co. (65 Miss. 264; 4 So. Rep. 59; 7 Am. St. Rep. 653; 41 Am. & Eng. R. Cas. 486), 491.
McMasters *v.* Pennsylvania R. Co. (3 Pittsb. [Pa.] 1), 283.
McMillan *v.* Grand R. Co. (130 Fed. Rep. 827), 76.
McMillan *v.* Spider Lake, etc., R. Co. (Wis., 91 N. W. Rep. 979; 60 L. R. R. 589), 69.
McMurtry *v.* Louisville, etc., R. Co. (67 Miss. 601; 7 So. Rep. 401), 779.
McNair *v.* Manhattan, etc., R. Co. (22 N. Y. S. R. 840; 51 Hun 644; 123 N. Y. 664; 34 N. Y. S. R. 1010), 93.
McNamara *v.* Great Northern R. Co. (61 Minn. 296; 63 N. W. Rep. 726), 1070.
McNamara *v.* New York, etc., R. Co. (136 N. Y. 650; 32 N. E. Rep. 765; 49 N. Y. S. R. 395), 1021.
McNaughton *v.* Illinois Cent. R. Co. (113 N. W. Rep. 844), 621.
McNeil *v.* Crucible Steel Co. (207 Pa. St. 493; 56 Atl. Rep. 1067), 298.
McNeil *v.* New York, etc., R. Co. (71 Hun 24; 24 N. Y. Supp. 616), 325.
McNown *v.* Wabash R. Co. (55 Mo. App. 585), 991.
McNulta *v.* Ensch (134 Ill. 46; 24 N. E. Rep. 631; 31 Ill. App. 100), 704.
McNulty *v.* Pennsylvania R. Co. (182 Pa. St. 479; 38 Atl. Rep. 524; 61 Am. St. Rep. 721; 38 L. R. A. 376), 568.
McNulty *v.* St. Louis & S. F. R. Co. (101 S. W. Rep. 1082), 971.

[References are to sections.]

McPadden *v.* New York, etc., R. Co. (44 N. Y. 478), 592.
McPeak *v.* Missouri, etc., R. Co. (128 Mo. 617; 30 S. W. Rep. 170), 806.
McPhee *v.* Scully (163 Mass. 216; 39 N. E. Rep. 1007), 509.
McPheeters *v.* Hannibal, etc., R. Co. (45 Mo. 26), 851.
McPherson *v.* St. Louis, etc., R. Co. (97 Mo. 253; 10 S. W. Rep. 846), 195.
McQuade *v.* Manhattan R. Co. (21 J. & S. [N. Y.] 91; 109 N. Y. 636; 16 N. E. Rep. 681), 700.
McQuade *v.* Suburban Ry. Co. (200 Mo. 157; 98 S. W. Rep. 552), 507.
McQueen *v.* Central Branch R. Co. (Kan., 15 Am. & Eng. R. Cas. 226), 568.
McQuerry *v.* Metropolitan R. Co. (117 Mo. App. 262), 737.
McQuigan *v.* Delaware, etc., R. Co. (129 N. Y. 50; 29 N. E. Rep. 235; 41 N. Y. S. R. 382; 60 Hun 576; 48 Am. & Eng. R. Cas. 490), 93.
McQuilken *v.* Central Pacific R. Co. (64 Cal. 463; 2 Pac. Rep. 46; 16 Am. & Eng. R. Cas. 353), 786.
McQuillen *v.* Central, etc., R. Co. (64 Cal. 463; 2 Pac. Rep. 46; 16 Am. & Eng. R. Cas. 353), 771.
McRea *v.* Wilmington, etc., R. Co. (88 N. Car. 526; 43 Am. Rep. 745; 18 Am. & Eng. R. Cas. 316), 659.
McVeety *v.* St. Paul, etc., R. Co. (45 Minn. 268; 47 N. W. Rep. 809; 47 Am. & Eng. R. Cas. 471), 554.
Machine Co. *v.* Keifer (134 Ill. 481), 228.
Mack *v.* Chicago, etc., R. Co. (101 S. W. Rep. 142), 495.
Mack *v.* Lombard, etc., R. Co. (18 Wash. 84), 29.
Mackay *v.* Central R. Co. (14 Blatchf. 65; 4 Fed. Rep. 617), 49.
Mackey *v.* Baltimore, etc., R. Co. (8 Mackey [D. C.] 282), 654.
Mackey *v.* Missouri Pacific Ry. Co. (5 McCrary [U. S.] 538), 582.
Macklin *v.* New Jersey Co. (7 Abb. Pr. N. S. [N. Y.] 229), 853.
Macklin *v.* Railway Co. (58 N. W. Rep. 999), 80.
Macklin *v.* Railway Co. (135 Mass. 201), 268.
Mackowik *v.* Kansas City, St. J. & C. B. R. Co. (94 S. W. Rep. 256), 412.
Macon, etc., R. Co. *v.* Davis (27 Ga. 113), 451.
Macon, etc., R. Co. *v.* Davis (18 Ga. 679), 877.
Macon, etc., R. Co. *v.* Johnson (38 Ga. 409), 92.
Macon Ry. Co. *v.* Mason (123 Ga. 773; 51 S. E. Rep. 569), 184.
Macon, etc., R. Co. *v.* Moore (108 Ga. 84; 33 S. E. Rep. 889; 15 Am. & Eng. R. Cas. [N. S.] 842), 685.
Macon & S. R. Co. *v.* Moore (54 S. E. Rep. 700), 731.
Macon, etc., R. Co. *v.* Wynn (19 Ga. 440), 994.
Macy *v.* St. Paul, etc., R. Co. (35 Minn. 200; 28 N. W. Rep. 249), 471.
Madden *v.* Chesapeake, etc., R. Co. (28 W. Va. 610; 57 Am. Rep. 695), 477.
Madden *v.* Missouri, etc., R. Co. (50 Mo. App. 666), 576.
Madden *v.* Port Royal, etc., R. Co. (35 So. Car. 381; 52 Am. & Eng. R. Cas. 286), 830.
Maddox *v.* London, etc., R. Co. (38 L. T. 458), 682.
Madison *v.* Missouri Pacific Ry. Co. (60 Mo. App. 509), 602.
Madole *v.* Denver R. Co. (Colo., 62 Pac. Rep. 964), 367.
Mad River R. Co. *v.* Barber (5 Ohio St. 541), 472.
Magee *v.* Northern Pacific R. Co. (78 Cal. 430). 602.
Magee *v.* Oregon, etc., R. Co. (46 Fed. Rep. 734), 729.
Magrane *v.* St. Louis, etc., R. Co. (183 Mo. 119; 81 S. W. Rep. 1158), 15.
Maguin *v.* Dinsmore (56 N. Y. 168), 15
Maguire *v.* Fitzburg, etc., R. Co. (146 Mass. 379; 15 N. E. Rep. 904; 34 Am. & Eng. R. Cas. 146), 397.
Maguire *v.* Railroad (115 Mass. 239), 95.
Maguire *v.* Transit Co. (103 Mo. App. 459; 78 S. W. Rep. 838), 685.
Mahaney *v.* St. Louis, etc., R. Co. (108 Mo. 191; 18 S. W. Rep. 895), 406.
Maher *v.* Atlantic, etc., R. Co. (64 Mo. 267; 17 Am. Ry. Rep. 231), 996.
Maher *v.* Boston, etc., R. Co. (158 Mass. 36), 399.
Maher *v.* Central Park R. Co. (67 N. Y. 55), 699.
Maher *v.* Metropolitan St. Ry. Co. (92 N. Y. S. 825; 102 App. Div. 517), 116.
Maher *v.* Union Pacific R. Co. (106 Fed. Rep. 309; 45 C. C. A. 301), 487.
Maher *v.* Winona & C. R. Co. (31 Minn. 401; 13 Am. & Eng. R. Cas. 572), 886.
Mahlen *v.* Lake Shore, etc., R. Co. (49 Mich. 585; 14 N. W. Rep. 556; 14 Am. & Eng. R. Cas. 687), 411.
Mahler *v.* Norwich, etc., R. Co. (35 N. Y. 352), 49.
Mahoney *v.* Bay State Co. (184 Mass. 287; 68 N. E. Rep. 234), 360.
Mahoney *v.* Metropolitan, etc., R. Co. (104 Mass. 73), 1036.
Mahoney *v.* New York, etc., R. Co. (39 N. Y. S. R. 911; 60 Hun 586; 131 N. Y. 623), 419.
Major *v.* Burlington, etc., R. Co. (115 Iowa 309; 88 N. W. Rep. 815), 61.
Malcolm *v.* Richmond, etc., R. Co. (106 N. Car. 63; 11 S. E. Rep. 187; 44 Am. & Eng. R. Cas. 379), 671.
Maleck *v.* Tower Grove R. Co. (57 Mo. 18), 727.
Malhado *v.* Brooklyn, etc., R. Co. (30 N. Y. 370), 92.
Mallett *v.* Schlosser (119 Ill. App. 259), 249.
Malloy *v.* Chicago, etc., R. Co. (173 Mo. 75; 73 S. W. Rep. 159), 209.
Malloy *v.* New York, etc., R. Co. (58 Barb. 182), 187.
Malloy *v.* St. Louis, etc., R. Co. (173 Mo. 75; 73 S. W. Rep. 159), 608.
Malone *v.* Burlington, etc., R. Co. (61

[*References are to sections.*]

Iowa 326; 16 N. W. Rep. 203; 47 Am. Rep. 813; 11 Am. & Eng. R. Cas. 165), 522.
Maloney *v.* Florence, etc., R. Co. (89 Pac. Rep. 649), 486.
Malott *v.* Central Trust Co. (79 N. E. Rep. 369), 563.
Maltby *v.* Chicago, etc., R. Co. (52 Mich. 108; 17 N. W. Rep. 717; 13 Am. & Eng. R. Cas. 606), 909.
Manchester, etc., R. Co. *v.* Fullerton (14 C. B. [N. S.] 54; 11 W. R. 754), 886.
Manchester, etc., Co. *v.* Polk (115 Ga. 542; 41 S. E. Rep. 1015), 310.
Maney *v.* Chicago, etc., R. Co. (49 Ill. App. 105), 968.
Mangum *v.* North Carolina R. Co. (N. C., 58 S. E. Rep. 913; 13 L. R. A. [N. S.] 589), 627.
Manigold *v.* Black River Co. (84 N. Y. S. 861; 81 App. Div. 381), 108.
Manion *v.* Lake Erie & W. Ry. Co. (80 N. E. Rep. 166), 875.
Manly *v.* Wilmington, etc., R. Co. (74 N. Car. 655; 13 Am. Ry. Rep. 105), 391.
Mann *v.* Belt Line R. Co. (128 Ind. 138; 26 N. E. Rep. 819), 1004.
Mann *v.* Central Vermont R. Co. (55 Vt. 484; 45 Am. Rep. 628; 14 Am. & Eng. R. Cas. 620), 903.
Mann *v.* Chicago, etc., R. Co. (86 Mo. 347), 872.
Mann *v.* Missouri, etc., R. Co. (100 S. W. Rep. 566), 417.
Manning *v.* Burlington, etc., R. Co., (64 Iowa 240; 20 N. W. Rep. 169), 522.
Manning *v.* Tacoma Ry., etc., Co. (34 Wash. 406; 75 Pac. Rep. 994), 64.
Manning *v.* Railroad Co. (105 Mich. 260; 63 N. W. Rep. 312), 326.
Manning *v.* Railroad (16 L. R. A. 271), 872.
Mansen *v.* Eddy (3 Texas Civ. App. 148; 22 S. W. Rep. 66), 333.
Manser *v.* Eastern, etc., R. Co. (3 L. T. 585), 652.
Mansfield, etc., Co. *v.* McEnry (36 Am. Rep. 664), 191.
Manville *v.* Cleveland, etc., R. Co. (11 Ohio St. 417), 500.
Marable *v.* Southern Ry. Co. (55 S. E. Rep. 355), 583.
Marble *v.* Worcester (4 Gray 305), 21.
Marbourg *v.* Seattle, etc., Ry. Co. (94 Pac. Rep. 649), 786.
Marbury, etc., Co. *v.* Westbrook (121 Ala. 179), 302.
Mareau *v.* New York, etc., R. Co. (167 Pa. St. 220; 31 Atl. Rep. 562), 446.
Marion *v.* Chicago, etc., R. Co. (64 Iowa 568; 21 N. W. Rep. 86), 91.
Markey *v.* Louisiana & M. R. Co. (185 Mo. 348; 84 S. W. Rep. 61), 235.
Markham *v.* Houston, etc., R. Co. (73 Texas 247; 11 S. W. Rep. 131), 1041.
Mark *v.* Petersburg, etc., R. Co. (88 Va. 1; 13 S. E. Rep 299; 49 Am. & Eng. R. Cas. 418), 993.
Markowitz *v.* Metropolitan R. Co. (186 Mo. 350; 85 S. W. Rep. 351; 69 L. R. A. 389), 1053.
Marks *v.* Fitchburg, etc., R. Co. (155 Mass. 493; 29 N. E. Rep. 1148), 889.
Marks *v.* Harriett Mills (135 N. C. 287; 47 S. E. Rep. 432), 99.
Marland *v.* Pittsburg, etc., R. Co. (123 Pa. St. 487; 16 Atl. Rep. 624), 1029.
Marquette *v.* Chicago, etc., R. Co. (33 Iowa 562), 746.
Mars *v.* Delaware, etc., R. Co. (54 Hun 625; 28 N. Y. S. R. 228; 8 N. Y. Supp. 107), 674.
Marsh *v.* Kansas City, etc., R. Co. (104 Mo. App. 577; 78 S. W. Rep. 284), 1055.
Marsh *v.* Western, etc., Ry. Co. (204 Pa. St. 229; 53 Atl. Rep. 1001), 58.
Marshall *v.* Boston, etc., R. Co. (145 Mass. 164; 13 N. E. Rep. 385; 31 Am. & Eng. R. Cas. 18), 99.
Marshall *v.* Nashville, etc., R. Co. (101 S. W. Rep. 419), 852.
Marshall *v.* St. Louis I. M. & S. Ry. Co. (Ark., 94 S. W. Rep. 56), 341.
Marshall *v.* York, etc., R. Co. (21 L. J. N. S. C. 34), 17.
Marshall *v.* Wabash R. Co. (120 Mo. 275; 25 S. W. Rep. 179), 64.
Martin *v.* Kansas City, etc., R. Co. (77 Miss. 720; 27 So. Rep. 646), 349.
Martin *v.* New York, etc., R. Co. (27 Hun [N. Y.] 532; 97 N. Y. 628), 980.
Martin *v.* New York, etc., R. Co. (50 N. Y. S. R. 553; 66 Hun 636; 21 N. Y. Supp. 191), 1017.
Martin *v.* New York, etc., R. Co. (103 N. Y. 626; 9 N. E. Rep. 505), 92.
Martin *v.* Pittsburg, etc., R. Co. (203 U. S. 284; 51 L. Ed. 184; 87 Sup. Ct. Rep. 100), 504.
Martin *v.* Southern Ry. Co. (58 S. E. Rep. 3; 77 S. C. 370), 717.
Martin *v.* Wabash Ry. Co. (142 Fed. Rep. 650; 73 C. C. A. 646), 266.
Martinez *v.* Gerber (3 Scott N. R. 306), 18.
Marty *v.* Chicago, etc., R. Co. (38 Minn. 108; 35 N. W. Rep. 670; 32 Am. & Eng. R. Cas. 107), 1005.
Marvin *v.* Maysville, etc., R. Co. (49 Fed. Rep. 436), 71.
Maryland *v.* Baltimore, etc., R. Co. (1 Hughes U. S. 337), 461.
Maryland, etc., R. Co. *v.* Neubeur (62 Md. 391; 19 Am. & Eng. R. Cas. 261), 936.
Mary, etc., R. Co. *v.* Chambliss (97 Ala. 171; 11 So. Rep. 897; 53 Am. & Eng. 254), 105.
Mase *v.* Northern Pacific R. Co. (57 Fed. Rep. 283), 491.
Mason *v.* Missouri Pacific Ry. Co. (27 Kan. 83; 41 Am. Rep. 405; 6 Am. & Eng. R. Cas. 1), 1067.
Mason *v.* Richmond, etc., R. Co. (111 N. C. 482; 16 S. E. Rep. 698; 53 Am. & Eng. R. Cas. 183), 491.
Mason, etc., R. Co. *v.* Yockey (103 Fed. Rep. 265; 43 C. C. A. 228), 251.
Masser *v.* Chicago, etc., R. Co. (68 Iowa 602; 27 N. W. Rep. 776), 1063.
Massie *v.* Peel Splint, etc., Co. (41 W. Va. 620; 24 S. E. Rep. 644), 311.

[*References are to sections.*]

Massoth *v.* Delaware, etc., Co. (64 N. Y. 524), 979.
Martin *v.* Atchison, etc., R. Co. (166 U. S. 399; 41 L. Ed. 1051; 17 Sup. Ct. Rep. 603), 568.
Martin *v.* California, etc., R. Co. (94 Cal. 326), 338.
Martin *v.* Chicago & N. W. R. Co. (194 Ill. 138; 62 N. E. Rep. 599), 273.
Martin *v.* Chicago Ry. Co. (91 N. W. Rep. 1034; 59 L. R. A. 698), 329.
Martin *v.* Chicago, etc., R. Co. (Iowa, 87 N. W. Rep. 654), 355.
Masterson *v.* Chicago, etc., R. Co. (58 Mo. App. 572), 1016.
Masterson *v.* Macon City, etc., R. Co. (88 Ga. 436; 14 S. E. Rep. 591), 791.
Masterson *v.* New York, etc., R. Co. (84 N. Y. 247), 1042.
Mathew *v.* Wabash R. Co. (115 Mo. App. 468), 578.
Mathew *v.* Wabash R. Co. (Mo. App., 78 S. W. Rep. 271), 695.
Mathieson *v.* Omaha, etc., R. Co. (Neb., 97 N. W. Rep. 243), 88.
Matlock *v.* Williamsville, etc., R. Co. (Mo., 95 S. W. Rep. 849), 63.
Matson *v.* Baird (3 App. Cas. 1082; 3 Ry. & T. C. Cas. 17), 916.
Matson *v.* Chicago, etc., R. Co. (68 Iowa 22; 25 N. W. Rep. 911), 522.
Matta *v.* Chicago, etc., R. Co. (69 Mich. 109; 37 N. W. Rep. 54; 32 Am. & Eng. R. Cas. 71), 446.
Matteson *v.* New York, etc., R. Co. (62 Barb. 364), 183.
Matteson *v.* Southern Pac. Co. (92 Pac. Rep. 101), 883.
Maury *v.* Talmadge (2 McLean U. S. 157, 158), 680.
Matze *v.* New York, etc., R. Co. (1 Hun [N. Y.] 417; 3 T. & C. 513), 967.
Mauer *v.* Ferguson (44 N. Y. St. Rep. 372), 255.
Mauerman *v.* St. Louis, etc., R. Co. (41 Mo. App. 348), 876.
Maverick *v.* Ry. Co. (36 N. Y. 378), 125.
Mayer *v.* New York, etc., R. Co. (132 N. Y. 579; 29 N. Y. S. R. 183), 961.
Mayes *v.* Chicago, etc., R. Co. (63 Iowa 562; 14 N. W. Rep. 340; 8 Am. & Eng. R. Cas. 527), 325.
Maynard *v.* Oregon, etc., R. Co. (Ore., 78 Pac. Rep. 983), 96.
Mayo *v.* Boston, etc., R. Co. (104 Mass. 137), 133.
Maysville, etc., R. Co. *v.* Herrick (13 Bush. [Ky.] 122), 177.
Maysville, etc., R. Co. *v.* McCabe (26 Ky. L. R. 532; 82 S. W. Rep. 233), 1100.
Maxey *v.* Missouri Pacific R. Co. (113 Mo. 1; 20 S. W. Rep. 654), 962.
Maxey *v.* Railroad Co. (113 Mo. 1), 408.
Maxwell *v.* Zdariski (93 Ill. App. 334), 159.
Meade *v.* Chicago, etc., R. Co. (68 Mo. App. 92), 26.
Meador *v.* Missouri, etc., R. Co. (62 Kan. 865; 61 Pac. Rep. 442), 608.
Meehan *v.* Atlas, etc., Co. (87 N. Y. S. 1031; 94 App. Div. 306), 307.
Meehan *v.* Great North. Ry. Co. (101 N. W. Rep. 183), 271.
Meehan *v.* Holyoke Ry. Co. (186 Mass. 511; 72 N. E. Rep. 61), 323.
Meehan *v.* St. Louis, M. & S. E. R. Co. (114 Mo. App. 396; 90 S. W. Rep. 102), 352.
Meek *v.* Pennsylvania R. Co. (38 Ohio Sy. 632; 13 Am. & Eng. R. Cas. 643), 977.
Meeks *v.* Ohio River R. Co. (52 W. Va. 99), 398.
Meeks *v.* Southern Pacific R. Co. (56 Cal. 513; 38 Am. Rep. 67; 8 Am. & Eng. R. Cas. 314), 302.
Mefford *v.* Missouri, etc., R. Co. (121 Mo. App. 647), 608.
Mefford *v.* Missouri, etc., Ry. Co. (97 S. W. Rep. 602), 826.
Meier *v.* Pennsylvania R. Co. (64 Pa. St. 225), 576.
Melchert *v.* Smith Co. (140 Pa. St. 448; 21 Atl. Rep. 755), 309.
Mellor *v.* Missouri Pacific Ry. Co. (105 Mo. 455; 16 S. W. Rep. 849; 10 L. R. A. 36; 14 S. W. Rep. 758), 563.
Meloy *v.* Chicago, etc., R. Co. (Iowa, 37 N. W. Rep. 335; 33 Am. & Eng. Cas. 358), 104.
Melton *v.* Chesapeake & O. Ry. Co. (61 S. E. Rep. 39), 962.
Melville *v.* Missouri River, etc., R. Co. (48 Fed. Rep. 820), 322.
Melville *v.* Railway Co. (48 Fed. Rep. 820), 261.
Melzer *v.* Peninsular Car Co. (76 Mich. 94; 42 N. W. Rep. 1078), 336.
Membery *v.* Great Western R. Co. (14 App. Cas. 179), 330.
Memphis, etc., R. Co. *v.* Copeland (61 Ala. 376), 391.
Memphis R. Co. *v.* Graham (94 Ala. 545; 10 So. Rep. 283; 53 Am. & Eng. R. Cas. 396), 163.
Memphis, etc., R. Co. *v.* Jobe (69 Miss. 452; 10 So. Rep. 672), 411.
Memphis, etc., R. Co. *v.* Reeves (77 U. S. [10 Wall.] 176; 19 L. Ed. 909, 913), 610.
Memphis, etc., R. Co. *v.* Salinger (46 Ark. 528), 801.
Memphis, etc., R. Co. *v.* Stringfellow (44 Ark. 322; 51 Am. Rep. 598; 21 Am. & Eng. R. Cas. 374), 704.
Memphis, etc., R. Co. *v.* Thomas (51 Miss. 637), 482.
Memphis, etc., R. Co. *v.* Whitfield (44 Miss. 466), 395.
Memphis, etc., R. Co. *v.* Womack (84 Ala. 149; 4 So. Rep. 618; 37 Am. & Eng. R. Cas. 308), 92.
Menard *v.* Boston, etc., R. Co. (150 Mass. 386; 32 N. E. Rep. 214), 97.
Mendizabal *v.* New York Cent. R. Co. (85 N. Y. S. 896; 89 App. Div. 386), 260.
Meng *v.* St. Louis, etc., R. Co. (108 Mo. App. 553; 84 S. W. Rep. 213), 98.
Mensch *v.* Pennsylvania R. Co. (150 Pa.

[*References are to sections.*]

St. 598; 25 Atl. Rep. 31; 53 Am. & Eng. R. Cas. 198), 322.
Mercer *v.* Cincinnati Northern R. Co. (115 N. W. Rep. 733; 15 Detroit Leg. N. 35), 709.
Merchants, etc., Co. *v.* Burns (Tex., 74 S. W. Rep. 758; 72 S. W. Rep. 626), 26.
Merino *v.* Lehmaier (173 N. Y. 530; 66 N. E. Rep. 572), 318.
Merkle *v.* New York, etc., R. Co. (49 N. J. L. 473; 9 Atl. Rep. 80), 1025.
Merrifield *v* Maryland, etc., Co. (143 Cal. 54; 76 Pac. Rep. 710), 318.
Merrill *v.* Eastern R. Co. (139 Mass. 238; 1 N. E. Rep. 548; 52 Am. Rep. 705), 556.
Merrill *v.* Oregon Short Line R. Co. (Utah, 81 Pac. Rep. 85), 327.
Merryman *v.* Chicago Great Western Ry. Co. (113 N. W. Rep. 357), 625.
Merwin *v.* Manhattan R. Co. (48 Hun 608; 113 N. Y. 659), 619.
Merz *v.* Missouri Pacific Ry. Co. (14 Mo. App. 459), 1078.
Messenger *v.* Pennsylvania R. Co. (36 N. J. L. 407), 949.
Messenger *v.* Pennsylvania R. Co. (64 Atl. Rep. 682), 922.
Metcalfe *v.* Rochester, etc., R. Co. (12 App. Div. 147; 42 N. Y. Supp. 661), 1958.
Meteer *v.* Manhattan R. Co. (63 Hun 533; 45 N. Y. S. R. 704; 18 N. Y. Supp. 561), 182.
Metropolitan R. Co. *v.* Dick (87 Ill. App. 40), 281.
Metropoltain, etc., Ry. Co. *v.* Fortin (107 Ill. App. 157), 381.
Metropolitan, etc., Ry. Co. *v.* Fortin (203 Ill. 454; 67 N. T. Rep. 977), 381.
Metropolitan R. Co. *v.* Jackson (L. R., 3 App. Cas. 193), 585.
Metropolitan R. Co. *v.* Powell (89 Ga. 601; 16 S. E. Rep. 118), 1043.
Metropolitan, etc., Ry. Co. *v.* Warren (86 Pac. Rep. 131), 576.
Mexican, etc., R. Co. *v.* Jackson (118 Fed. Rep. 549; 55 C. C. A. 315), 243.
Mexican, etc., R. Co. *v.* Knox (114 Fed. Rep. 73; 53 C. C. A. 21), 386.
Mexican, etc., R. Co. *v.* Meddlegge (75 Tex., 634; 13 S. W. Rep. 257), 166.
Mexican, etc., R. Co. *v.* Musselts (86 Tex., 708), 28.
Mexican, etc., R. Co. *v.* Shean (Tex., 18 S. W. Rep. 151), 332.
Mexican, etc., R. Co. *v.* Townsend (114 Fed. Rep. 739; 52 C. C. A. 369), 118.
Meyer *v.* Detroit, etc., Ry. Co. (Mich., 105 N. W. Rep. 888; 12 Det. Leg. N. 843), 323.
Meyer *v.* Ladewig (110 N. W. Rep. 419), 267.
Meyer *v.* Midland Pacific R. Co. (2 Neb. 319), 293.
Meyer *v.* Milwaukee, etc., R. Co. (93 N. W. Rep. 6), 31.
Meyers *v.* Missouri Pac. Ry. Co. (2 Neb. 320), 33.
Meyer *v.* St. Louis, etc., R. Co. (54 Fed. Rep. 116; 10 N. S. App. 677; 4 C. C. A. 221; 58 Am. & Eng. R. Cas. 111), 586.
Meyer *v.* Second Ave. R. Co. (8 Bosw. [N. Y.] 305), 153.
Meyers *v.* Central R. Co. (67 Atl. Rep. 620; 218 Pa. St. 305), 974.
Meyers *v.* Chicago, etc., R. Co. (103 Mo. App. 268; 77 S. W. Rep. 149), 388.
Meyers *v.* Highland Boy G. M. Co. (77 Pac. Rep. 743), 95.
Michigan, etc., R. Co. *v.* Austin (40 Mich. 247), 325.
Michigan *v.* Boeckling (122 Ind. 39; 23 N. E. Rep. 518), 1043.
Michigan, etc., R. Co. *v.* Campau (35 Mich. 468; 15 Am. Ry. Rep. 314), 1092.
Michigan, etc., R. Co. *v.* Coleman (28 Mich. 440; 12 Am. Ry. Rep. 59), 788.
Michigan, etc., R. Co. *v.* Dolan (32 Mich. 510), 10.
Michigan, etc., R. Co. *v.* Gilbert (46 Mich. 176; 9 N. W. Rep. 243; 9 Am. & Eng. R. Cas. 230), 483.
Michigan, etc., R. Co. *v.* Smithson (45 Mich. 212; 7 N. W. Rep. 791; 1 Am. & Eng. R. Cas. 101), 335.
Mickee *v* Wood, etc., R. Co. (70 Hun [N. Y.] 456; 53 N. Y. S. R. 689), 365.
Midland Valley R. Co. *v.* Hamilton (104 S. W. Rep. 540), 588.
Middle Georgia, etc., R. Co. *v.* Barnett (104 Ga. 582; 30 S. E. Rep. 771; 12 Am. & Eng. R. Cas. [N. S.] 532), 245.
Middlesborough, etc., R. Co. *v.* Webster (Ky., 50 S. W. Rep. 843; 14 Am. & Eng. R. Cas. [N. S.] 209), 690.
Mielke *v.* Chicago, etc., R. Co. (Wis., 79 N. W. Rep. 22), 353.
Mikos *v.* New York Cent., etc., R. Co. (102 N. Y. S. 995), 534.
Milbur *v.* Kansas City, etc., R. Co. (86 Mo. 104; 29 Am. & Eng. R. Cas. 244), 388.
Miles *v.* Fonda, etc., R. Co. (86 Hun 508; 33 N. Y. Supp. 729), 1039.
Miller *v.* American Bridge Co. (65 Atl. Rep. 1109; 216 Pac. St. 559), 476.
Miller *v.* Atlanta, etc., R. Co. (55 S. E. Rep. 439), 664.
Miller *v.* Boston, etc., R. Co. (N. H., 61 Atl. Rep. 360), 366.
Miller *v.* Chicago, etc., R. Co. (90 Mich. 230; 51 N. W. Rep. 370), 492.
Miller *v.* Chicago, etc., R. Co. (115 N. W. Rep. 794), 801.
Miller *v.* Chicago & A. R. Co. (62 App. 252), 150.
Miller *v.* Detroit, etc., Ry. Co. (Mich., 95 N. W. Rep. 718), 342.
Miller *v.* East Tennessee, etc. R. Co. (93 Ga. 630; 21 S. E. Rep. 153), 787.
Miller *v.* Louisville, etc., R. Co. (128 Ind. 97; 27 N. E. Rep. 339; 25 Am. St. Rep. 416), 1056.
Miller *v.* Merritt (211 Pa. St. 127; 60 Atl. Rep. 508), 283.
Miller *v.* Michigan, etc., R. Co. (123

[*References are to sections.*]

Mich. 374; 82 N. W. Rep. 58), 499.
Miller *v.* Minnesota, etc., R. Co. (76 Iowa 655; 39 N. W. Rep. 188; 38 Am. & Eng. R. Cas. 234), 293.
Miller *v.* Missouri Pacific Ry. Co. (109 Mo. 350; 19 S. W. Rep. 58; 53 Am. & Eng. R. Cas. 598), 472.
Miller *v.* New York, etc., R. Co. (125 N. Y. 118; 26 N. E. Rep. 35), 817.
Miller *v.* Ohio, etc., R. Co. (24 Ill. App. 326), 492.
Miller *v.* Railway Co. (C. C., 65 Fed. Rep. 305), 299.
Miller *v.* St. Louis, etc., R. Co. (5 Mo. App. 471), 678.
Miller *v.* Southern Pacific R. Co. (20 Ore. 285; 26 Pac. Rep. 70; 48 Am. & Eng. R. Cas. 294), 490.
Miller *v.* Southwestern R. Co. (55 Ga. 143), 58.
Miller *v.* Steamship Co. (118 N. Y. 200), 596.
Miller *v.* Union Pacific R. Co. (5 McCrary U. S. 300; 17 Fed. Rep. 67), 475.
Milliman *v.* New York, etc., R. Co. (66 N. Y. 642; 4 Hun 409; 6 T. & C. 585), 588.
Mills *v.* Missouri, etc., R. Co. (Tex., 57 S. W. Rep. 291), 715.
Mills *v.* Missouri Pac. R. Co. (Mo., 94 S. W. Rep. 973), 273.
Millsap *v.* Louisville, etc., R. Co. (69 Miss. 423; 13 So. Rep. 696), 488.
Milwaukee, etc., R. Co. *v.* Arms (91 N. S. 495), 15.
Milwaukee, etc., R. Co. *v.* Hunter (11 Wis. 160), 911.
Milwaukee, etc., R. Co. *v.* Kellogg (94 U. S. 474), 393.
Minahan *v.* Grand Trunk R. Co. (138 Fed. Rep. 37), 122.
Minden *v.* Vedene (Neb., 101 N. W. Rep. 330), 92.
Miner *v.* Railroad (153 Mass. 398), 311.
Minter *v.* Chicago, etc., Ry. Co. (Iowa, 96 N. W. Rep. 1108), 354.
Minneapolis, etc., R. Co. *v.* Herrick (127 U. S. 210), 504.
Minneapolis, etc., R. Co. *v.* Huntley (Mich., 9 Am. Neg. Cas. 472), 653.
Minnesota, etc., R. Co. *v.* Kline (199 U. S. 593; 26 Sup. Ct. Rep. 159), 504.
Minneapolis & St. Paul R. Co. *v.* Kellogg (94 U. S. 469), 23.
Minnier *v.* Sedalia, etc., R. Co. (167 Mo. 99; 66 S. W. Rep. 1092), 162.
Minock *v.* Detroit, etc., R. Co. (97 Mich. 425; 56 N. W. Rep. 780), 704.
Minster *v.* Citizens R. Co. (53 Mo. App. 276), 175.
Minty *v.* Union Pac. R. Co. (2 Idaho 437; 21 Pac. Rep. 660), 323.
Missimer *v.* Philadelphia, etc., R. Co. (17 Phila. [Pa.] 172), 649.
Mississippi Central R. Co. *v.* Hardy (Miss., 41 So. Rep. 505), 258.
Mississippi, etc., R. Co. *v.* Harrison (66 Miss. 419; 6 So. Rep. 319; 39 Am. & Eng. R. Cas. 449), 707.
Missouri, etc., R. Co. *v.* Abend (107 Ill. 44), 375.
Missouri, etc., Ry. Co. *v.* Baker (Tex., 81 S. W. Rep. 67), 375.
Missouri, etc., Ry. Co. *v.* Barnes (95 S. W. Rep. 714), 500.
Missouri, etc., Ry. Co. *v.* Bridges (74 Tex. 520; 12 S. W. Rep. 210; 39 Am. & Eng. R. Cas. 604), 908.
Missouri, etc., Ry. Co. *v.* Brown (101 S. W. Rep. 464), 875.
Missouri, etc., R. Co. *v.* Brown (Tex., 18 S. W. Rep. 670), 873.
Missouri, etc., R. Co. *v.* Bussey (66 Kan. 735; 71 Pac. Rep. 261), 1039.
Missouri, etc., R. Co. *v.* Byrd (Tex., 89 S. W. Rep. 991), 647.
Missouri Pacific Ry. Co. *v.* Collier (62 Tex. 318; 18 Am. & Eng. R. Co. 281), 661.
Missouri Pac. R. Co. *v.* Columbia (69 Pac. Rep. 338), 39.
Missouri, etc., R. Co. *v.* Crane (13 Tex. Civ. App. 426; 35 S. W. Rep. 797), 379.
Missouri, etc., Ry. Co. *v.* Crenshaw (71 Tex. 340; 9 S. W. Rep. 262), 374.
Missouri, etc., Ry. Co. *v.* Criswell (108 S. W. Rep. 806), 626.
Missouri, etc., Ry. Co. *v.* Crum (Tex., 81 S. W. Rep. 72), 372.
Missouri, etc., Ry. Co. *v.* Dean (89 S. W. Rep. 797), 543.
Missouri, etc., Co. *v.* Dillon (206 Ill. 145; 69 N. E. Rep. 12), 161.
Missouri, etc., R. Co. *v.* Door (Kan., 85 Pac. Rep. 533), 79.
Missouri, etc., Ry. Co. *v.* Dumas (Tex., 93 S. W. Rep. 493), 372.
Missouri, etc., Ry. Co. *v.* Dunbar (108 S. W. Rep. 500), 626.
Missouri, etc., R. Co. *v.* Dwyer (36 Kan. 58), 494.
Missouri Pac. R. Co. *v.* Eagin (72 Tex. 127; 9 S. W. Rep. 749; 2 L. R. A. 75), 99.
Missouri, etc., R. Co. *v.* Elliott (102 Fed. Rep. 96; 42 C. C. A. 188), 488.
Missouri, etc., R. Co. *v.* Evans (71 Tex. 361; 9 S. W. Rep. 325; 37 Am. & Eng. R. Cas. 144), 1084.
Missouri, etc., Ry. Co. *v.* Ferch (Tex. Civ. App., 36 S. W. Rep. 487), 247.
Missouri, etc., Ry. Co. *v.* Foreman (73 Tex. 311; 11 S. W. Rep. 326), 557.
Missouri, etc., R. Co. *v.* Foreman (Tex., 46 S. W. Rep. 834), 719.
Missouri, etc., Ry. Co. *v.* Freeman (73 S. W. Rep. 542), 63.
Missouri, etc., Ry. Co. *v.* Gearheart (Tex., 81 S. W. Rep. 325), 372.
Missouri, etc., Ry. Co. *v.* Green (89 Pac. Rep. 1042), 523.
Missouri, etc., R. Co. *v.* Greenwood (Tex., 89 S. W. Rep. 810), 73.
Missouri, etc., Ry. Co. *v.* Hagan (Tex., 93 S. W. Rep. 1014), 266.
Missouri, etc., Ry. Co. *v.* Haley (25 Kan. 35; 5 Am. & Eng. R. Cas. 594), 504.
Missouri, etc., R. Co. *v.* Hansom (Tex., 90 S. W. Rep. 1122), 254.
Missouri, etc., R. Co. *v.* Hennessey (20 Tex. Civ. App. 316; 49 S. W. Rep. 917), 38.

[*References are to sections.*]

Missouri, etc., R. Co. *v.* Hennessey (75 Tex. 155), 94.
Missouri, etc., R. Co. *v.* Henry (75 Tex. 220; 12 S. W. Rep. 820), 64.
Missouri, etc., R. Co. *v.* Hibbitts (Tex., 109 S. W. Rep. 228), 737.
Missouri, etc., R. Co. *v.* Hines (Tex., 40 S. W. Rep. 152), 490.
Missouri, etc., Ry. Co. *v.* Holcomb (44 Kan. 332; 24 Pac. Rep. 467; 44 Am. & Eng. R. Cas. 303), 669.
Missouri, etc., Ry. Co. *v.* Hollan (107 S. W. Rep. 642), 890.
Missouri, etc., Ry. Co. *v.* Hutchens (Tex., 80 S. W. Rep. 415).
Missouri, etc., Ry. Co. *v.* Ivey (Tex., 37 Am. & Eng. R. Cas. 46), 567.
Missouri, etc., Ry. Co. *v.* Johnson (72 Tex. 95; 10 S. W. Rep. 325); 37 Am. & Eng. R. Cas. 128), 616.
Missouri, etc., R. Co. *v.* Jones (35 Tex. Civ. App. 584; 80 S. W. Rep. 852), 91.
Missouri, etc., Ry. Co. *v.* Jones (75 Tex. 151; 12 S. W. Rep. 972; 41 Am. & Eng. R. Cas. 363), 230.
Missouri, etc., R. Co. *v.* Keaveney (80 S. W. Rep. 387), 107.
Missouri, etc., R. Co. *v.* Keefe (Tex., 84 S. W. Rep. 679), 367.
Missouri, etc., Ry. Co. *v.* King (2 Tex. Civ. App. 122; 20 S. W. Rep. 1014; 23 S. W. Rep. 917), 301.
Missouri, etc., R. Co. *v.* Lamothe (76 Tex. 219; 13 S. W. Rep. 194), 90.
Missouri, etc., Ry. Co. *v.* Lee (35 Am. & Eng. R. Cas. 364; 70 Tex. 496; 7 S. W. Rep. 857), 951.
Missouri, etc., Ry. Co. *v.* Lehmberg (75 Tex. 61; 12 S. W. Rep. 838), 202.
Missouri, etc., R. Co. *v.* Lewis (24 Neb. 848; 40 N. W. Rep. 401; 2 L. R. A. 67), 47.
Missouri, etc., Ry. Co. *v.* Long (81 Tex. 253; 16 S. W. Rep. 1016), 714.
Missouri, etc., Ry. Co. *v.* Lyde (57 Tex. 505; 11 Am. & Eng. R. Cas. 188), 186.
Missouri, etc., R. Co. *v.* Lynch (90 S. W. Rep. 511), 266.
Missouri, etc., R. Co. *v.* Lyons (54 Neb. 633; 75 N. W. Rep. 31), 493.
Missouri, etc., Ry. Co. *v.* Mackey (127 U. S. 205; 8 Sup. Ct. Rep. 1161; 33 Am. & Eng. R. Cas. 390), 504.
Missouri, etc., R. Co. *v.* Mackey (33 Kan. 298; 6. Pac. Rep. 291; 22 Am. & Eng. R. Cas. 306), 523.
Missouri, etc., Ry. Co. *v.* McCally (41 Kan. 639; 21 Pac. Rep. 574), 400.
Missouri Pac. R. Co. *v.* McElyea (71 Tex. 386; 9 S. W. Rep. 313), 245.
Missouri, etc., R. Co. *v.* Mitchell (75 Tex. 77; 12 S. W. Rep. 810; 41 Am. & Eng. R. Cas. 224), 83.
Missouri, etc., R. Co. *v.* Mitchell (Tex., 79 S. W. Rep. 94), 656.
Missouri, etc., R. Co. *v.* Moody (Tex., 79 S. W. Rep. 856), 92.
Missouri, etc., Ry. Co. *v.* Moseley (57 Fed. Rep. 921), 876.
Missouri, etc., Ry. Co. *v.* Neiswanger (41 Kan. 621; 21 Pac. Rep. 582), 625.
Missouri, etc., Ry. Co. *v.* Nichols (8 Kan. 505), 225.
Missouri, etc., Ry. Co. *v.* Owens (75 S. W. Rep. 579), 235.
Missouri, etc., Ry. Co. *v.* Peregoy (36 Kan. 424; 14 Pac. Rep. 7), 164.
Missouri, etc., Ry. Co. *v.* Perry (95 S. W. Rep. 42), 649.
Missouri, etc., Ry. Co. *v.* Pierce (33 Kan. 61; 5 Pac. Rep. 378; 19 Am. & Eng. R. Cas. 318), 961.
Missouri, etc., Ry. Co. *v.* Price (106 S. W. Rep. 700), 557.
Missouri, etc., Ry. Co. *v.* Raney (99 S. W. Rep. 589), 621.
Missouri, etc., R. Co. *v.* Reasor (28 Tex. Civ. App. 302; 68 S. W. Rep. 332), 224.
Missouri, etc., Ry. Co. *v.* Schroeder (100 S. W. Rep. 808), 583.
Missouri, etc., Ry. Co. *v.* Smith (99 S. W. Rep. 743), 543.
Missouri, etc., Ry. Co. *v.* Somers (71 Tex. 700), 343.
Missouri, etc., Ry. Co. *v.* Texas, etc., R. Co. (38 Fed. Rep. 816), 491.
Missouri, etc., Ry. Co. *v.* Texas Pacific R. Co. (41 Fed. Rep. 316), 1043.
Missouri, etc., R. Co. *v.* Thomas (Tex., 28 S. W. Rep. 139), 1057.
Missouri, etc., Ry. Co. *v.* Thompson (11 Tex. Civ. App. 658; 33 S. W. Rep. 718), 41.
Missouri, etc., Ry. Co. *v.* Walden (Tex., 66 S. W. Rep. 584), 360.
Missouri, etc., R. Co. *v.* Watts (63 Tex. 549; 22 Am. & Eng. R. Cas. 277), 321.
Missouri, etc., Ry. Co. *v.* Weisen (65 Tex. 443), 1103.
Missouri, etc., Ry. Co. *v.* Williams (75 Tex. 4; 12 S. W. Rep. 835), 407.
Missouri, etc., Ry. Co. *v.* Wise (106 S. W. Rep. 465), 473.
Missouri, etc., Ry. Co. *v.* Wortham (73 Tex. 25; 10 S. W. Rep. 741; 3 L. R. A. 868; 37 Am. & Eng. R. Cas. 82), 711.
Missouri, etc., R. Co. *v.* Wylie (Tex., 33 S. W. Rep. 771), 238.
Mitchell *v.* Chicago, etc., R. Co. (114 N. W. Rep. 622), 608.
Mitchell *v.* Chicago, etc., R. Co. (51 Mich. 236; 16 N. W. Rep. 388; 47 Am. Rep. 566; 12 Am. & Eng. R. Cas. 163), 787.
Mitchell *v.* Chicago, etc., R. Co. (108 Mo. App. 142; 83 S. W. Rep. 289), 379.
Mitchell *v.* New York, etc., R. Co. (2 Hun 535; 5 T. & C. 122; 64 N. Y. 655), 201.
Mitchell *v.* Pennsylvania R. Co. (Pa., 1 Am. Law Reg. 717), 506.
Mitchell *v.* St. Louis, etc., R. Co. (122 Mo. App. 50), 884.
Mitchell *v.* St. Louis, etc., R. Co. (97 S. W. Rep. 552), 411.
Mitchell *v.* Southern Pac. R. Co. (87

[*References are to sections.*]

Cal. 62; 25 Pac. Rep. 245; 11 L. R. A. 130), 39.
Mitchell *v.* United Ry. Cos. (125 Mo. App. 1), 737.
Mitchell *v.* Wabash R. Co. (97 Mo. App. 411; 76 S. W. Rep. 647), 254.
Mixter *v.* Coal Co. (152 Pa. 395; 25 Atl. Rep. 342), 118.
Moakler *v.* Williamette Valley R. Co. (18 Ore. 189; 41 Am. & Eng. R. Cas. 135), 802.
Moberly *v.* Kansas City, etc., R. Co. (17 Mo. App. 518; 98 Mo. 183; 11 S. W. Rep. 569), 1014.
Moberly *v.* Kansas City, etc., R. Co. (98 Mo. 183; 11 S. W. Rep. 569), 1004.
Moberly *v.* Missouri Pacific Ry. Co. (98 Mo. 183; 11 S. W. Rep. 569), 1000.
Mobile, etc., R. Co. *v.* Ashcraft (48 Ala. 15), 97.
Mobile, etc., R. Co. *v.* Beasley (119 Ill. App. 18), 327.
Mobile, etc., R. Co. *v.* Blakely (59 Ala. 471), 1083.
Mobile, etc., R. Co. *v.* Davis (130 Ill. 146; 22 N. E. Rep. 850; 42 Am. & Eng. R. Cas. 70), 974.
Mobile, etc., R. Co. *v.* George (94 Ala. 199; 10 So. Rep. 145), 181.
Mobile, etc., R. Co. *v.* Healy (100 Ill. App. 586), 328.
Mobile, etc., R. Co. *v.* Holborn (84 Ala. 133; 4 So. Rep. 146), 404.
Mobile, etc., R. Co. *v.* Hopkins (41 Ala. 486), 850.
Mobile, etc., R. Co. *v.* Klein (43 Ill. App. 63), 792.
Mobile, etc., R. Co. *v.* McArthur (43 Miss. 180), 663.
Mobile, etc., R. Co. *v.* Smith (59 Ala. 245), 461.
Mobile, etc., R. Co. *v.* Thomas (42 Ala. 672), 478.
Mobile, etc., R. Co. *v.* Vallowe (115 Ill. App. 621; 214 Ill. 124; 73 N. E. Rep. 416), 360.
Mobile, etc., R. Co. *v.* Walty (69 Miss. 145; 13 So. Rep. 825), 198.
Moebus *v.* Herrman (108 N. Y. 349; 15 N. E. Rep. 415), 1005.
Molaskee *v.* Ohio, etc., Co. (86 Wis. 22), 146.
Mollhoff *v.* Chicago R. I. & P. R. Co. (82 Pac. Rep. 733), 464.
Monaghan *v.* New York, etc., R. Co. (9 N. Y. S. R. 672; 45 Hun. 113), 489.
Montgomery *v.* Alabama, etc., R. Co. (97 Ala. 305; 12 So. Rep. 170), 1030.
Montgomery, etc., R. Co. *v.* Barringer (109 Ill. App. 185), 338.
Montgomery, etc., R. Co. *v.* Boring (51 Ga. 582), 169.
Montgomery *v.* Chicago, etc., R. Co. (109 Mo. App. 83 S. W. Rep. 66), 367.
Montgomery, etc., R. Co. *v.* Mallette (92 Ala. 209; 9 So. Rep. 363), 589.
Montgomery *v.* Missouri Pac. R. Co. (182 Mo. 495), 88.
Montgomery *v.* Missouri Pac. Ry. Co. (181 Mo. 477; 79 S. W. Rep. 930), 940.
Montgomery, etc., Co. *v.* Montgomery, etc., R. Co. (86 Ala. 372; 5 So. Rep. 735), 282.
Montgomery, etc., R. Co. *v.* Smith (Ala., 39 So. Rep. 575), 282.
Montgomery, etc., R. Co. *v.* Stewart (91 Ala. 421; 8 So. Rep. 708), 664.
Montgomery, etc., R. Co. *v.* Thompson (71 Ala. 448; 54 Am. Rep. 72), 1069.
Montgomery, etc., Co. *v.* Whatley (44 So. Rep. 538), 746.
Moody *v.* Peterson (11 Ill. App. 180), 455.
Moon Anchor Con. Co. *v.* Hopkins (111 Fed. Rep. 298; 49 C. C. A. 347), 145.
Moon *v.* Northern Pac. R. Co. (46 Minn. 106; 48 N. W. Rep. 679; 48 Am. & Eng. R. Cas. 195) 153.
Moon *v.* Pere Marquette R. Co. (143 Mich. 125, 136; 106 N. W. Rep. 715), 95.
Mooney *v.* Hudson River R. Co. (5 Robt. 548), 1043.
Moore *v.* Boston, etc., R. Co. (159 Mass. 399; 34 N. E. Rep. 366), 408.
Moore *v.* Central R. Co. (47 Iowa 688), 977.
Moore *v.* Chicago, etc., R. Co. (59 Miss. 243; 9 Am. & Eng. R. Cas. 401), 92.
Moore *v.* Columbia, etc., R. Co. (38 So. Car. 1; 16 S. E. Rep. 781; 58 Am. & Eng. R. Cas. 493), 1070.
Moore *v.* Edison, etc., R. Co. (43 La. Ann. 792; 9 So. Rep. 433), 802.
Moore *v.* Illinois Central R. Co. (135 Fed. Rep. 67; 67 C. C. A. 541), 528.
Moore *v.* Kansas City, etc., R. Co. (146 Mo. 580; 48 S. W. Rep. 487), 140.
Moore *v.* Kansas City, etc., R. Co. (126 Mo. 265; 29 S. W. Rep. 9), 1095.
Moore *v.* Lindell Ry. Co. (176 Mo. 528; 75 S. W. Rep. 672), 388.
Moore *v.* New York, etc., R. Co. (42 N. Y. S. R. 489; 62 Hun 621; 39 Am. & Eng. R. Cas. 628), 1001.
Moore *v.* Norfolk, etc., R. Co. (87 Va. 489; 12 S. E. Rep. 968), 413.
Moore *v.* Philadelphia, etc., R. Co. (108 Pa. St. 349), 978.
Moore *v.* Saginaw, etc., R. Co. (115 Mich. 103; 72 N. W. Rep. 1112), 667.
Moore *v.* St. Louis, etc., Ry. Co. (La. Ann., 38 So. Rep. 913), 335.
Moore *v.* Southern Ry. Co. (N. C., 53 S. E. Rep. 745), 252.
Moore *v.* Transit Co. (194 Mo. 1; 92 S. W. Rep. 390), 775.
Moore *v.* Wabash R. Co. (85 Mo. 588; 21 Am. & Eng. R. Cas. 509), 485.
Moorman *v.* Atchison, etc., R. Co. (105 Mo. App. 711; 78 S. W. Rep. 1089), 665.
Moran *v.* Nashville, etc., R. Co. (2 Baxt. [Tenn.] 379), 973.
Moran *v.* New York, etc., R. Co. (67 Barb. [N. Y.] 96), 492.
Moran *v.* Rockland, etc., R. Co. (99 Me. 127; 58 Atl. Rep. 676), 264.

[*References are to sections.*]

Morbly *v.* Chicago, etc., Ry. Co. (Iowa, 89 N. W. Rep. 105), 381.
Morehead *v.* Yazoo, etc., R. Co. (Miss., 36 So. Rep. 151), 328.
Moreland *v.* Boston R. Co. (141 Mass. 31; 1 N. E. Rep. 909), 620.
Morgan *v.* Bowman (22 Mo. 538), 278.
Morgan *v.* Chesapeake & O. R. Co. (Ky., 105 S. W. Rep. 961; 15 L. R. A. N. S. 790), 811.
Morgan *v.* Hudson River, etc., Co. (133 N. Y. 666; 31 N. E. Rep. 234), 263.
Morgan *v.* Smith (159 Mass. 570; 35 N. E. Rep. 101), 276.
Morgan *v.* Southern Pacific R. Co. (95 Cal. 510; 54 Am. & Eng. R. Cas. 101; 30 Pac. Rep. 603), 206.
Morgan *v.* Wabash R. Co. (159 Mo. 262; 60 S. W. Rep. 195), 1065.
Morgen *v.* Camden, etc., R. Co. (Pa., 16 Atl. Rep. 353), 786.
Morgen *v.* Norfolk Southern R. Co. (98 No. Car. 247), 886.
Morgen *v.* Pennsylvania R. Co. (19 Blatchf. U. S. 239; 7 Fed. Rep. 78), 871.
Morgen *v.* Southern Pacific R. Co. (95 Cal. 510; 30 Pac. Rep. 603; 54 Am. & Eng. R. Cas. 101), 194.
Morgen *v.* Vale of Neath R. Co. (B. & S., 736; 35 L. J. Q. B. 23; 13 L. T. 564), 497.
Morgen *v.* Wabash R. Co. (159 Mo. 262; 60 S. W. Rep. 195), 1076.
Morissette *v.* Canadian Pac. R. Co. (74 Vt. 232; 52 Atl. Rep. 520), 369.
Morley *v.* Great Western R. Co. (16 U. C. Q. B. 504), 202.
Morris, etc., R. Co. *v.* Ayres (29 N. J. L. 393), 658.
Morris *v.* Boston, etc., R. Co. (15 Am. Neg. Rep. 8), 408.
Morris *v.* Chicago, etc., R. Co. (65 Iowa 727; 19 Am. & Eng. R. Cas. 180; 54 Am. Rep. 39), 47.
Morris *v.* Chicago, etc., R. Co. (26 Fed. Rep. 22), 882.
Morris *v.* Duluth, etc., R. Co. (108 Fed. Rep. 747; 47 C. C. A. 661), 358.
Morris *v.* Eastern Ry. Co. (88 Minn. 112; 92 N. W. Rep. 535), 267.
Morris, etc., R. Co. *v.* Haslan (33 N. J. L. 147), 1023.
Morris *v.* Metropolitan R. Co. (63 App. Div. 78; 71 N. Y. Supp. 321; 170 N. Y. 592; 63 N. E. Rep. 1119), 1052.
Morris *v.* New York, etc., R. Co. (106 N. Y. 678; 13 N. E. Rep. 455; 36 Hun 647), 584.
Morrison *v.* Erie Co. (56 N. Y. 302; 6 Am. Ry. Rep. 166), 790.
Morrison *v.* San Pedro, etc., R. Co. (88 Pac. Rep. 998), 473.
Morrissey *v.* Eastern R. Co. (126 Mass. 377), 1084.
Morrow *v.* Pullman Palace Car Co. (98 Mo. App. 351; 73 S. W. Rep. 281), 137.
Morrow *v.* Southern Ry. Co. (61 S. E. Rep. 621), 1080.
Morse *v.* Erie R. Co. (65 Barb. N. Y. 490), 1004.
Morse *v.* Minneapolis, etc., R. Co. (30 Minn. 465; 16 N. W. Rep. 358; 11 Am. & Eng. R. Cas. 168), 334.
Morse *v.* Richmond (41 Vt. 435), 393.
Moses *v.* Louisville, etc., R. Co. (39 La. Ann. 649; 2 So. Rep. 567; 30 Am. & Eng. R. Cas. 556), 625.
Mosgrove *v.* Coal Co. (Iowa, 81 N. W. Rep. 227), 356.
Mosher *v.* St. Louis, etc., R. Co. (127 U. S. 393), 847.
Moskovitz *v.* Lighte (68 Hun 102), 206.
Moss *v.* Johnson (22 Ill. 633), 568.
Moss *v.* Missouri Pacific Ry. Co. (49 Mo. 167; 1 Am. Ry. Rep. 576), 464.
Moster *v.* Terminal R. Ass'n (106 Ill. App. 494), 341.
Mott *v.* Central R. Co. (70 Ga. 680; 48 Am. Rep. 595), 65.
Mott *v.* Southern Ry. Co. (131 N. C. 234; 42 S. E. Rep. 601), 386.
Mounce *v.* Lodwick Lumber Co. (91 S. W. Rep. 240), 543.
Mt. Olive, etc., Co. *v.* Herbeck (92 Ill. App. 441; 60 N. E. Rep. 105), 356.
Mountain Copper Co. *v.* Van Buren (123 Fed. Rep. 61), 128.
Moyer *v.* Ramsey-Brisbane Co. (119 Ga. 734; 46 S. E. Rep. 844), 109.
Muelhauser *v.* St. Louis, etc., R. Co. (91 Mo. 332; 2 S. W. Rep. 315; 28 Am. & Eng. R. Cas. 157), 555.
Mueller *v.* Northwestern, etc., Co. (125 Wis. 326; 104 N. W. Rep. 67), 97.
Muench *v.* Heineman (Wis., 96 N. W. Rep. 800), 872.
Muhl *v.* Michigan So. R. Co. (10 Ohio St. 272), 64.
Muirhead *v.* Hannibal, etc., R. Co. (19 Mo. App. 634), 344.
Muldoon *v.* Seattle, etc., R. Co. (22 L. R. A. 794; 10 Wash. 311; 38 Pac. Rep. 995; 7 Wash. 528; 35 Pac. Rep. 422; 58 Am. & Eng. R. Cas. 546), 851, 852.
Muldowney *v.* Illinois, etc., R. Co. (39 Iowa 615; 8 Am. Ry. Rep. 487), 340.
Mulhall *v.* O'Fallon (176 Mass. 266; 57 N. E. Rep. 386; 54 L. R. A. 934; 79 Am. St. Rep. 309), 69.
Mulhausen *v.* St. Louis, etc., R. Co. (91 Mo. 332; 2 S. W. Rep. 315; 28 Am. & Eng. R. Cas. 157), 561.
Mulherrin *v.* Delaware, etc., R. Co. (81 Pa. St. 366; 15 Am. Ry. Rep. 456), 413.
Mullen *v.* Owosso (100 Mich. 103; 58 N. W. Rep. 663; 43 Am. St. Rep. 436; 23 L. R. A. 693), 1058.
Mullen *v.* Wisconsin, etc., R. Co. (46 Minn. 474; 47 Am. & Eng. R. Cas. 649), 749.
Mullich *v.* Brocker (97 S. W. Rep. 549), 278.
Mulligan *v.* New York, etc., R. Co. (129 N. Y. 506; 29 N. E. Rep. 952; 42 N. Y. S. R. 83; 53 Am. & Eng. R. Cas. 47), 735.
Mullins *v.* Siegel, etc., Co. (183 N. Y. 129; 75 N. E. Rep. 1112), 285.
Mumford *v.* Chicago, R. I. & P. Ry. Co. (128 Iowa 685; 104 N. W. Rep. 1135), 849.

[*References are to sections.*]

Mumma *v.* Easton & A. R. Co. (65 Atl. Rep. 208), 110.
Munger *v.* Sedalia (66 Mo. App. 629), 1056.
Munro *v.* Pacific Coast R. Co. (84 Cal. 515; 24 Pac. Rep. 303), 191.
Muntz *v.* Algiers & G. R. Co. (115 La. 437; 38 So. Rep. 410), 235.
Murch *v.* Concord R. Co. (29 N. H. 9; 61 Am. Dec. 631), 395.
Murtfelt *v.* New York, etc., R. Co. (102 N. Y. 703; 7 N. E. Rep. 404; 34 Hun 632; 25 Am. & Eng. R. Cas. 144), 291.
Murphy *v.* Atlanta, etc., R. Co. (89 Ga. 832; 15 S. E. Rep. 774), 592.
Murphy *v.* Boston, etc., R. Co. (88 N. Y. 146; 24 Hun 142; 59 Hun. Pr. 197; 8 Am. & Eng. R. Cas. 510), 468.
Murphy *v.* Boston, etc., R. Co. (133 Mass. 121; 14 Am. & Eng. R. Cas. 675), 881.
Murphy *v.* Galveston, H. & N. Ry. Co. 96 S. W. Rep. 940), 265.
Murphy *v.* Holbrook (20 Ohio St. 137), 238.
Murphy *v.* New York, etc., R. Co. (187 Mass. 18; 72 N. E. Rep. 330), 379.
Murphy *v.* New York, etc., R. Co. (118 N. Y. 527; 23 N. E. Rep. 812), 407.
Murphy *v.* New York, etc., R. Co. (8 N. Y. 445; 8 Am. & Eng. R. Cas. 490; 25 Hun 311), 199.
Murphy *v.* New York, etc., R. Co. (29 Conn. 496), 200.
Murphy *v.* New York, etc., R. Co. (66 Barb. [N. Y.] 125), 83.
Murphy *v.* Rome, etc., R. Co. (32 N. Y. S. R. 381; 10 N. Y. Supp. 354; 56 Hun 645), 790.
Murphy *v.* St. Louis, etc., R. Co. (43 Mo. App. 351), 692.
Murphy *v.* Wabash R. Co. (115 Mo. 11; 21 S. W. Rep. 862), 326.
Murray *v.* Boston Ice Co. (180 Mass. 165; 61 N. E. Rep. 1001), 1043.
Murray *v.* Central City R. Co. (66 Barb. [N. Y.] 43; 51 N. Y. 666), 389.
Murray *v.* Dwight (161 N. Y. 301; 55 N. E. Rep. 901), 226.
Murray *v.* Lehigh Valley R. Co. (66 Conn. 512; 34 Atl. Rep. 506; 32 L. R. A. 539), 818.
Murray *v.* Metropolitan R. Co. (27 L. T. 762), 649.
Murray *v.* Missouri Pacific Ry. Co. (101 Mo. 236; 13 S. W. Rep. 817), 953.
Murray *v.* New York, etc., R. Co. (66 Conn. 512; 34 Atl. Rep. 506; 32 L. R. A. 539), 683.
Murray *v.* Railroad Co. (101 Mo. 236), 136.
Murray *v.* Richmond, etc., R. Co. (93 No. Car. 92), 391.
Murray *v.* Usher (117 N. Y. 542; 23 N. E. Rep. 564; 27 N. Y. S. R. 928), 199.
Murtaugh *v.* New York, etc., R. Co. (23 N. Y. S. R. 636; 3 N. Y. Supp. 483), 374.
Murtaugh *v.* New York, etc., R. Co. (49 Hun 456), 27.
Murtaugh *v.* St. Louis (44 Mo. 480), 299.
Muster *v.* Chicago, etc., R. Co. (61 Wis. 325; 21 N. W. Rep. 223; 49 Am. Rep. 41; 18 Am. & Eng. R. Cas. 113), 590.
Muth *v.* St. Louis, etc., R. Co. (87 Mo. App. 422), 657.
Myers *v.* Baltimore, etc., R. Co. (150 Pa. St. 386; 24 Atl. Rep. 747), 1003.
Myers *v.* Indianapolis, etc., R. Co. (113 Ill. 386; 1 N. E. Rep. 899), 408.
Myers *v.* San Francisco (42 Cal. 215), 200.
Mynning *v.* Detroit, etc., R. Co. (67 Mich. 677), 138.
Mynning *v.* Detroit, etc., R. Co. (59 Mich. 257; 26 N. W. Rep. 514; 23 Am. & Eng. R. Cas. 317), 446.

N

Nadau *v.* White River, etc., Co. (76 Wis. 120; 43 N. W. Rep. 1135), 245.
Nagle *v.* California Southern R. Co. (88 Cal. 86; 25 Pac. Rep. 1106), 787.
Nagle *v.* Missouri Pacific Ry. Co. (75 Mo. 653; 42 Am. Rep. 418; 10 Am. & Eng. R. Cas. 702), 168.
Nall *v.* Louisville, etc., R. Co. (129 Ind. 260; 28 N. E. Rep. 183, 611; 48 Am. & Eng. R. Cas. 309), 378.
Nalley *v.* Hartford Co. (51 Conn. 524; 50 Am. Rep. 47), 95.
Nance *v.* Carolina R. Co. (94 No. Car. 619), 790.
Narramore *v.* Cleveland, etc., R. Co. (96 Fed. Rep. 298; 37 C. C. A. 499; 48 L. R. A. 68), 382.
Nary *v.* New York, etc., R. Co. (29 N. Y. S. R. 630; 9 N. Y. Supp. 153; 55 Hun 612; 125 N. Y. 759; 27 N. E. Rep. 408), 470.
Nash *v.* Downing (93 Mo. App. 156), 99.
Nash *v.* New York, etc., R. Co. (34 N. Y. S. R. 788; 3 Silv. App. 315), 1015.
Nash *v.* New York, etc., R. Co. (14 N. Y. S. R. 531), 1005.
Nash *v.* New York, etc., R. Co. (125 N. Y. 715; 51 Hun 594), 409.
Nash *v.* Richmond, etc., R. Co. (82 Va. 55), 1025.
Nashville, C. & St. L. Ry. Co. *v.* Bean's Exr's (110 S. W. Rep. 328), 1094.
Nashville, etc., R. Co. *v.* Carroll (6 Heisk. [Tenn.] 347; 12 Am. Ry. Rep. 20), 395.
Nashville, etc., R. Co. *v.* David (6 Heisk. 261), 604.
Nashville, etc., R. Co. *v.* Eakin (6 Caldw. [Tenn.] 582), 54.
Nashville, etc., R. Co. *v.* Foster (10 Lea [Tenn.] 351; 11 Am. & Eng. R. Cas. 180), 505.
Nashville, etc., R. Co. *v.* Ganns (101 Tenn. 380; 47 S. W. Rep. 493), 495.
Nashville, etc., R. Co. *v.* Handman (13 Lea [Tenn.] 423), 468.
Nashville, C. & St. L. Ry. *v.* Hayes (99 S. W. Rep. 362), 260.
Nashville, etc., R. Co. *v.* Jones (9

[*References are to sections.*]

Heisk. [Tenn.] 27; 19 Am. Ry. Rep. 261), 480.
Nashville, etc., R. Co. *v.* McDaniel (12 Lea [Tenn.] 386), 227.
Nashville, etc., R. Co. *v.* Messine (1 Sneed. [Tenn.] 220), 551.
Nashville, etc., R. Co. *v.* Miller (120 Ga. 453; 47 S. E. Rep. 959), 91.
Nashville, C. & St. L. Ry. *v.* Reynolds (41 So. Rep. 1001), 979.
Nashville, etc., E. Co. *v.* Prince (2 Heisk. 580), 193.
Nashville, etc., R. Co. *v.* Smith (6 Heisk. [Tenn.] 174), 173.
Nashville, etc., R. Co. *v.* Stearns (9 Heisk. [Tenn.] 52), 177.
Nashville, etc., R. Co. *v.* Stevens (9 Heisk. [Tenn.] 12; 19 Am. Ry. Rep. 363), 165.
Nashville, etc., R. Co. *v.* Sprayberry (8 Baxt. [Tenn.] 341), 810.
Nashville, etc., R. Co. *v.* Sprayberry (9 Heisk. [Tenn.] 852; 20 Am. Ry. Rep. 55), 47.
Nashville, etc., R. Co. *v.* Troxlee (1 Lea [Tenn.] 520), 678.
Nashville, etc., R. Co. *v.* Wheeler (Tenn., 4 Am. & Eng. R. Cas. 633), 355.
Natchez, etc., Co. *v.* Mullins (67 Miss. 672; 7 So. Rep. 542), 59.
Nattress *v.* Philadelphia, etc., R. Co. (150 Pa. St. 527; 24 Atl. Rep. 753), 417.
Nauss *v.* Boston & M. R. Co. (81 N. E. Rep. 280), 866.
Nave *v.* Alabama, etc., R. Co. (96 Ala., 264; 11 So. Rep. 391; 54 Am. & Eng. R. Cas. 151), 408.
Naylor *v.* Chicago, etc., R. Co. (53 Wis. 661; 11 N. W. Rep. 24; 5 Am. & Eng. R. Cas. 460), 341.
Naylor *v.* Chicago, etc., R. Co. (Wis., 2 N. W. Rep. 24), 353.
Naylor *v.* New York, etc., R. Co. (33 Fed. Rep. 801), 322.
Naylor *v.* Ry. Co. 53 Wis. 661; 11 N. W. Rep. 24), 243.
Naylor *v.* Pittsburg, etc., R. Co. (26 Ohio Cir. Ct. 277), 71.
Neagle *v.* Syracuse, etc., R. Co. (95 N. Y. S. 884; 109 App. Div. 339), 367.
Neal *v.* Railroad Co. (57 Minn. 365; 59 N. W. Rep. 312), 157.
Neal *v.* Rendall (98 Me. 69; 56 Atl. Rep. 209; 63 L. R. A. 668), 1056.
Nebauer *v.* Great Northern R. Co. (Minn., 99 N. W. Rep. 620), 47.
Nebauer *v.* New York, etc., R. Co. (101 N. Y. 607; 4 N. E. Rep. 125), 139.
Needham *v.* Grand Trunk R. Co. (38 Vt. 294), 45.
Needham *v.* Louisville & N. R. Co. (85 Ky. 423; 3 S. W. Rep. 797), 152.
Neeley *v.* Southwestern, etc., Co. (13 Okl. 356; 75 Pac. Rep. 537; 64 L. R. A. 145), 246.
Neet *v.* Burlington, etc., R. Co. (106 Iowa 248), 398.
Nehrbas *v.* Central Pacific R. Co. (62 Cal. 320; 14 Am. & Eng. R. Cas. 670), 206.
Neiman *v.* Delaware, etc., R. Co. (149 Pa. St. 92; 24 Atl. Rep. 96), 1013.
Neilon *v.* Kansas City, etc., R. Co. (85 Mo. 599; 28 Am. & Eng. R. Cas. 386), 483.
Nejus *v.* Chicago, etc., R. Co. (47 Minn. 92; 49 N. W. Rep. 527), 522.
Nelson *v.* Atlantic, etc., R. Co. (68 Mo. 593), 789.
Nelson *v.* Central, etc., R. Co. (88 Ga. 225; 14 S. E. Rep. 210), 419.
Nelson *v.* Chesapeake & Ohio R. Co. (88 Va. 971; 54 Am. & Eng. R. Cas. 82; 14 S. E. Rep. 838), 52.
Nelson *v.* Chicago, etc., R. Co. (73 Iowa 576; 35 N. W. Rep. 611), 522.
Nelson *v.* Galveston, etc., R. Co. (78 Tex. 621; 14 S. W. Rep. 1021; 48 Am. & Eng. R. Cas. 8), 66.
Nelson *v.* Lehigh Valley, etc., R. Co. (50 N. Y. S. 63; 25 App. Div. 535), 113.
Nelson *v.* Metropolitan R. Co. (88 S. W. Rep. 781), 175.
Nelson *v.* Oil City R. Co. (207 Pa. St. 363; 56 Atl. Rep. 933), 328.
Nelson *v.* Union, etc., R. Co. (25 R. I. 251; 58 Atl. Rep. 780), 97.
Nelson *v.* Vermont, etc., R. Co. (26 Vt. 717), 815.
Nesbit *v.* Garner (75 Iowa 314; 39 N. W. Rep. 516; 9 Am. St. Rep. 486; 1 L. R. A. 152), 1055.
Netelle *v.* Railroad (56 Fed. Rep. 261), 55.
New Albany, etc., Co. *v.* Cooper (131 Ind. 363; 30 N. E. Rep. 294), 291.
Newcomb *v.* New York, etc., Ry. Co. 169 Mo. 409; 69 S. W. Rep. 348), 715.
Newcomb *v.* New York, etc., R. Co. (182 Mo. 687; 81 S. W. Rep. 631), 97.
New England R. Co. *v.* Conroy (175 U. S. 323; 44 L. Ed. 181), 491.
Newhard *v.* Pennsylvania R. Co. (153 Pa. St. 417; 26 Atl. Rep. 105; 55 Am. & Eng. R. Cas. 258), 882.
New Jersey Co. *v.* Brockett (121 U. S. 637; 30 L. Ed. 1049), 735.
New Jersey R. Co. *v.* Kennard (21 Pa. St. 203), 802.
New Jersey, etc., R. Co. *v.* Nichols (33 N. J. L. 343), 186.
New Jersey, etc., R. Co. *v.* Pollard (22 Wall. [U. S.] 341; 22 L. Ed. 877), 665.
New Jersey, etc., R. Co. *v.* West (32 N. J. L. 91), 990.
New Jersey, etc., R. Co. *v.* Young (49 Fed. Rep. 723; 1 U. S. App. 96; 1 C. C. A. 428), 397.
Newman *v.* Chicago, etc., R. Co. (80 Iowa 672; 45 N. W. Rep. 1054; 44 Am. & Eng. R. Cas. 555), 397.
New Orleans, etc., R. Co. *v.* Allbriton (38 Miss. 242), 180.
New Orleans, etc., R. Co. *v.* Bailey (40 Miss. 395), 177.
New Orleans, etc., R. Co. *v.* Burke (53 Miss. 200; 9 Am. Ry. Rep. 308), 745.

[*References are to sections.*]

New Orleans, etc., R. Co. *v.* Harrrison (48 Miss. 112), 466.
New Orleans, etc., R. Co. *v.* Hughes (49 Miss. 258), 321.
New Orleans, etc., R. Co. *v.* Hurst (36 Miss. 660), 176.
New Orleans & N. E. R. R. Co. *v.* Jopes (142 U. S. 18; 12 Supt. Ct. 109; 35 L. Ed. 919), 234.
New Orleans, etc., R. Co. *v.* Reese (61 Miss. 581), 276.
New Orleans, etc., R. Co. *v.* Statham (42 Miss. 608), 178.
Newport, etc., R. Co. *v.* Carroll (31 S. W. Rep. 132; 17 Ky. L. R. 374), 92.
Newport, etc., Co. *v.* Dentzel (91 Ky. 42; 14 S. W. Rep. 958), 152.
Newport News, etc., R. Co. *v.* Howe (52 Fed. Rep. 362; 6 U. S. App. 172; 3 C. C. A. 121), 1031.
Newsom *v.* Georgia, etc., R. Co. (62 Ga. 339), 99.
Newsom *v.* Georgia R. Co. (66 Ga. 57), 92.
Newton *v.* New York, etc., R. Co. (89 N. Y. S. 23; 96 App. Div. 81), 266.
Newton *v.* New York, etc., R. Co. (94 N. Y. S. R. 825; 106 App. Div. 415), 171.
New York, etc., R. Co. *v.* Ball (53 N. J. L. 283; 21 Atl. Rep. 1052), 572.
New York, etc., R. Co. *v.* Bell (112 Pa. St. 400; 4 Atl. Rep. 50; 28 Am. & Eng. R. Cas. 338), 478.
New York, etc., R. Co. *v.* Callahan (81 N. E. Rep. 670), 674.
New York, etc., R. Co. *v.* Cooper (85 Va. 939; 9 S. E. Rep. 321; 37 Am. & Eng. R. Cas. 33), 1043.
New York, etc., R. Co. *v.* Cleybourne (69 Md. 360; 16 Atl. Rep. 208; 1 L. R. A. 541), 789.
New York, etc., Co. *v.* Diffendaffer (125 Fed. Rep. 893), 243.
New York, etc., R. Co. *v.* Doane (115 Ind. 435; 17 N. E. Rep. 913; 7 Am. St. Rep. 451; 1 L. R. A. 157), 669.
New York, etc., R. Co. *v.* Enches (127 Pa. St. 316; 39 Am. & Eng. R. Cas. 444; 17 Atl. Rep. 991), 788.
New York, etc., R. Co. *v.* Hyde (56 Fed. Rep. 188; 5 C. C. A. 461), 493.
New York, etc., R. Co. *v.* Kellams (Va., 32 Am. & Eng. R. Cas. 114), 661.
New York, etc., R. Co. *v.* Kistler (66 Ohio St. 326; 64 N. E. Rep. 130), 1059.
New York, etc., R. Co. *v.* Leahman (54 N. J. L. 202; 23 Atl. Rep. 691), 959.
New York, etc., R. Co. *v.* Lockwood (17 Wall. 357; 84 U. S. 673; 21 L. Ed. 627), 856.
New York, etc., R. Co. *v.* Lyon (119 Pa. St. 234; 13 Atl. Rep. 205), 343.
New York, etc., R. Co. *v.* Price (159 Fed. Rep. 330), 916.
New York, etc., R. Co. *v.* Randel (47 N. J. L. 144; 23 Am. & Eng. R. Cas. 308), 957.
New York, etc., R. Co. *v.* Rapp (Ohio, 11 L. R. A. [N. S.] 413), 265.
New York, etc., R. Co. *v.* Seylott (18 Am. & Eng. R. Cas. 162), 563.
New York, etc., R. Co. *v.* Steinbrenner (47 N. J. L. 161; 23 Am. & Eng. R. Cas. 330), 1043.
New York, etc., R. Co. *v.* Vick (N. Y., 17 Am. & Eng. R. Cas. 609), 568.
New York, etc., R. Co. *v.* Winters (143 U. S. 60; 36 L. Ed. 71; 12 Sup. Ct. Rep. 356), 729.
Niantic Coal Co. *v.* Leonard (126 Ill. 216), 14.
Nicholas *v.* Burlington, etc., R. Co. Minn. (80 N. W. Rep. 776), 47.
Nichols *v.* Chicago, etc., R. Co. (90 Mich. 203; 51 N. W. Rep. 364; 52 Am. & Eng. R. Cas. 304), 705.
Nichols *v.* Dubuque, etc., R. Co. (68 Iowa, 732; 28 N. W. Rep. 44; 27 Am. & Eng. R. Cas. 188), 790.
Nichols *v.* Great Western R. Co. (27 U. C. Q. B. 382), 1004.
Nichols *v.* Louisville, etc., R. Co. (Ky., 6 S. W. Rep. 339; 34 Am. & Eng. R. Cas. 37), 1085.
Nichols *v.* Pere Marquette R. Co. (108 N. W. Rep. 1016), 267.
Nichols *v.* Washington, etc., R. Co. (83 Va. 99; 5 S. E. Rep. 171; 5 Am. St. Rep. 257; 32 Am. & Eng. R. Cas. 27), 862.
Nicholson *v.* Erie, etc., R. Co. (41 N. Y. 525), 4.
Nicholson *v.* Lancashire, etc., R. Co. (3 H. & C. 534; 34 L. J. Ex. 84; 12 L. T. 391), 625.
Nicholson *v.* Transylvania R. Co. (138 N. C. 516; 51 S. E. Rep. 40), 535.
Nieto *v.* Clark (1 Cliff. [U. S.] 145), 738.
Nix *v.* Texas, etc., R. Co. 82 Tex. 473; 18 S. W. Rep. 571), 485.
Nixon *v.* Hannibal, etc., Ry. Co. (141 Mo. 439; 42 S. W. Rep. 242), 1011.
Noe *v.* Rapid R. Co. (133 Mich. 152; 94 N. W. Rep. 743), 563.
Nolan *v.* Metropolitan, etc., R. Co. (72 N. Y. S. 501; 65 App. Div. 184), 39.
Nolan *v.* Montana, etc., R. Co. (25 Mont. 107; 63 Pac. Rep. 926), 251.
Nolan *v.* New York, etc., R. Co. (53 Conn. 461; 4 Atl. Rep. 106; 25 Am. & Eng. R. Cas. 342), 1084.
Nolan *v.* Shickle (3 Mo. App. 300), 137.
Noonan *v.* Consolidated Tr. Co. (64 N. J. L. 579; 46 Atl. Rep. 770), 1055.
Noonan *v.* New York, etc., R. Co. (62 Hun 618; 42 N. Y. S. R. 41; 16 N. Y. Supp. 678; 131 N. Y. 594; 30 N. E. Rep. 67), 1005.
Nolton *v.* Western R. Co. (15 N. Y. 444; 10 Hun Pr. 97), 563.
Nord *v.* Boston, etc., R. Co. (Mont., 75 Pac. Rep. 681), 89.
Nordquist *v.* Great Northern R. Co. (95 N. W. Rep. 322), 408.
Norfolk, etc., R. Co. *v.* Bell (52 S. E. Rep. 700), 253.
Norfolk, etc., R. Co. *v.* Burge (84 Va. 63; 4 S. E. Rep. 21; 32 Am. & Eng. R. Cas. 101), 1004.
Norfolk, etc., R. Co. *v.* Cottrell (83 Va. 512; 3 S. E. Rep. 123; 31 Am. & Eng. R. Cas. 235), 321.

[*References are to sections.*]

Norfolk & W. Ry. Co. *v.* Dean's Adm'x (59 S. E. Rep. 389), 1078.
Norfolk, etc., R. Co. *v.* Donnelly (88 Va. 853; 14 S. E. Rep. 692; 53 Am. & Eng. R. Cas. 571), 492.
Norfolk, etc., R. Co. *v.* Ferguson (79 Va. 241), 796.
Norfolk *v.* Galligher (89 Va. 639), 552.
Norfolk & Western R. Co. *v.* Gesswine (144 Fed. Rep. 56), 99.
Norfolk, etc., R. Co. *v.* Graham (96 Va. 430; 31 S. E. Rep. 604), 245.
Norfolk, etc., R. Co. *v.* Groseclose (88 Va. 267; 13 S. E. Rep. 454), 555.
Norfolk, etc., R. Co. *v.* Harman (83 Va. 553; 8 S. E. Rep. 251), 1093.
Norfolk, etc., R. Co. *v.* Hoover (79 Md. 253; 29 Atl. Rep. 994; 25 L. R. A. 710), 488.
Norfolk, etc., Ry. Co. *v.* Lipscomb (90 Va. 137), 663.
Norfolk, etc., R. Co. *v.* McDonald (88 Va. 352; 13 S. E. Rep. 706), 348.
Norfolk, etc., R. Co. *v.* Prinnell (Va., 3 S. E. Rep. 95; 30 Am. & Eng. R. Cas. 574), 664.
Norfolk, etc., R. Co. *v.* Stevens (97 Va. 631; 34 S. E. Rep. 525; 46 L. R. A. 367), 276.
Norfolk, etc., R. Co. *v.* Thomas (90 Va. 205; 17 S. E. Rep. 884), 245.
Norfolk, etc., R. Co. *v.* Wysor (82 Va. 250; 26 Am. & Eng. R. Cas. 234), 659.
Norfolk & West. Ry. Co. *v.* Cheatwood's Adm'r (103 Va. 356; 49 S. E. Rep. 489), 260.
Norfolk & W. R. Co. *v.* Cromer's Exec. (99 Va. 763; 40 S. E. Rep. 54), 258.
Norfolk & W. R. Co. *v.* Poole's Adm'r (40 S. E. Rep. 627), 258.
Norfolk & Western R. Co. *v.* Spratley (103 Va. 379; 49 S. E. Rep. 502), 100.
North Birmingham R. Co. *v.* Calderwood (89 Ala. 247; 7 So. Rep. 360), 392.
North Chicago, etc., R. Co. *v.* Aufmann (221 Ill. 614; 77 N. E. Rep. 1120), 379.
North Chicago, etc., R. Co. *v.* Cook (145 Ill. 551; 33 N. E. Rep. 958), 583.
North Chicago R. Co. *v.* Dudgeon (69 Ill. App. 67), 278.
North Chicago R. Co. *v.* Dudgeon (184 Ill. 476; 56 N. E. Rep. 796), 281.
North Chicago Co. *v.* Johnson (114 Ill. 57), 470.
North Chicago R. Co. *v.* Olds (40 Ill. App. 421), 1088.
North Pennsylvania R. Co. *v.* Kirk (90 Pa. St. 15; 1 Am. & Eng. R. Cas. 45), 198.
Northeastern, etc., R. Co. *v.* Chandler (84 Ga. 37; 10 S. E. Rep. 586), 105.
North Eastern R. Co. *v.* Wanless (43 L. J. Q. B. 185; L. R., 7 H. L. Cas. 12; 22 W. R. 561; 30 L. T. 275; L. R., 6 Q. B. 481), 919.
Northern, etc., R. Co. *v.* O'Connor (76 Md. 207; 24 Atl. Rep. 449; 16 L. R. A. 449; 52 Am. & Eng. R. Cas. 176), 658.
North. Ala., etc., Co. *v.* Beacham (Ala., 37 So. Rep. 227), 307.
Northern Alabama Ry. Co. *v.* Key (43 So. Rep. 794), 413.
Northern Alabama R. Co. *v.* Mansell (138 Ala. 548; 36 So. Rep. 459), 92.
Northern Ala. R. Co. *v.* Shea (Ala., 37 So. Rep. 796), 367.
Northern Cent. R. Co. *v.* Husson (101 Pa. St. 1), 141.
Northern Central R. Co. *v.* State (29 Md. 420), 21.
Northern Pacific R. Co. *v.* Adams (192 U. S. 441; 48 L. Ed. 513), 848.
Northern Pacific R. Co. *v.* Amato (49 Fed. Rep. 881; 144 U. S. 465; 12 Sup. Ct. Rep. 740), 1105.
Northern Pacific R. R. Co. *v.* Babcock (154 U. S. 190; 14 Sup. Ct. Rep. 978; 38 L. Ed. 958), 43.
Northern Pacific R. Co. *v.* Behling (57 Fed. Rep. 1037), 527.
Northern Pac. R. Co. *v.* Charless (51 Fed. Rep. 562; 7 U. S. App. 359; 2 C. C. A. 380; 51 Am. & Eng. R. Cas. 198), 381.
Northern Pacific R. Co. *v.* Charless (162 U. S. 359; 40 L. Ed. 999), 498.
Northern Pac. Ry. Co. *v.* Dixon (139 Fed. Rep. 737), 113.
Northern Pac. R. Co. *v.* Dixon (194 U. S. 338; 48 L. Ed. 1006), 489.
Northern Pacific R. Co. *v.* Hambly (154 U. S. 349; 14 Sup. Ct. Rep. 983; 38 L. Ed. 1009), 461.
Northern Pacific R. Co. *v.* Herbert (116 U. S. 642; 6 Sup. Ct. Rep. 590; 29 L. Ed. 755), 461.
Northern Pacific R. Co. *v.* Hess (2 Wash. 383; 26 Pac. Rep. 866; 48 Am. & Eng. R. Cas. 91), 833.
Northern Pacific R. Co. *v.* Holmes (3 Wash. 543; 18 Pac. Rep. 76), 882.
Northern Pacific R. Co. *v.* Kavanaugh (51 Fed. Rep. 517), 491.
Northern Pacific R. Co. *v.* Mase (63 Fed. Rep. 113; 11 C. C. A. 63), 487.
Northern Pac. R. Co. *v.* Nichols (50 Fed. Rep. 718; 4 U. S. App. 369), 263.
Northern Pacific R. Co. *v.* O'Brien (1 Wash. 599; 21 Pac. Rep. 32), 147.
Northern Pacific R. Co. *v.* Peterson (162 U. S. 346; 16 Sup. Ct. Rep. 843; 40 L. Ed. 994), 461.
Northern Pacific R. Co. *v.* Peterson (51 Fed. Rep. 182; 4 U. S. App. 574; 2 C. C. A. 157), 505.
Northern Pacific R. Co. *v.* Peterson (55 Fed. Rep. 940), 1021.
Northern Pacific R. Co. *v.* Porier (167 U. S. 48; 17 Sup. Ct. Rep. 741; 42 L. Ed. 72), 461.
Northern Pacific R. Co. *v.* Sullivan (53 Fed. Rep. 219; 10 U. S. App. 473; 3 C. C. A. 506), 401.
Northern Pac. R. Co. *v.* Tynan (119 Fed. Rep. 288), 254.
Northwestern R. Co. *v.* Hack (66 Ill. 238), 736.
Norton *v.* Consolidated Ry. Co. (63 Atl. Rep. 1087), 658.
Norton *v.* Eastern R. Co. (113 Mass. 366), 969.

[*References are to sections.*]

Norton *v.* Galveston, etc., Ry. Co. (108 S. W. Rep. 1044), 826.
Norton *v.* Kramer (180 Mo. 536; 79 S. W. Rep. 699), 95.
Norton *v.* St. Louis, etc., R. Co. (40 Mo. App. 642), 165.
Nowakowski *v.* Detroit, etc., Co. (89 N. W. Rep. 956; 9 Det. Leg. N. 25), 145.
Norwood *v.* Raleigh, etc., R. Co. (111 No. Car. 236; 16 S. E. Rep. 4), 1099.
Nosler *v.* Chicago, etc., R. Co. (73 Iowa 286; 34 N. W. Rep. 850), 1003.
Noyes *v.* Boscawen (64 N. H. 361; 10 Atl. Rep. 690), 1043.
Nugent *v.* Boston, etc., R. Co. (80 Me. 62; 12 Atl. Rep. 797), 229.
Nugent *v.* Brooklyn El. R. Co. (72 N. Y. S. 67; 64 App. Div. 351), 255.
Nugent *v.* Milling Co. (131 Mo. 253; 33 S. W. Rep. 428), 148.
Nugent *v.* Smith (1 C. P. D. 444), 32.
Nunn *v.* Georgia, etc., R. Co. (71 Ga. 710; 51 Am. Rep. 284), 704.
Nutter *v.* Boston, etc., R. Co. (60 N. H. 483), 104.

O

Oakes *v.* Mase (165 U. S. 363), 478.
Oakland R. Co. *v.* Fielding (48 Pa. St. 320), 909.
Oates *v.* Metropolitan St. Ry. Co. (168 Mo. 535; 68 S. W. Rep. 906; 58 L. R. A. 447), 392.
Oates *v.* Union Pac. R. Co. (104 Mo. 514; 16 S. W. Rep. 487), 49.
O'Bannon's Admr. *v.* Louisville, etc., R. Co. (9 Ky. L. R. 706; 6 S. W. Rep. 434), 355.
Obertoni *v.* Boston, etc., R. Co. (186 Mass. 481; 71 N. E. Rep. 980; 67 L. R. A. 422), 120.
O'Brien *v.* American, etc., Co. (53 N. J. L. 291; 21 Atl. Rep. 224), 472.
O'Brien *v.* Boston, etc., R. Co. (138 Mass. 387; 52 Am. Rep. 279), 461.
O'Brien *v.* Boston, etc., R. Co. (15 Gray [Mass.] 20), 736.
O'Brien *v.* Chicago, etc., Ry. Co. (116 Fed. Rep. 502), 506.
O'Brien *v.* Cunard S. S. Co. (154 Mass. 372; 28 N. E. Rep. 266; 13 L. R. A. 329), 29.
O'Brien *v.* Missouri, K. & T. Ry. Co. (Tex., 82 S. W. Rep. 319), 267.
O'Brien *v.* Transit Co. (110 S. W. Rep. 705), 737.
Oceanic, etc., R. Co. *v.* Compania Translantique, etc., Co. (134 N. Y. 461; 31 N. E. Rep. 987; 30 Am. St. Rep. 685), 234.
Och *v.* Missouri, etc., R. Co. (130 Mo. 27; 31 S. W. Rep. 962; 36 L. R. A. 442), 649.
O'Connell *v.* Baltimore, etc., R. Co. (20 Md. 212), 464.
O'Connell *v.* St. Louis, etc., R. Co. (106 Mo. 482; 17 S. W. Rep. 494), 582.
O'Connor *v.* Illinois Central R. Co. (44 La. Ann. 339; 10 So. Rep. 678), 1086.
O'Connor *v.* Missouri Pacific R. Co. (94 Mo. 150; 4 Am. St. Rep. 364; 7 S. W. Rep. 106), 947.
Odell *v.* New York, etc., R. Co. (120 N. Y. 323; 24 N. E. Rep. 478), 406.
Odin Coal Co. *v.* Denman (185 Ill. 413; 57 N. E. Rep. 192; 76 Am. St. Rep. 45), 14.
O'Donnell *v.* Allegheny Valley R. Co. (59 Pa. St. 239), 803.
O'Donnell *v.* Baum (38 Mo. App. 245), 256.
O'Donnell *v.* Kansas City, etc., R. Co. (197 Mo. 110, 117; 95 S. W. Rep. 196), 554.
O'Donnell *v.* Missouri Pacific Ry. Co. (7 Mo. App. 190), 1089.
O'Donnell *v.* Providence, etc., R. Co. (6 R. I. 211), 965.
O'Donnell *v.* Rhode Island R. Co. (28 R. I. 245; 66 Atl. Rep. 578), 168.
O'Flaherty *v.* Union R. Co. (45 Mo. 70), 1058.
O'Gara *v.* St. Louis Transit Co. (103 S. W. Rep. 54), 582.
Ogle *v.* Mills (139 N. Y. 458), 308.
Oglesby *v.* Railway Co. (177 Mo. 272; 76 S. W. Rep. 623), 119.
O'Hare *v.* Chicago, etc., R. Co. (95 Mo. 662; 9 S. W. Rep. 23), 103.
Ohio, etc., R. Co. *v.* Allender (47 Ill. App. 484), 801.
Ohio, etc., Ry. Co. *v.* Collern (73 Ind. 261), 261.
Ohio, etc., R. Co. *v.* Crosby (107 Ind. 32; 7 N. E. Rep. 373; 27 Am. & Eng. R. Cas. 339), 181.
Ohio, etc., Ry. Co. *v.* Dickerson (59 Ind. 317), 670.
Ohio, etc., R. Co. *v.* Dunbar (20 Ill. 385), 815.
Ohio, etc., R. Co. *v.* Early (141 Ind. 73; 40 N. E. Rep. 257; 28 L. R. A. 546), 216.
Ohio, etc., R. Co. *v.* Gullett (15 Ind. 487), 394.
Ohio, etc., R. Co. *v.* Hammersley (28 Ind. 371), 359.
Ohio, etc., R. Co. *v.* Hatten (60 Ind. 12), 832.
Ohio, etc., R. Co. *v.* Hecht (115 Ind. 443; 17 N. E. Rep. 297; 34 Am. & Eng. R. Cas. 447), 174.
Ohio, etc., R. Co. *v.* McClelland (25 Ill. 140), 976.
Ohio, etc., R. Co. *v.* McDonald (5 Ind. App. 108; 31 N. E. Rep. 836), 952.
Ohio, etc., R. Co. *v.* Metropolitan St. Ry. Co. (103 S. W. Rep. 142), 715.
Ohio, etc., R. Co. *v.* Muhling (30 Ill. 1), 568.
Ohio, etc., R. Co. *v.* Pearcy (128 Ind. 197; 27 N. E. Rep. 479), 406.
Ohio, etc., R. Co. *v.* Reed (40 Ill. App. 47), 972.
Ohio, etc., R. Co. *v.* Robb (36 Ill. App. 627), 492.
Ohio, etc., R. Co. *v.* Schiebe (44 Ill. 460), 785.
Ohio, etc., R. Co. *v.* Selby (47 Ind. 471; 8 Am. Ry. Rep. 177), 826.
Ohio, etc., R. Co. *v.* Simms (43 Ill. App. 260), 628.
Ohio, etc., R. Co. *v.* Smith (5 Ind. App. 560; 32 N. E. Rep. 809), 833.
Ohio, etc., R. Co. *v.* Stansberry (132

[*References are to sections.*]

Ind. 533; 32 N. E. Rep. 218), 793.
Ohio, etc., R. Co. *v.* Stein (140 Ind. 61; 39 N. E. Rep. 246), 493.
Ohio, etc., R. Co. *v.* Stratton (78 Ill. 88), 787.
Ohio, etc., R. Co. *v.* Trowbridge (126 Ind. 391; 26 N. E. Rep. 64; 45 Am. & Eng. R. Cas. 200), 27.
Ohio, etc., R. Co. *v.* Tyndall (13 Ind. 366), 57.
Ohio, etc., R. Co. *v.* Voight (122 Ind. 288; 23 N. E. Rep. 774), 576.
Ohio, etc., R. Co. *v.* Walker (113 Ind. 196; 15 N. E. Rep. 234; 32 Am. & Eng. R. Cas. 121), 882.
Ohio, etc., R. Co. *v.* Wangelin (43 Ill. App. 324), 190.
Ohio, etc., R. Co. *v.* Watson (Ky., 21 S. W. Rep. 244; 58 Am. & Eng. R. Cas. 418), 669.
Ohlenkamp *v.* Union Pac. R. Co. (Utah, 67 Pac. Rep. 411), 109.
Oil City Co. *v.* Boundy (122 Pa. St. 449; 15 Atl. Rep. 865), 395.
O'Keefe *v.* Chicago, etc., R. Co. (32 Iowa 467), 446.
Old Colony R. Co. *v.* Tripp (147 Mass. 35; 17 N. E. Rep. 89; 33 Am. & Eng. R. Cas. 497), 263.
Oldenburg *v.* New York, etc., R. Co. (124 N. Y. 414; 26 N. E. Rep. 1021), 921.
Oldfield *v.* New York, etc., R. Co. (14 N. Y. 310), 202.
Olds *v.* New York, etc., R. Co. (172 Mass. 72), 670.
O'Leary *v.* Railroad (52 Ill. App. 641), 161.
Oliver *v.* Denver, etc., Tr. Co. (13 Colo. App. 543), 398.
Oliver *v.* Louisville, etc., R. Co. (43 La. Ann. 804; 9 So. Rep. 431; 47 Am. & Eng. R. Cas. 576), 801.
Oliver *v.* New York, etc., R. Co. (1 Edm. Sel. Cas. [N. Y.] 589), 605.
Oliver *v.* Ohio River R. Co. (42 W. Va. 703; 26 S. E. Rep. 444), 251.
Olsen *v.* Citizens Ry. Co. (152 Mo. 431; 54 S. W. Rep. 470), 660.
Olsen *v.* Cook Inlet, etc., Co. (121 Fed. Rep. 726; 58 C. C. A. 146), 157.
Olsen *v.* Maple Grove, etc., M. Co. (Iowa, 87 N. W. Rep. 736), 145.
Olsen *v.* Oregon, etc., R. Co. (9 Utah 129; 33 Pac. Rep. 623), 953.
Olsen *v.* St. Paul, etc., R. Co. (38 Minn. 117; 35 N. W. Rep. 866; 33 Am. & Eng. R. Cas. 386), 406.
Olson *v.* Boston, etc., R. Co. (71 N. H. 427; 52 Atl. Rep. 1097), 154.
Olson *v.* Luck (103 Wis. 33; 79 N. W. Rep. 29), 1053.
Olson *v.* McMullen (34 Minn. 94; 24 N. W. Rep. 318), 34.
Omaha R. Co. *v.* Boesen (Neb., 105 N. W. Rep. 303), 122.
Omaha, etc., R. Co. *v.* Doolittle (7 Neb. 481), 394.
Omaha, etc., R. Co. *v.* Hargadine (5 Neb. 418; 98 N. W. Rep. 1071), 283.
Omaha, etc., R. Co. *v.* Martin (14 Neb. 295; 15 N. W. Rep. 696; 19 Am. & Eng. R. Cas. 236), 879.
Omaha, etc., R. Co. *v.* Morgan (40 Neb. 604; 59 N. W. Rep. 81), 229.
Omaha, etc., Co. *v.* Murray (112 Ill. App. 233), 120.
Omaha, etc., R. Co. *v.* O'Donnell (22 Neb. 475; 35 N. W. Rep. 235), 1036.
O'Maley *v.* Gaslight Co. (158 Mass. 135; 32 N. E. Rep. 1119; 47 L. R. A. 161), 356.
O'Malley *v.* Missouri Pac. Ry. Co. (113 Mo. 319), 79.
O'Malley *v.* Missouri Pac. Ry. Co. (53 Am. & Eng. R. Cas. 280), 136.
O'Malley *v.* New York, etc., R. Co. (51 N. Y. S. R. 366; 67 Hun 130; 22 N. Y. Supp. 48), 419.
O'Malley *v.* St. Paul, etc., R. Co. (43 Minn. 289; 45 N. W. Rep. 440), 1073.
O'Mara *v.* Delaware, etc., R. Co. (18 Hun [N. Y.] 192), 1028.
O'Mara *v.* New York, etc., R. Co. (18 Hun [N. Y.] 193), 414.
O'Meara *v.* Hudson River R. Co. (38 N. Y. 445), 206.
O'Mellia *v.* Kansas City, etc., R. Co. (115 Mo. 205; 21 S. W. Rep. 503), 343.
Ominger *v.* New York, etc., R. Co. (4 Hun [N. Y.] 159), 300.
Onderdonk *v.* New York, etc., R. Co. (74 Hun 42; 26 N. Y. Supp. 310; 56 N. Y. S. R. 190), 710.
O'Neal *v.* Chicago, etc., R. Co. (132 Ind. 110; 31 N. E. Rep. 669), 336.
O'Neal *v.* St. Louis, etc., R. Co. (3 McCrary [U. S.] 423; 9 Fed. Rep. 337), 321.
O'Neill *v.* Blase (94 Mo. App. 648; 68 S. W. Rep. 764), 283.
O'Neill *v.* Chicago, etc., R. Co. (Neb., 92 N. W. Rep. 731; 60 L. R. A. 443), 252.
O'Neill *v.* Pittsburg, etc., R. Co. (130 Fed. Rep. 204), 568.
Openshaw *v.* Utah, etc., R. Co. (6 Utah 132), 491.
Oppenheimer *v.* Manhattan R. Co. (63 Hun [N. Y.] 633), 732.
Orcutt *v.* Century Bldg. Co. (201 Mo. 424; 99 S. W. Rep. 1062; 8 L. R. A. [N. S.] 929), 299.
O'Reilly *v.* Long Island R. Co. (44 N. Y. Supp. 264; 15 App. Div. 79), 630.
O'Reilly *v.* New York, etc., R. Co. (16 R. I. 388; 17 Atl. Rep. 906; 42 Am. & Eng. R. Cas. 50; 6 L. R. A. 719; 29 Cent. L. J. 210), 52.
Oregon, etc., R. Co. *v.* Frost (74 Fed. Rep. 965; 21 C. C. A. 186; 44 U. S. App. 606), 489.
Orendorff *v.* Terminal R. Assn. (Mo. App., 92 S. W. Rep. 148), 529.
Orman *v.* Salvo (117 Fed. Rep. 233; 54 C. C. A. 265), 308.
Ormond *v.* Hays (60 Tex. 180), 840.
Ormsbee *v.* Boston, etc., R. Co. (14 R. I. 102; 51 Am. Rep. 354), 1009.
O'Rourke *v.* Lindell Ry. Co. (142 Mo. 342; 44 S. W. Rep. 254), 1045.
Osteen *v.* Southern Ry. (Carolina Div., 57 S. E. 196), 1012.
O'Sullivan *v.* Chicago, etc., R. Co. (23 Ill. App. 646), 229.

[*References are to sections.*]

O'Toole *v.* Central, etc., R. Co. (12 N. Y. Supp. 347; 35 N. Y. S. R. 591; 128 N. Y. 597), 1021.
O'Toole *v.* Pittsburg, etc., R. Co. (158 Pa. St. 99; 27 Atl. Rep. 737; 33 Am. St. Rep. 830; 22 L. R. A. 606), 1039.
Ott *v.* Lake Shore, etc., R. Co. (18 Ohio Cir. Ct. 395; 10 O. C. D. 85), 50.
Ouverson *v.* Grafton (5 N. D. 281; 65 N. W. Rep. 676), 1055.
Overby *v.* Chesapeake, etc., R. Co. (37 W. Va. 524; 16 S. E. Rep. 813; 53 Am. & Eng. R. Cas. 417), 390.
Oviatt *v.* Dakota, etc., R. Co. (43 Minn. 300; 45 N. W. Rep. 436), 668.
Owen *v.* Great Western R. Co. (46 L. J. Q. B. D. 486; 36 L. T. 850), 787.
Owen *v.* Hannibal, etc., R. Co. (58 Mo. 386), 1105.
Owen *v.* Hudson River R. Co. (35 N. Y. 516; 7 Bosw. 329), 994.
Owens *v.* Kansas City, etc., R. Co. (95 Mo. 169; 8 S. W. Rep. 350; 33 Am. & Eng. R. Cas. 524), 840.
Owens *v.* Pennsylvania R. Co. (41 Fed. Rep. 187), 962.
Owens *v.* Wabash R. Co. (84 Mo. App. 143, 148), 717.
Oyler *v.* Quincy, etc., R. Co. (113 Mo. App. 375; 88 S. W. Rep. 162), 602.
Oyster *v.* Chicago, etc., R. Co. (Neb., 91 N. W. Rep. 699; 59 L. R. A. 291), 243.
Ozanne *v.* Illinois Cent. R. Co. (151 Fed. Rep. 900), 645.

P

Pacheco *v.* Mfg. Co. (113 Cal. 541; 45 Pac. Rep. 833), 95.
Packard *v.* Hannibal & R. Co. (181 Mo. 421; 80 S. W. Rep. 951), 61.
Paddock *v.* Atchison, etc., R. Co. (37 Fed. Rep. 841; 4 L. R. A. 231), 730.
Padgitt *v.* Moll (159 Mo. 143; 81 Am. St. Rep. 347; 52 L. R. A. 854; 60 S. W. Rep. 121), 678.
Paducah, etc., R. Co. *v.* Hoehl (12 Bush. [Ky.] 41; 18 Am. Ry. Rep. 338), 955.
Paducah, etc., R. Co. *v.* Letcher (Ky., 12 Am. & Eng. R. Cas. 61), 153.
Pagan *v.* Southern Ry. Co. (59 S. E. Rep. 32), 473.
Pagels *v.* Myers (193 Ill. 172; 61 N. E. Rep. 1111), 161.
Pahlan *v.* Detroit, etc., R. Co. (122 Mich. 232; 81 N. W. Rep. 103), 245.
Pakalinsky *v.* New York, etc., R. Co. (32 N. Y. 424; 2 Am. & Eng. R. Cas. 251), 951.
Paland *v.* Chicago, etc., R. Co. (44 La. Ann. 1003; 11 So. Rep. 707), 388.
Palmer Brick Co. *v.* Chenall (119 Ga. 837; 47 S. E. Rep. 329), 118.
Palmer *v.* Chicago, etc., R. Co. (112 Ind. 250; 14 N. E. Rep. 70; 31 Am. & Eng. R. Cas. 364), 873.
Palmer *v.* Delaware, etc., R. Co. (120 N. Y. 170; 24 N. E. Rep. 302; 30 N. Y. S. R. 817; 46 Hun 486; 11 N. Y. S. R. 872; 44 Am. & Eng. R. Cas. 298), 637.
Palmer *v.* Harrison (57 Mich. 182), 308.
Palmer *v.* Michigan, etc., R. Co. (93 Mich. 363; 53 N. W. Rep. 397), 485.
Palmer *v.* New York, etc., R. Co. (112 N. Y. 234; 19 N. E. Rep. 678), 1001.
Palmer *v.* Pennsylvania R. Co. (111 N. Y. 488; 18 N. E. Rep. 859; 2 L. R. A. 252; 3 Thompson on Neg. 2786, p. 252), 637.
Palmer *v.* Utah, etc., R. Co. (2 Idaho 290; 13 Pac. Rep. 425), 472.
Pannell *v.* Nashville, etc., R. Co. (97 Ala. 298; 12 So. Rep. 236; 55 Am. & Eng. R. Cas. 92), 1028.
Pannell *v.* Potomac, etc., R. Co. (Va., 53 S. E. Rep. 113; 4 L. R. A. [N. S.] 80), 1073.
Paris & G. N. Ry. Co. *v.* Calvin (103 S. W. Rep. 428), 886.
Parish *v.* Missouri, K. & T. R. Co. (Tex., 76 S. W. Rep. 234), 270.
Parker *v.* Georgia, etc., Ry. Co. (83 Ga. 539; 10 S. E. Rep. 233), 263.
Parker *v.* Hannibal, etc., R. Co. (109 Mo. 362; 19 S. W. Rep. 1119; 50 Am. & Eng. R. Cas. 521), 469.
Parker *v.* New York, etc., R. Co. (18 R. I. 773; 30 Atl. Rep. 849), 493.
Parker *v.* Publishing Co. (69 Me. 173), 870.
Parker *v.* Railroad (91 Mo. 86), 304.
Parker *v.* Wilmington, etc., R. Co. (86 No. Car. 221; 8 Am. & Eng. R. Cas. 420), 950.
Parkes *v.* Seasongood (152 Fed. Rep. 583), 207.
Parkhurst *v.* Johnson (50 Mich. 70; 15 N. W. Rep. 107), 269.
Parmelee *v.* Farro (22 Ill. App. 467), 456.
Parody *v.* Chicago, etc., R. Co. (5 McCrary [U. S.] 38; 15 Fed. Rep. 205), 375.
Parrish *v.* Pensacola, etc., R. Co. (28 Fla. 251; 9 So. Rep. 696), 461.
Parrott *v.* Chicago, etc., R. Co. (127 Iowa 419; 103 N. W. Rep. 352), 283.
Parsons *v.* Hammond Co. (96 Mo. App. 372; 70 S. W. Rep. 519), 154.
Parsons *v.* Missouri Pacific R. Co. (94 Mo. 286; 6 S. W. Rep. 464), 194.
Parsons *v.* New York, etc., R. Co. (113 N. Y. 355; 21 N. E. Rep. 145; 22 N. Y. S. R. 697; 48 Hun 615; 3 L. R. A. 683), 557.
Parsons *v.* New York Central R. Co. (37 Hun [N. Y.] 128), 720.
Parvis *v.* Philadelphia, etc., R. Co. (Del., 17 Atl. Rep. 702), 394.
Passameneck *v.* Louisville, etc., R. Co. (98 Ky. 195; 32 S. W. Rep. 620), 1040.
Pastoris *v.* Baltimore, etc., R. Co. (Pa., 24 Atl. Rep. 283), 786.
Patchell *v.* North Western Co. (6 Ir. C. L. 117), 679.
Paterson *v.* Philadelphia Rapid Transit Co. (67 Atl. Rep. 616), 801.
Pattee *v.* Chicago, etc., R. Co. (5 Dakota 267; 38 N. W. Rep. 435; 34 Am. & Eng. R. Cas. 399), 598.
Patten *v.* Chicago, etc., R. Co. (32 Wis. 524), 37.

[*References are to sections.*]

Patterson *v.* Pittsburg, etc., R. Co. (76 Pa. St. 389), 376.
Patterson *v.* South, etc., R. Co. (89 Ala. 318; 7 So. Rep. 437), 173.
Patterson *v.* Wabash, etc., R. Co. (54 Mich. 91; 19 N. W. Rep. 761; 18 Am. & Eng. R. Cas. 130), 817.
Patton *v.* Central, etc., R. Co. (73 Iowa 306; 35 N. W. Rep. 149, 987.
Patton *v.* East Tennessee, etc., R. Co. (89 Tenn. 370; 15 S. W. Rep. 919; 48 Am. & Eng. R. Cas. 581), 1105.
Patton *v.* Southern R. Co. (82 Fed. Rep. 979; 42 U. S. App. 576; 27 C. C. A. 287), 4.
Patton *v.* Texas & P. Ry. Co. (179 U. S. 658; 45 L. Ed. 361; 21 Sup. Ct. Rep. 275), 118.
Patton *v.* Western, etc., R. Co. (96 N. Car. 455; 1 S. E. Rep. 863; 31 Am. & Eng. R. Cas. 298), 495.
Paul *v.* Salt Lake, etc., R. Co. (Utah, 33 Pac. Rep. 563), 125.
Paulmier *v.* Erie R. Co. (34 N. J. L. 151), 206.
Pawlett *v.* Rutland, etc., R. Co. (28 Vt. 297), 283.
Payne *v.* Chicago, etc., R. Co. (129 Mo. 405; 31 S. W. Rep. 885), 404.
Payne *v.* Chicago, etc., R. Co. (44 Iowa 236), 917.
Payne *v.* Chicago, etc., R. Co. (129 Mo. 405; 31 S. W. Rep. 885), 150.
Payne *v.* Illinois Cent. R. Co. (155 Fed. Rep. 73), 952.
Payne *v.* Railway Co. (136 Mo. 562), 313.
Payne *v.* Terre Haute, etc., R. Co. (157 Ind. 616; 56 L. R. A. 472; 62 N. E. Rep. 472), 852.
Payne *v.* Troy, etc., R. Co. (83 N. Y. 572; 6 Am. & Eng. R. Cas. 54), 915.
Paynter *v.* Traction Co. (67 N. J. L. 619; 52 Atl. Rep. 367), 114.
Peabody *v.* Oregon, etc., R. Co. (21 Oregon 121; 26 Pac. Rep. 1053; 47 Am. & Eng. R. Cas. 598), 74.
Pearl *v.* Omaha, etc., R. Co. (Iowa, 88 N. W. Rep. 1078), 386.
Pearl *v.* West End R. Co. (176 Mass. 177; 57 N. E. Rep. 339; 49 L. R. A. 826; 79 Am. St. Rep. 330), 283.
Pearsall *v.* New York Cent. R. Co. (82 N. E. Rep. 752; 189 N. Y. 474), 493.
Pearson *v.* Chicago, etc., R. Co. (47 Minn. 9; 49 N. W. Rep. 302; 48 Am. & Eng. R. Cas. 364), 527.
Pearson *v.* Duane (4 Wall. [U. S.] 605), 586.
Pease *v.* Chicago, etc., R. Co. (61 Wis. 163; 20 N. W. Rep. 908; 17 Am. & Eng. R. Cas. 527), 491.
Peaslee *v.* Fitchburg, etc., R. Co. (152 Mass. 155; 25 N. E. Rep. 71), 487.
Peck *v.* Michigan, etc., R. Co. (57 Mich. 3; 23 N. W. Rep. 466; 19 Am. & Eng. R. Cas. 257), 940.
Peck *v.* New York, etc., R. Co. (70 N. Y. 587), 736.
Peck *v.* New York, etc., R. Co. (14 Am. & Eng. R. Cas. 633; 50 Conn. 379), 1056.
Peck *v.* Springfield Traction Co. (110 S. W. Rep. 659), 708.
Pelmer *v.* Philadelphia, etc., R. Co. (66 Atl. Rep. 1127), 200.
Pembroke *v.* Hannibal, etc., R. Co. (32 Mo. App. 61), 851.
Pence *v.* California, etc., R. Co. (27 Utah 378; 75 Pac. Rep. 934).
Pence *v.* Chicago, etc., R. Co. (79 Iowa 389; 44 N. W. Rep. 686; 42 Am. & Eng. R. Cas. 126), 104.
Pence *v.* Wabash R. Co. (116 Iowa 279), 719.
Peniston *v.* Chicago, etc., R. Co. (34 La. Ann. 777; 44 Am. Rep. 444), 630.
Penney *v.* Atlantic Coast Line R. Co. (133 No. Car. 221; 45 S. E. Rep. 563; 63 L. R. A. 497), 751.
Pennington *v.* Detroit, etc., R. Co. (90 Mich. 505; 51 N. W. Rep. 634), 348.
Pennsylvania R. Co. *v.* Adams (55 Pa. St. 499), 70.
Pennsylvania, etc., Co. *v.* Anderson (94 Pa. St. 351), 32.
Pennsylvania, etc., R. Co. *v.* Aspell (23 Pa. St. 147), 692.
Pennsylvania R. Co. *v.* Bachs (133 Ill. 255; 24 N. E. Rep. 563), 336.
Pennsylvania R. Co. *v.* Bartom (54 Pa. St. 495), 202.
Pennsylvania R. Co. *v.* Barnett (59 Pa. St. 259; 98 Am. Dec. 346), 902.
Pennsylvania R. Co. *v.* Beale (73 Pa. St. 504; 6 Am. Ry. Rep. 158), 1016.
Pennsylvania R. Co. *v.* Bock (93 Pa. St. 427), 1058.
Pennsylvania R. Co. *v.* Books (57 Pa. St. 339; 98 Am. Dec. 234), 553.
Pennsylvania, etc., R. Co. *v.* Brannen (17 W. N. C. [Pa.] 227), 38.
Pennsylvania R. Co. *v.* Bray (125 Ind. 229; 25 N. E. Rep. 439), 729.
Pennsylvania R. Co. *v.* Brigham (29 Ohio St. 374), 32.
Pennsylvania R. Co. *v.* Bruce (102 Pa. St. 23), 7.
Pennsylvania R. Co. *v.* Butler (57 Pa. St. 335), 194.
Pennsylvania R. Co. *v.* Chapman (220 Ill. 428; 77 N. E. Rep. 248), 243.
Pennsylvania R. Co. *v.* Congdon (134 Ind. 226), 80.
Pennsylvania R. Co. *v.* Coon (111 Pa. St. 430; 3 Atl. Rep. 234), 977.
Pennsylvania, etc., R. Co. *v.* Dean (92 Ind. 459; 18 Am. & Eng. R. Cas. 188), 824.
Pennsylvania R. Co. *v.* Gibson (96 Pa. St. 83), 641.
Pennsylvania R. Co. *v.* Gilliland (56 Pa. St. 445), 32.
Pennsylvania R. Co. *v.* Goodenough (55 N. J. L. 577; 28 Atl. Rep. 3; 22 L. R. A. 460), 1056.
Pennsylvania R. Co. *v.* Goodman (62 Pa. St. 329), 197.
Pennsylvania R. Co. *v.* Hammill (56 N. J. L. 370; 29 Atl. Rep. 151; 24 L. R. A. 531), 620.
Pennsylvania R. Co. *v.* Henderson (51 Pa. St. 315), 856.
Pennsylvania R. Co. *v.* Hensil (70 Ind.

[*References are to sections.*]

569; 36 Am. Rep. 188; 6 Am. & Eng. R. Cas. 79), 934.
Pennsylvania R. Co. *v.* Hinds (53 Pa. St. 512), 738.
Pennsylvania R. Co. *v.* Hoagland (78 Ind. 203; 3 Am. & Eng. R. Cas. 436), 787.
Pennsylvania R. Co. *v.* Horst (110 Pa. St. 226), 133.
Pennsylvania R. Co. *v.* Howard (178 U. S. 153; 44 L. Ed. 1015), 683.
Pennsylvania R. Co. *v.* Jones (Pa., 123 Fed. Rep. 753), 367.
Pennsylvania R. Co. *v.* Keane (41 Ill. App. 317), 795.
Pennsylvania R. Co. *v.* Keane (143 Ill. 172; 32 N. E. Rep. 260), 190.
Pennsylvania R. Co. *v.* Keller (67 Pa. St. 300), 64.
Pennsylvania R. Co. *v.* Kennard (10 Am. Neg. Cas. 151), 649.
Pennsylvania R. Co. *v.* Kilgore (32 Pa. St. 292), 708.
Pennsylvania R. Co. *v.* Krick (47 Ind. 368), 995.
Pennsylvania R. Co. *v.* Langdon (92 Pa. St. 21; 1 Am. & Eng. R. Cas. 87), 803.
Pennsylvania R. Co. *v.* Langedorf (48 Ohio St. 316; 28 N. E. Rep. 172; 49 Am. & Eng. R. Cas. 317), 410.
Pennsylvania R. Co. *v.* Lewis (79 Pa. St. 33), 873.
Pennsylvania R. Co. *v.* Long (94 Ind. 250; 15 Am. & Eng. R. Cas. 345), 801.
Pennsylvania R. Co. *v.* Lynch (90 Ill. 333), 340.
Pennsylvania R. Co. *v.* Lyons (129 Pa. St. 113; 18 Atl. Rep. 759; 41 Am. & Eng. R. Cas. 154), 576.
Pennsylvania, etc., R. Co. *v.* Mahoney (8 Ind. 441), 852.
Pennsylvania R. Co. *v.* Marion (123 Ind. 415; 23 N. E. Rep. 973; 7 L. R. A. 687), 619.
Pennsylvania R. Co. *v.* Marion (104 Ind. 239; 27 Am. & Eng. R. Cas. 132), 557.
Pennsylvania R. Co. *v.* Maroney (22 Ohio Cir. Ct. 469; 12 O. C. D. 366), 273.
Pennsylvania R. Co. *v.* Matthews (36 N. J. L. 531), 938.
Pennsylvania R. Co. *v.* McCaffrey (173 Ill. 169; 50 N. E. Rep. 713), 708.
Pennsylvania R. Co. *v.* McCaffrey, 149 Fed. Rep. 404), 591.
Pennsylvania R. Co. *v.* McCann (54 Ohio St. 10; 42 N. E. Rep. 768; 56 Am. St. Rep. 695), 50.
Pennsylvania R. Co. *v.* McClosky (23 Pa. St. 526), 850.
Pennsylvania R. Co. *v.* McKinney (124 Pa. St. 462; 37 Am. & Eng. R. Cas. 153), 593.
Pennsylvania R. Co. *v.* Myers (136 Ind. 242), 861.
Pennsylvania R. Co. *v.* Mooney (126 Pa. St. 244; 17 Atl. Rep. 590; 39 Am. & Eng. R. Cas. 612), 1003.
Pennsylvania R. Co. *v.* Morel (40 Ohio St. 338), 1016.
Pennsylvania R. Co. *v.* Newmeier (129 Ind. 401; 28 N. E. Rep. 860; 52 Am. & Eng. R. Cas. 454), 669.
Pennsylvania R. Co. *v.* Ogier (35 Pa. St. 60), 200.
Pennsylvania R. Co. *v.* O'Shaughnessy (122 Ind. 588; 23 N. E. Rep. 675; 41 Am. & Eng. R. Cas. 479), 411.
Pennsylvania R. Co. *v.* Peters (116 Pa. St. 206; 9 Atl. Rep. 317), 4.
Pennsylvania R. Co. *v.* Price (96 Pa. St. 256; 1 Am. & Eng. R. Cas. 234), 481.
Pennsylvania R. Co. *v.* Righter (42 N. J. L. 180; 2 Am. & Eng. R. Cas. 220), 1009.
Pennsylvania R. Co. *v.* Roney (89 Ind. 453), 451.
Pennsylvania R. Co. *v.* Rothgeb (32 Ohio St. 66), 1009.
Pennsylvania R. Co. *v.* Roy (102 U. S. 451; 26 L. Ed. 141), 565.
Pennsylvania R. Co. *v.* Sinclair (62 Ind. 301), 392.
Pennsylvania R. Co. *v.* Sloan (125 Ill. 72; 17 N. E. Rep. 37; 35 Am. & Eng. R. Cas. 440), 940.
Pennsylvania R. Co. *v.* Snyder (55 Ohio St. 342; 45 N. E. Rep. 559), 38.
Pennsylvania, etc., R. Co. *v.* Staley (41 Ohio St. 188; 19 Am. & Eng. R. Cas. 381), 39.
Pennsylvania R. Co. *v.* State (61 Md. 108; 19 Am. & Eng. R. Cas. 326), 940.
Pennsylvania C. Co. *v.* Stegemeier (118 Ind. 305; 20 N. E. Rep. 843; 10 Am. St. Rep. 136), 941.
Pennsylvania R. Co. *v.* Stinger (78 Pa. St. 225), 4.
Pennsylvania, etc., R. Co. *v.* Taylor (104 Pa. 306), 39.
Pennsylvania R. Co. *v.* Wachter (60 Md. 395; 15 Am. & Eng. R. Cas. 187), 483.
Pennsylvania R. Co. *v.* Werner (89 Pa. St. 59), 1012.
Pennsylvania R. Co. *v.* White (88 Pa. St. 327), 632.
Pennsylvania R. Co. *v.* Whitman (111 Ind. 212; 12 N. E. Rep. 380; 31 Am. & Eng. R. Cas. 149), 485.
Pennsylvania, etc., R. Co. *v.* Witte (15 Ind. App. 583; 43 N. E. Rep. 319), 319.
Pennsylvania R. Co. *v.* Woodworth (26 Ohio St. 585), 17.
Pennsylvania R. Co. *v.* Yost (104 Pa. St. 26), 301.
Pennsylvania R. Co. *v.* Zebe (37 Pa. St. 420; 33 Pa. St. 318), 786.
Pennsylvania R. Co. *v.* Zink (126 Pa. St. 288; 17 Atl. Rep. 614), 374.
People *v.* Boston, etc., R. Co. (70 N. Y. 570), 949.
People *v.* Douglas (87 Cal. 281; 25 Pac. Rep. 417), 553.
People *v.* Murphy (101 N. Y. 126), 101.
People *v.* New York Central R. Co. (13 N. Y. 78), 890.
People *v.* North Car. R. Co. (N. C., 49 S. E. Rep. 87), 273.
Peoria, etc., R. Co. *v.* Clayberg (107 Ill. 644; 15 Am. & Eng. R. Cas. 356), 946.

[*References are to sections.*]

Peoria, etc., R. Co. *v.* Foltz (13 Ill. App. 535), 971.
Peoria, etc., R. Co. *v.* Hermann (39 Ill. App. 287), 933.
Peoria, etc., R. Co. *v.* Johns (43 Ill. App. 83), 492.
Peoria, etc., R. Co. *v.* Lane (83 Ill. 448), 803.
Peoria, etc., R. Co. *v.* Loomis (20 Ill. 235), 176.
Peoria, etc., R. Co. *v.* Puckett (42 Ill. App. 642), 345.
Peoria, etc., R. Co. *v.* Reynolds (88 Ill. 418; 21 Am. Ry. Rep. 324), 616.
Peoria, etc., R. Co. *v.* Rice (46 Ill. App. 60; 144 Ill. 227; 33 N. E. Rep. 951), 93.
Peoria, etc., R. Co. *v.* Siltman (88 Ill. 529), 953.
Peoria, etc., R. Co. *v.* Stillman (88 Ill. 529; 21 Am. Ry. Rep. 352), 957.
Pere Marquette R. Co. *v.* Strange (84 N. E. Rep. 819), 775.
Perez *v.* New Orleans, etc., R. Co. (47 La. Ann. 1391; 17 So. Rep. 869), 1048.
Perigo *v.* Chicago, etc., R. Co. (52 Iowa 276; 3 N. W. Rep. 43), 341.
Perigo *v.* Chicago, etc., R. Co. (55 Iowa 326; 7 N. W. Rep. 627), 406.
Perkins *v.* Chicago, etc., R. Co. (60 Miss. 726; 21 Am. & Eng. R. Cas. 242), 699.
Perkins *v.* Citizens R. Co. (55 Mo. 201), 173.
Perkins *v.* Missouri, etc., R. Co. (55 Mo. 201), 1088.
Perkins *v.* New York, etc., R. Co. (24 N. Y. 196), 848.
Perkins *v.* Wabash R. Co. (84 N. E. Rep. 677; 233 Ill. 458), 918.
Perry *v.* Central R. Co. (66 Ga. 746), 169.
Pershing *v.* Chicago, etc., R. Co. (71 Iowa 561; 32 N. W. Rep. 488; 34 Am. & Eng. R. Cas. 405), 597.
Persigner *v.* Wabash R. Co. (82 Mo. 197), 989.
Peschel *v.* Chicago, etc., R. Co. (62 Wis. 338; 21 N. W. Rep. 269; 17 Am. & Eng. R. Cas. 545), 461.
Peterman *v.* Northern Pac. R. Co. (105 Fed. Rep. 335), 64.
Peters *v.* McKay & Co. (136 Cal. 73; 68 Pac. Rep. 478), 154.
Peters *v.* Mariette, etc., R. Co. (42 Ohio St. 275), 849.
Peterson *v.* Chicago, etc., R. Co. (67 Mich. 102; 34 N. W. Rep. 260; 31 Am. & Eng. R. Cas. 292), 461.
Peterson *v.* Chicago, etc., R. Co. (64 Mich. 621), 21.
Peterson *v.* Chicago, etc., R. Co. (Wis., 32 Am. & Eng. R. Cas. [N. S.] 286), 852.
Peterson *v.* Philadelphia B. & W. R. Co. (66 Atl. Rep. 660), 473.
Peterson *v.* Rushford (41 Minn. 290), 145.
Peterson *v.* St. Louis Transit Co. (199 Mo. 341; 97 S. W. Rep. 860), 1057.
Peterson *v.* South & W. R. R. (55 S. E. Rep. 618), 871.
Peterson *v.* Traction Co. (23 Wash. 615; 63 Pac. Rep. 539), 243.
Petrie *v.* Columbia, etc., R. Co. (29 So. Car. 303; 35 Am. & Eng. R. Cas. 430; 7 S. E. Rep. 515), 70.
Petty *v.* Hannibal, etc., R. Co. (88 Mo. 306; 28 Am. & Eng. R. Cas. 618), 954.
Phelps *v.* Chicago, etc., R. Co. (Mich., 81 N. W. Rep. 101), 326.
Philadelphia, etc., R. Co. *v.* Anderson (72 Md. 519; 20 Atl. Rep. 2; 8 L. L. A. 673), 619.
Philadelphia, etc., R. Co. *v.* Anderson (44 Am. & Eng. R. Cas. 345), 599.
Philadelphia, etc., R. Co. *v.* Anderson (94 Pa. St. 351; 39 Am. Rep. 787; 6 Am. & Eng. R. Cas. 407), 653.
Philadelphia, etc., R. Co. *v.* Bowyer (97 Pa. St. 91), 1044.
Philadelphia, etc., R. Co. *v.* Brown (49 U. S. App. 101), 866.
Philadelphia, etc., R. Co. *v.* Derby (14 How. 468; 14 L. Ed. 502), 635.
Philadelphia, etc., R. Co. *v.* Hahn (Pa., 12 Atl. Rep. 479; 32 Am. & Eng. R. Cas. 24), 291.
Philadelphia, etc., R. Co. *v.* Hoagland (66 Md. 149; 7 Atl. Rep. 105), 969.
Philadelphia, etc., R. Co. *v.* Hoffich (62 Md. 300; 50 Am. Rep. 223; 18 Am. & Eng. R. Cas. 373), 176.
Philadelphia, etc., R. Co. *v.* Hummell (44 Pa. St. 375; 84 Am. Dec. 457), 759.
Philadelphia, etc., R. Co. *v.* Killipps (88 Pa. St. 405), 941.
Philadelphia & R. R. Co. *v.* Klutt (148 Fed. Rep. 818), 398.
Philadelphia, etc., R. Co. *v.* McCormick (124 Pa. St. 427; 16 Atl. Rep. 848), 704.
Philadelphia Tr. Co. *v.* Orbann (119 Pa. St. 37; 12 Atl. Rep. 816; 34 Am. & Eng. R. Cas. 432), 173.
Philadelphia, etc., R. Co. *v.* Quigley (62 U. S. 21; 17 How. 210; 16 L. Ed. 75), 735.
Philadelphia, etc., R. Co. *v.* Spearen 47 Pa. St. 300), 888.
Philadelphia, etc., R. Co. *v.* State (58 Md. 372; 10 Am. & Eng. R. Cas. 792), 325.
Philadelphia, etc., R. Co. *v.* Stebbing (62 Md. 504; 19 Am. & Eng. R. Cas. 36), 977.
Philadelphia, etc., R. Co. *v.* Stinger (78 Pa. St. 219), 886.
Philadelphia & R. Ry. Co. *v.* Winkler (56 Atl. Rep. 112), 254.
Philby *v.* Northern Pacific Ry. Co. (89 Pac. Rep. 468), 199.
Phillipps *v.* Chicago, etc., R. Co. (64 Wis. 475; 25 N. W. Rep. 544; 23 Am. & Eng. R. Cas. 453), 488.
Phillipps *v.* East Tennessee, etc., R. Co. (87 Ga. 272; 13 S. E. Rep. 644; 48 Am. & Eng. R. Cas. 61), 1096.
Phillipps *v.* London, etc., R. Co. (27 W. R. 797; 40 L. T. 813), 105.
Phillipps *v.* New York, etc., R. Co. (25 N. Y. S. R. 91; 6 N. Y. Supp. 621; 127 N. Y. 657; 27 N. E. Rep. 978; 38 N. Y. S. R. 675), 1059.

[*References are to sections.*]

Phillipps *v.* Northern, etc., R. Co. (41 N. Y. S. R. 780; 16 N. Y. S. 909), 782.
Phillipps *v.* Renssealer, etc., R. Co. (57 Barb. 645; 49 N. Y. 177; 3 Am. Ry. Rep. 477), 780.
Phillipps *v.* St. Louis, etc., R. Co. (Mo., 111 S. W. Rep. 112, 113), 800.
Phillipps *v.* Saratoga, etc., R. Co. (49 N. Y. 177), 692.
Phillipps *v.* Washington & R. Ry. Co. (65 Atl. Rep. 422), 987.
Philpott *v.* Missouri Pac. R. Co. (85 Mo. 164; 27 Am. & Eng. R. Cas. 323), 71.
Phinney *v.* Illinois Cent. R. Co. (98 N. W. Rep. 358), 386.
Phippin *v.* Missouri Pacific Ry. Co. (196 Mo. 321; 93 S. W. Rep. 410), 529.
Pickens *v.* Decker (21 Ohio St. 212; 8 Am. Rep. 55), 283.
Pickett *v.* Southern Ry. Co. (69 S. C. 445; 48 S. E. Rep. 466), 240.
Pidcock *v.* Union Pac. R. Co. (5 Utah 612; 19 Pac. Rep. 191; 1 L. R. A. 131), 369.
Pieart *v.* Chicago, etc., R. Co. (82 Iowa 148; 47 N. W. Rep. 1017), 376.
Pierce *v.* Central R. Co. (73 Iowa 140; 34 N. W. Rep. 783), 504.
Pierce's Admr. *v.* Union Pacific Ry. Co. (66 Fed. Rep. 44; 13 C. C. A. 323; 32 U. S. App. 48), 214.
Piermerini *v.* New York, etc., Ry. Co. (191 Mass. 9; 77 N. E. Rep. 306), 526.
Pierson *v.* Chicago, etc., Ry. Co. (Iowa, 102 N. W. Rep. 149), 372.
Pierson *v.* Chicago, etc., R. Co. (Iowa, 88 N. W. Rep. 505), 90.
Pike *v.* Boston Elevated Ry. Co. (78 N. E. Rep. 497), 853.
Pike *v.* Chicago, etc., R. Co. (39 Fed. Rep. 754), 968.
Pike *v.* Chicago, etc., R. Co. (41 Fed. Rep. 95), 473.
Pike *v.* Grand Trunk Ry. Co. (39 Fed. Rep. 255), 21.
Pilkington *v.* Railway Co. (70 Tex. 226; 7 S. W. Rep. 805), 263.
Pill *v.* Brooklyn R. Co. (27 N. Y. Supp. 230; 57 N. Y. S. R. 783), 184.
Pine Bluff Co. *v.* Schneider (62 Ark. 109; 34 S. W. Rep. 547; 33 L. R. A. 366), 1051.
Pinney *v.* Missouri, etc., R. Co. (71 Mo. App. 577), 947.
Pineo *v.* New York, etc., R. Co. (34 Hun [N. Y.] 80), 206.
Piper *v.* Chicago, etc., R. Co. (77 Wis. 247; 46 N. W. Rep. 165), 997.
Piper *v.* New York, etc., R. Co. (76 Hun 44; 59 N. Y. S. R. 629; 27 N. Y. Supp. 593), 648.
Piquegno *v.* Railroad Co. (52 Mich. 40; 17 N. W. Rep. 232; 50 Am. Rep. 248), 355.
Pitcher *v.* Lake Shore, etc., R. Co. (16 N. Y. Supp. 62; 33 N. E. Rep. 339), 780.
Pitts *v.* New York, etc., R. Co. (79 Hun 546; 29 N. Y. Supp. 871), 1048.
Pittsburg, etc., R. Co. *v.* Adams (105 Ind. 151; 5 N. E. Rep. 187; 23 Am. & Eng. R. Cas. 408), 808.
Pittsburg, etc., R. Co. *v.* Andrews (39 Md. 329; 10 Am. Ry. Rep. 485), 802.
Pittsburg, etc., R. Co. *v.* Aspell (23 Pa. St. 147), 715.
Pittsburg, etc., R. Co. *v.* Board (121 Ill. App. 49), 493.
Pittsburg, etc., R. Co. *v.* Brigham (29 Ohio St. 374), 624.
Pittsburg, etc., R. Co. *v.* Brown (67 Ind. 45), 949.
Pittsburg, etc., Ry. Co. *v.* Collins (80 N. E. Rep. 415), 521.
Pittsburg, etc., R. Co. *v.* Devinney (17 Ohio St. 197), 491.
Pittsburg, etc., R. Co. *v.* Dunn (56 Pa. St. 280), 903.
Pittsburg, etc., R. Co. *v.* Van Dyke (57 Ind. 576; 18 Am. Ry. Rep. 454), 586.
Pittsburg, etc., R. Co. *v.* Evans (53 Pa. St. 250), 967.
Pittsburg, etc., R. Co. *v.* Gilliland (56 Pa. St. 445), 604.
Pittsburg, etc., R. Co. *v.* Henderson (37 Ohio St. 549; 5 Am. & Eng. R. Cas. 529), 475.
Pittsburg, etc., R. Co. *v.* Henly (48 Ohio St. 608; 29 N. E. Rep. 575; 53 Am. & Eng. R. Cas. 194), 322.
Pittsburg, etc., R. Co. *v.* Kirk (102 Ill. App. 428; 66 N. E. Rep. 829), 379.
Pittsburg, etc., R. Co. *v.* Hinds (53 Pa. St. 512; 91 Am. Dec. 224), 743.
Pittsburg, etc., R. Co. *v.* Kirk (102 Ind. 399; 1 N. E. Rep. 849; 52 Am. Rep. 675), 481.
Pittsburg, etc., R. Co. *v.* Krause (30 Ohio St. 222; 15 Am. Ry. Rep. 298), 869.
Pittsburg, etc., R. Co. *v.* Lamphere (137 Fed. Rep. 20), 99.
Pittsburg, etc., R. Co. *v.* Lewis (33 Ohio St. 196), 472.
Pittsburg, etc., R. Co. *v.* Lightheiser (78 N. E. Rep. 1033), 412.
Pittsburg, etc., R. Co. *v.* Lyon (123 Pa. St. 140; 16 Atl. Rep. 607; 37 Am. & Eng. R. Cas. 231), 658.
Pittsburg, etc., R. Co. *v.* Mahoney (148 Ind. 196; 46 N. E. Rep. 917; 47 N. E. Rep. 464; 40 L. R. A. 101), 564.
Pittsburg, etc., R. Co. *v.* Martin (82 Ind. 476; 8 Am. & Eng. R. Cas. 253), 1021.
Pittsburg, etc., R. Co. *v.* Maurer (21 Ohio St. 421), 914.
Pittsburg, etc., R. Co. *v.* McClurg (56 Pa. St. 294), 802.
Pittsburg, etc., R. Co. *v.* Moses (Pa., 2 Atl. Rep. 188; 24 Am. & Eng. R. Cas. 295), 914.
Pittsburg, etc., R. Co. *v.* Nelson (51 Ind. 150), 643.
Pittsburg, etc., R. Co. *v.* Nicholas (Ind., 73 N. E. Rep. 195; 74 N. E. Rep. 626), 379.
Pittsburg C. C., etc., R. Co. *v.* Nicholas (165 Ind. 679; 76 N. E. Rep. 522), 273.
Pittsburg, etc., R. Co. *v.* Nuxum (50 Ind. 141; 9 Am. Ry. Rep. 396), 686.

[*References are to sections.*]

Pittsburg, etc., Ry. Co. *v.* Parish (Ind., 62 N. E. Rep. 514), 260.
Pittsburg, etc., R. Co. *v.* Pearson (72 Pa. St. 169), 1058.
Pittsburg, etc., R. Co. *v.* Pillow (76 Pa. St. 510; 18 Am. Rep. 424), 744.
Pittsburg, etc., R. Co. *v.* Powers (74 Ill. 341), 477.
Pittsburg, etc., R. Co. *v.* Puszdrakiewicz (129 Ill. App. 295), 877.
Pittsburg, etc., R. Co. *v.* Ranney (37 Ohio St. 665; 5 Am. & Eng. R. Cas. 533), 472.
Pittsburg, etc., R. Co. *v.* Ruby (38 Ind. 294; 10 Am. Rep. 111), 95.
Pittsburg, etc., R. Co. *v.* Schepman (84 N. E. Rep. 988; 82 N. E. Rep. 998), 668.
Pittsburg, etc., R. Co. *v.* Sentmeyer (92 Pa. St. 276), 345.
Pittsburg, etc., R. Co. *v.* Simons (Ind., 76 N. E. Rep. 883), 19.
Pittsburg, etc., R. Co. *v.* Slusser (19 Ohio St. 157), 177.
Pittsburg, etc., R. Co. *v.* Spencer (98 Ind. 186; 21 Am. & Eng. R. Cas. 478), 675.
Pittsburg, etc., R. Co. *v.* Sullivan (141 Ind. 83; 50 Am. St. Rep. 313; 40 N. E. Rep. 138; 27 L. R. A. 840), 212.
Pittsburg, etc., R. Co. *v.* Taylor (104 Pa. St. 306; 49 Am. Rep. 580), 179.
Pittsburg, etc., R. Co. *v.* Theobald (51 Ind. 246), 827.
Pittsburg, etc., R. Co. *v.* Thompson (56 Ill. 138; 3 Am. Ry. Rep. 454), 583.
Pittsburg, etc., R. Co. *v.* Vining (27 Ind. 573), 1058.
Pittsburg, etc., Ry. Co. *v.* Warrum (82 N. E. Rep. 934), 882.
Pittsburg, etc., R. Co. *v.* Williams (74 Ind. 462), 614.
Pittsburg, etc., R. Co. *v.* Wright (80 Ind. 182; 5 Am. & Eng. R. Cas. 628), 92.
Pittsburg, etc., R. Co. *v.* Yundt (78 Ind. 373; 41 Am. Rep. 580; 3 Am. & Eng. R. Cas. 502), 1004.
Plant *v.* Midland R. Co. (21 L. T. 836), 787.
Planz *v.* Boston, etc., R. Co. (157 Mass. 377; 32 N. E. Rep. 356), 807.
Platz *v.* Cohoes (24 Hun 101; 89 N. Y. 219; 42 Am. Rep. 286), 1056.
Pleasants *v.* Raleigh, etc., R. Co. (121 N. Car. 492; 28 S. E. Rep. 267; 61 Am. St. Rep. 674), 487.
Pleasants *v.* Raleigh, etc., R. Co. (95 N. Car. 195), 343.
Plefka *v.* Knapp, Stout & Co. (145 Mo. 316; 46 S. W. Rep. 974), 127.
Plummer *v.* Dill (156 Mass. 426; 31 N. E. Rep. 128; 32 Am. St. Rep. 463), 870.
Plunkett *v.* Railway Co. (105 Ga. 203), 369.
Pocahontas Co. *v.* Ruke's Admr. (51 S. E. Rep. 449), 71.
Poff *v.* New England, etc., R. Co. (72 N. H. 164; 55 Atl. Rep. 891), 55.
Poling *v.* Ohio River R. Co. (38 W. Va. 645; 18 S. E. Rep. 782), 590.
Pollich *v.* Sellers (42 La. Ann. 623; 7 So. Rep. 786), 345.
Pollock *v.* Eastern R. Co. (124 Mass. 158), 886.
Pomroy *v.* Bangor & Aroostook R. Co. (67 Atl. Rep. 561), 584.
Pool *v.* Chicago, etc., R. Co. (56 Wis. 227; 8 Am. & Eng. R. Cas. 360; 14 N. W. Rep. 46), 152.
Pool *v.* Southern Pacific R. Co. (7 Utah 303; 26 Pac. Rep. 654), 490.
Poole *v.* Chicago, etc., R. Co. (89 Ga. 320; 15 S. E. Rep. 321), 685.
Poole *v.* Delaware, etc., R. Co. (35 Hun [N. Y.] 29), 295.
Poole *v.* Georgia, etc., R. Co. (89 Ga. 320; 15 S. E. Rep. 321), 686.
Poole *v.* North Carolina R. Co. (No. Car., 8 Jones 340), 1085.
Porter *v.* Chicago, etc., R. Co. (80 Mich. 156; 44 N. W. Rep. 1054), 724.
Porter *v.* Hannibal, etc., R. Co. (71 Mo. 66; 36 Am. Rep. 454; 2 Am. & Eng. R. Cas. 44), 374.
Porter *v.* Missouri Pac. Ry. Co. (97 S. W. Rep. 880), 411.
Porter *v.* Missouri Pacific Ry. Co. (199 Mo. 82), 846.
Porter *v.* Railroad (Mich., 4 Am. Neg. Cas. 96), 654.
Porter *v.* Western, etc., R. Co. (97 N. C. 66; 2 Am. St. Rep. 272; 2 S. E. Rep. 580), 483.
Portland *v.* Atlantic, etc., R. Co. (66 Me. 485), 905.
Portuchek *v.* Wabash R. Co. (101 Mo. App. 52; 74 S. W. Rep. 368), 670.
Post *v.* Chicago, B. & Q. R. Co. (Mo., 97 S. W. Rep. 233), 249.
Potter *v.* Bunnell (20 Ohio St. 150), 914.
Potter *v.* Chicago, etc., R. Co. (46 Iowa 399; 16 Am. Ry. Rep. 57), 522.
Potter *v.* Chicago, etc., R. Co. (21 Wis. 372; 22 idem 615), 198.
Potter *v.* Detroit, etc., R. Co. (Mich., 81 N. W. Rep. 80; 82 N. W. Rep. 245), 369.
Potter *v.* Flint, etc., R. Co. (62 Mich. 22; 28 S. W. Rep. 714), 1029.
Potter *v.* New York, etc., R. Co. (136 N. Y. 77; 48 N. Y. S. R. 843; 32 N. E. Rep. 603), 494.
Potts *v.* Chicago, etc., R. Co. (33 Fed. Rep. 610), 173.
Poucher *v.* New York, etc., R. Co. (49 N. Y. 263), 850.
Powell *v.* Augusta, etc., R. Co. (77 Ga. 192; 3 S. E. Rep. 757), 92.
Powell *v.* Missouri Pacific R. Co. (76 Mo. 80; 8 Am. & Eng. R. Cas. 467), 661.
Powell *v.* New York, etc., R. Co. (109 N. Y. 613; 15 N. E. Rep. 891; 14 N. Y. S. R. 74; 38 Hun 640), 1023.
Powell *v.* Sherwood (162 Mo. 605; 63 S. W. Rep. 485), 504.
Powell *v.* Steel Co. (98 Wis. 35; 73 N. W. Rep. 573), 356.
Powell *v.* Virginia, etc., Co. (88 Tenn. 692; 13 S. W. Rep. 691; 17 Am. St. Rep. 925), 290.

[*References are to sections.*]

Powers *v.* Boston (154 Mass. 60; 27 N. E. Rep. 995), 153.
Powers *v.* New York, etc., R. Co. (14 N. Y. Supp. 408; 60 Hun 19; 128 N. Y. 659; 29 N. E. Rep. 148), 133.
Powers *v.* R. R. (175 Mass. 466; 56 N. E. Rep. 710), 95.
Praeger *v.* Bristol, etc., R. Co. (24 L. T. 105), 714.
Prather *v.* Railway Co. (80 Ga. 427; 9 S. E. Rep. 530), 143.
Pratt, etc., Co. *v.* Brawley (83 Ala. 371; 3 So. Rep. 555; 3 Am. St. Rep. 571), 1040.
Pratt *v.* Chicago, etc., R. Co. (38 Minn. 455; 38 N. W. Rep. 356), 675.
Pratt *v.* Lake Shore, etc., R. Co. (45 N. Y. S. R. 715; 63 Hun 616; 18 N. Y. Supp. 682; 136 N. Y. 654; 32 N. E. Rep. 1016), 419.
Pratt *v.* Prouty (153 Mass. 333), 308.
Prendegast *v.* New York, etc., R. Co. (58 N. Y. 652), 1080.
Prescott, etc., R. Co. *v.* Rees (Ariz., 28 Pac. Rep. 1134), 446.
Pressed Steel Car Co. *v.* Herath (110 Ill. App. 596), 79.
Prewitt *v.* Eddy (115 Mo. 283; 21 S. W. Rep. 742), 411.
Price *v.* Central of Georgia Ry. Co. (124 Ga. 899; 49 S. E. Rep. 683; 53 S. E. Rep. 455), 270.
Price *v.* Detroit, etc., R. Co. (145 U. S. 65), 488.
Price *v.* Hannibal, etc., R. Co. (77 Mo. 508; 15 Am. & Eng. R. Cas. 168), 417.
Price *v.* Pennsylvania R. Co. (113 U. S. 218; 18 Am. & Eng. R. Cas. 273), 563.
Price *v.* Richmond, etc., R. Co. (38 So. Car. 199; 17 S. E. Rep. 732), 102.
Price *v.* St. Louis, etc., R. Co. (72 Mo. 414; 3 Am. & Eng. R. Cas. 365), 789.
Prideaux *v.* Mineral Point (43 Wis. 513; 28 Am. Rep. 558), 1043.
Priestly *v.* Fowler (3 M. & W. 1), 139.
Prince *v.* International, etc., R. Co. (64 Tex. 144; 21 Am. & Eng. R. Cas. 152), 562.
Pringle *v.* Chicago, etc., R. Co. (64 Iowa 613; 21 N. W. Rep. 108; 18 Am. & Eng. R. Cas. 91), 407.
Proctor *v.* Hannibal, etc., R. Co. (64 Mo. 112; 9 Am. Ry. Rep. 440), 482.
Proctor *v.* San Antonio, etc., R. Co. (62 S. W. Rep. 939), 65.
Proud *v.* Philadelphia, etc., R. Co. (64 N. J. L. 702; 46 Atl. Rep. 710), 637.
Pruitt *v.* Hannibal & St. Joe R. Co. (62 Mo. 527), 35.
Pueschell *v.* K. C., etc. (79 Mo. App. 459), 313.
Puff *v.* Lehigh Valley R. Co. (71 Hun [N. Y.] 577), 1027.
Pulcino *v.* Long Island R. Co. (109 N. Y. S. 1076), 930.
Pullman Car Co. *v.* Barker (4 Colo. 344), 169.
Pullman Car Co. *v.* Blume (109 Ill. 20), 29.
Pullman Car Co. *v.* Harkins (55 Fed. Rep. 932), 471.
Pullman Car Co. *v.* Laack (143 Ill. 242; 32 N. E. Rep. 285), 360.
Pullman Co. *v.* Norton (Tex., 91 S. W. Rep. 841), 645.
Pullman Co. *v.* Stearn (41 So. Rep. 383), 557.
Pullman Car Co. *v.* Woodfolk (121 Ill. App. 321), 497.
Purcell *v.* Richmond, etc., R. Co. (108 No. Car. 414; 12 S. E. Rep. 954; 47 Am. & Eng. R. Cas. 457), 832.
Purcell *v.* Southern R. Co. (119 N. Car. 728; 26 S. E. Rep. 161), 491.
Purdy *v.* Rome, etc., R. Co. (125 N. Y. 209; 26 N. E. Rep. 255), 506.
Purinton *v.* Maine Central R. Co. (78 Me. 569; 7 Atl. Rep. 707), 947.
Purkey *v.* Southern Tr. Co. (W. Va., 50 S. E. Rep. 755), 341.
Purl *v.* St. Louis, etc., R. Co. (72 Mo. 168; 6 Am. & Eng. R. Cas. 27), 1021.
Pursley *v.* Bridge Works (67 N. Y. S. 719; 56 App. Div. 71; 168 N. Y. 589; 60 N. E. Rep. 1119), 255.
Purvis *v.* Buffalo, etc., R. Co. (68 Atl. Rep. 189; 219 Pa. St. 195), 785.
Putnam *v.* Broadway, etc., R. Co. (15 Abb. Pr. [N. S.] N. Y. 383), 753.
Putnam *v.* Broadway R. Co. (55 N. Y. 113), 224.
Putnam *v.* Southern Pac. R. Co. (21 Oregon 230; 27 Pac. Rep. 1033), 64.
Pyle *v.* Clark (75 Fed. Rep. 644; 25 C. C. A. 190; 45 U. S. App. 260; 79 Fed. Rep. 744), 1053.
Pyne *v.* Chicago, etc., R. Co. (54 Iowa 223; 6 N. W. Rep. 281; 37 Am. Rep. 198), 522.

Q

Quackenbush *v.* Chicago, etc., R. Co. (73 Iowa 458; 35 N. W. Rep. 523; 34 Am. & Eng. R. Cas. 545), 664.
Quackenbush *v.* Wisconsin, etc., R. Co. 62 Wis. 411), 507.
Quarman *v.* Burnett (6 M. & W. 499), 1047.
Quibell *v.* Union Pac. R. Co. (7 Utah 122; 25 Pac. Rep. 734), 133.
Quick *v.* Indianapolis, etc., R. Co. (130 Ill. 334; 22 N. E. Rep. 709), 145.
Quigley *v.* Delaware, etc., R. Co. (142 Pa. St. 388; 21 Atl. Rep. 827), 951.
Quill *v.* New York, etc., R. Co. (16 Daly [N. Y.] 313; 32 N. Y. S. R. 612; 126 N. Y. 629), 996.
Quimby *v.* Boston, etc., R. Co. (150 Mass. 365; 23 N. E. Rep. 205; 5 L. R. A. 846; 40 Am. & Eng. R. Cas. 693), 851.
Quincy, etc., R. Co. *v.* Gnuse (137 Ill. 264; 27 N. E. Rep. 190), 92.
Quincy Mining Co. *v.* Kitts (42 Mich. 35; 3 N. W. Rep. 240), 119.
Quinn *v.* Kansas City, M. & B. R. Co. (94 Tenn. [10 Pickle] 713; 30 S. W. Rep. 1036; 45 Am. St. Rep. 767; 28 L. R. A. 552), 221.
Quinn *v.* Manhattan R. Co. (7 N. Y. S. R. 252), 791.
Quinn *v.* Nashville, etc., R. Co. (74

[References are to sections.]

Tenn. 713; 45 Am. St. Rep. 767), 298.
Quinn *v.* New York, etc., R. Co. (175 Mass. 150; 55 N. E. Rep. 891), 326.
Quinn *v.* South Carolina R. Co. (29 So. Car. 381; 7 S. E. Rep. 614; 1 L. R. A. 682; 37 Am. & Eng. R. Cas. 166), 802.

R

Raben *v.* Central Iowa R. Co. (73 Iowa 579; 35 N. W. Rep. 645; 33 Am. & Eng. R. Cas. 520), 713.
Raben *v.* Central Iowa R. Co. (74 Iowa 732; 34 N. W. Rep. 621; 31 Am. & Eng. R. Cas. 45), 694.
Rabostelli *v.* New York, etc., R. Co. (33 Fed. Rep. 796; 34 Am. & Eng. R. Cas. 515), 775.
Racine *v.* New York, etc., R. Co. (70 Hun 453; 53 N. Y. S. R. 680; 24 N. Y. Supp. 388), 374.
Rader's Admx. *v.* Louisville & N. R. Co. (104 S. W. Rep. 774), 1079.
Radley *v.* London, etc., R. Co. (L. R., 1 App. Cas. 754; 46 L. J. Ex. D. 573; 35 L. T. 637; 25 W. R. 147), 398.
Rafferty *v.* Missouri Pac. R. Co. (91 Mo. 33; 3 S. W. Rep. 393), 74.
Ragon *v.* Toledo, etc., R. Co. (97 Mich. 265; 56 N. W. Rep. 612), 341.
Ragsdale *v.* Northern Pacific R. Co. (42 Fed. Rep. 383), 491.
Rahm *v.* Chicago, etc., R. Co. (108 S. W. Rep. 370), 463.
Railroad *v.* Adams (105 Ind. 151), 311.
Railroad *v.* Allbriton (38 Miss. 242), 116.
Railroad *v.* Austin (69 Ill. 426), 306.
Railroad Co. *v.* Barber (5 Ohio St. 541), 311.
Railroad Co. *v.* Beggs (85 Ill. 80), 122.
Railroad Co. *v.* Crumpley (122 Fed. Rep. 425; 59 C. C. A. 51), 594.
Railroad Co. *v.* Eraid (1 Moo. P. C. C. [N. S.] 101), 122.
Railroad Co. *v.* Fort (84 U. S. 555), 269.
Railroad *v.* Frawley (110 Ind. 18; 9 N. E. Rep. 594), 310.
Railroad Co. *v.* Hennessey (96 Fed. Rep. 713; 38 C. C. A. 307), 348.
Railroad Co. *v.* Hester (64 Tex. 401), 355.
Railroad Co. *v.* Jackson (65 Fed. Rep. 48; 27 U. S. App. 519; 12 C. C. A. 507), 252.
Railroad Co. *v.* Knause (39 Ill. 272), 228.
Railroad Co. *v.* May (108 Ill. 298), 158.
Railroad Co. *v.* Peterson (156 Ind. 364; 59 N. E. Rep. 1044), 356.
Railroad Co. *v.* Pollard (22 Wall. 341), 122.
Railroad *v.* Sanders (86 Ky. 259; 5 S. W. Rep. 563), 55.
Railroad *v.* Shires (108 Ill. 630), 101.
Railroad Co. *v.* Smith (9 Lea 685), 311.
Railroad *v.* Smith (82 Ga. 236; 8 S. E. Rep. 311), 355.
Railroad *v.* Shaw (116 Fed. Rep. 621; 54 C. C. A. 77), 412.
Railroad *v.* Torrey (58 Ark. 217), 158.
Railroad Co. *v.* Trimble (35 N. E. Rep. 716), 80.
Railroad *v.* Walker (11 Heisk. 383; Beach, Con. Neg. 97), 451.
Railroad *v.* Weldon (52 Ill. 290), 307.
Railroad *v.* Winans (17 How. 30; 58 U. S. 27), 235.
Railroad Co. *v.* Wightman (29 Gratt. 431), 122.
Railroad Co. *v.* Young (49 Fed. Rep. 723), 311.
Railway *v.* Babcock (152 U. S. 190), 311.
Railway *v.* Brown's Admr. (49 U. S. App. 101; 79 Fed. Rep. 257; 24 C. C. A. 559), 412.
Railway Co. *v.* Chewning (93 Ala. 24; 50 Am. & Eng. R. Cas. 46), 208.
Railway Co. *v.* Davis (92 Ala. 300), 208.
Railway *v.* Duncan (88 Tex. 611; 32 S. W. Rep. 878), 412.
Railway Co. *v.* Fort (17 Wall. [U. S.] 553), 311.
Railway Co. *v.* Hawkins (92 Ala. 241), 208.
Railway Co. *v.* Mowery (36 Ohio St. 418), 116.
Railway Co. *v.* Shacklett (105 Ill. 364), 228.
Railway Co. *v.* Thompson (56 Ill. 138), 122.
Rainey *v.* New York, etc., R. Co. (23 N. Y. Supp. 80; 68 Hun 495), 920.
Rains *v.* St. Louis, etc., R. Co. (71 Mo. 164; 5 Am. & Eng. R. Cas. 610), 390.
Raisor *v.* Chicago & A. R. Co. (117 Ill. App. 488; 215 Ill. 47; 74 N. E. Rep. 69), 50.
Raming *v.* Metropolitan, etc., R. Co. (157 Mo. 477; 57 S. W. Rep. 268), 697.
Ramsbottom *v.* Atlantic Coast, etc., R. Co. (138 N. C. 38; 50 S. E. Rep. 448), 20.
Ramsden *v.* Boston, etc., R. Co. (104 Mass. 117), 727.
Ramsey *v.* Louisville, etc., R. Co. (89 Ky. 99; 20 S. W. Rep. 162), 984.
Randall *v.* Baltimore, etc., R. Co. (109 U. S. 478; 3 Sup. Ct. Rep. 222; 15 Am. & Eng. R. Cas. 243), 480.
Randall *v.* Connecticut River R. Co. (132 Mass. 269), 1018.
Randall *v.* Richmond, etc., R. Co. (104 No. Car. 410; 10 S. E. Rep. 691; 42 Am. & Eng. R. Cas. 603), 995.
Randolph *v.* Metropolitan Ry. Co. (102 S. W. Rep. 1085), 684.
Randolph *v.* Riordan (155 Mass. 331; 29 N. E. Rep. 583), 1047.
Randolph *v.* Quincy, etc., R. Co. (107 S. W. Rep. 1029), 856.
Ransier *v.* Minneapolis, etc., R. Co. (32 Minn. 331; 20 N. W. Rep. 332; 21 Am. & Eng. R. Cas. 601), 419.
Ransom *v.* Chicago, etc., R. Co. (62 Wis. 178; 22 N. W. Rep. 147; 51 Am. Rep. 718; 19 Am. & Eng. R. Cas. 16), 951.
Rapp *v.* St. Joseph, etc., R. Co. (106 Mo. 423; 17 S. W. Rep. 487), 200.
Rapp *v.* Transit Co. (190 Mo. 144; 88 S. W. Rep. 865), 1077.
Rapson *v.* Cubitt (9 M. & W. 710), 278.

[*References are to sections.*]

Rasmussen *v.* Chicago, etc., R. Co. (65 Iowa 236; 21 N. W. Rep. 583; 18 Am. & Eng. R. Cas. 54), 341.
Ravenna *v.* Pennsylvania R. Co. (45 Ohio St. 118; 12 N. E. Rep. 445), 934.
Ravenscraft *v.* Missouri Pacific Ry. Co. (27 Mo. App. 617), 133.
Rawlings *v.* Wabash Ry. Co. (97 Mo. App. 515, 518), 559.
Rawson *v.* Kansas City Ry. Co. (107 S. W. Rep. 1101), 621.
Rawson *v.* Kansas City, etc., R. Co. (129 Mo. App. 613; 111 S. W. Rep. 234), 821.
Ray *v.* Pecos, etc., R. Co. (80 S. W. Rep. 112), 229.
Ray *v.* Pecos, etc., R. Co. (Tex., 88 S. W. Rep. 466), 24.
Rayburn *v.* Central R. Co. (74 Iowa 637; 35 N. W. Rep. 606; 38 N. W. Rep. 520), 504.
Raymond *v.* Burlington, etc., R. Co. (65 Iowa 152; 17 N. W. Rep. 923; 18 Am. & Eng. R. Cas. 217), 578.
Raymond *v.* Danbury, etc., R. Co. (14 Blatchf. [U. S.] 133), 167.
Raymond *v.* Portland R. Co. (100 Me. 529; 62 Atl. Rep. 602), 13.
Rea *v.* St. Louis, etc., R. Co. (Tex., 73 S. W. Rep. 555), 33.
Read *v.* Great Eastern R. Co. (9 B. & S. 714; 37 L. J. Q. B. 278), 57.
Read *v.* New York Cent. & H. R. R. Co. (107 N. Y. S. 1068), 1004.
Read *v.* Suburban, etc., R. Co. (115 Ga. 366; 41 S. E. Rep. 629), 1051.
Reading, etc., R. Co. *v.* Ritchie (102 Pa. St. 425; 19 Am. & Eng. R. Cas. 267), 661.
Reading *v.* Pennsylvania R. Co. (52 N. J. L. 264; 19 Atl. Rep. 321), 164.
Reading Township *v.* Telfer (57 Kan. 798; 48 Pac. Rep. 134; 57 Am. St. Rep. 355), 1056.
Reagan *v.* Transit Co. (180 Mo. 117; 79 S. W. Rep. 435), 708.
Reardon *v.* Missouri Pacific Ry. Co. (114 Mo. 384; 21 S. W. Rep. 731), 186.
Reardon *v.* Thompson (149 Mass. 267; 21 N. E. Rep. 369), 870.
Reary *v.* Louisville, etc., R. Co. (40 La. Ann. 32; 30 So. Rep. 390; 8 Am. St. Rep. 497; 34 Am. & Eng. R. Cas. 277), 792.
Receiver *v.* Jackson (56 Ark. 594; 20 S. W. Rep. 528), 602.
Redding *v.* Central, etc., R. Co. (68 N. J. L. 643; 54 Atl. Rep. 431), 632.
Redding *v.* South Carolina R. Co. (3 So. Car.) 153.
Reddington *v.* Chicago, etc., R. Co. (78 N. W. Rep. 800), 504.
Redhead *v.* Midland R. Co. (8 B. & S. 371; 36 L. J. Q. B. 181; L. R., 2 Q. B. 412; 15 W. R. 831; 16 L. T. 485; 9 B. & S. 519; L. R., 4 Q. B. 379; 38 L. J. Q. B. 169; 20 L. T. 682; 17 W. R. 737), 652.
Redigan *v.* Railroad Co. (Mass., 28 N. E. Rep. 1134; 14 L. R. A. 276), 872.
Redmond *v.* Lumber Co. (96 Mich. 545; 101 N. W. Rep. 1904), 118.
Redmond *v.* Metropolitan, etc., R. Co. (185 Mo. 1; 84 S. W. Rep. 26), 91.
Redmond *v.* Rome, etc., R. Co. (56 Hun 645; 31 N. Y. S. R. 366; 10 N. Y. Supp. 330), 1092.
Redner *v.* Lehigh, etc., R. Co. (73 Hun 562; 26 N. Y. Supp. 1050; 56 N. Y. S. R. 230), 689.
Reed *v.* Chicago, etc., R. Co. (74 Iowa 188; 37 N. W. Rep. 149), 1003.
Reed *v.* Chicago, etc., R. Co. (57 Iowa 23; 10 N. W. Rep. 285; 8 Am. & Eng. R. Cas. 180), 175.
Reed *v.* Duluth, etc., R. Co. (Mich., 59 N. W. Rep. 144; 58 Am. & Eng. R. Cas. 77), 724.
Reed *v.* Misosuri Pacific R. Co. (94 Mo. App. 371; 68 S. W. Rep. 364), 227.
Reed *v.* New York, etc., R. Co. (56 Barb. [N. Y.] 493), 600.
Reed *v.* New York & Q. C. Ry. Co. (102 N. Y. S. 19), 729.
Reed *v.* Pennsylvania R. Co. (56 Fed. Rep. 184), 771.
Reed *v.* Railroad (45 N. Y. 574), 101.
Reed *v.* St. Louis, etc., R. Co. (107 Mo. App. 238; 80 S. W. Rep. 919). 948.
Reed *v.* St. Louis, etc., R. Co. (60 Mo. 199), 35.
Reed *v.* Southern Ry. Co. (55 S. E. Rep. 218; 75 S. C. 162), 541.
Reed *v.* Stockmeyer (74 Fed. Rep. 186), 158.
Reedie *v.* London, etc., R. Co. (4 Exch. 244; 20 L. J. Exch. 65; 26 Enc. Law & Proc. [Cyc.] 1553), 278.
Reeks *v.* New York, etc., R. Co. (72 N. Y. 59), 749.
Reeves *v.* Delaware, Lackawanna & W. R. Co. (30 Pa. St. 464), 451.
Reeves *v.* Galveston, H. & S. A. Ry. Co. (98 S. W. Rep. 929), 400.
Regan *v.* St. Louis, etc., R. Co. (93 Mo. 348; 6. S. W. Rep. 371), 245.
Regler *v.* Charlotte, etc., R. Co. (94 No. Car. 604; 26 Am. & Eng. R. Cas. 386), 884.
Reibel *v.* Cincinnati, etc., R. Co. (114 Ind. 476; 17 N. E. Rep. 107), 590.
Reid *v.* Railroad (81 Ga. 694; 8 S. E. Rep. 629), 119.
Reid *v.* New York, etc., R. Co. (63 Hun 630; 17 N. Y. Supp. 801; 44 N. Y. S. R. 688), 935.
Reinke *v.* Northern Pac. Ry. Co. (145 Fed. Rep. 988), 530.
Reiser *v.* Pennsylvania R. Co. (152 Pa. St. 38; 25 Atl. Rep. 175), 261.
Reiss *v.* Wilmington City Ry. Co. (67 Atl. Rep. 153), 573.
Reiter-Conley Co. *v.* Hamlin (144 Ala. 192; 40 So. Rep. 280), 184.
Reiter *v.* Winona, etc., Co. (72 Minn. 225; 75 N. W. Rep. 219), 128.
Relyea *v.* Kansas City, etc., R. Co. (112 Mo. 86; 20 S. W. Rep. 480; 53 Am. & Eng. Cas. 578), 479.
Rembe *v.* New York, etc., R. Co. (102 N. Y. 721; 7 N. E. Rep. 797; 2 N. Y. S. R. 498; 32 Hun 68), 1012.
Remer *v.* Long Island R. Co. (1 N. Y. Supp. 124; 48 Hun 352; 15 N. Y.

[*References are to sections.*]

S. R. 884; 113 N. Y. 669; 23 N. Y. S. R. 994; 21 N. E. Rep. 1116), 1077.
Renfro *v.* Chicago, etc., R. Co. (86 Mo. 302), 465.
Renlund *v.* Commodore, etc., Co. (89 Minn. 41; 93 N. W. Rep. 1057), 159.
Renneker *v.* South Carolina R. Co. (20 So. Car. 219; 18 Am. & Eng. R. Cas. 149), 793.
Reno *v.* St. Louis, etc., R. Co. (180 Mo. 483; 79 S. W. Rep. 464), 1011.
Renwick *v.* New York, etc., R. Co. (36 N. Y. 132; 34 How. Pr. 91), 1014.
Republic, etc., Co. *v.* Ohler (68 N. E. Rep. 901), 384.
Retan *v.* Lake Shore, etc., R. Co. (94 Mich. 146; 53 N. W. Rep. 1094), 1030.
Revolinsky *v.* Adams Coal Co. (95 N. W. Rep. 122), 95.
Reyburn *v.* Central Iowa R. Co. (74 Iowa 637; 35 N. W. Rep. 606), 783.
Reyburn *v.* Missouri Pacific Ry. Co. (187 Mo. 565; 86 S. W. Rep. 174), 1061.
Reynolds *v.* St. Louis Transfer Co. (189 Mo. 408; 88 S. W. Rep. 50), 555.
Rheiner *v.* Chicago, etc., R. Co. (36 Minn. 170), 1094.
Rhodes *v.* Chicago, etc., R. Co. (58 Mich. 263; 25 N. W. Rep. 182; 21 Am. & Eng. R. Cas. 659), 1014.
Riccio *v.* New York, N. H., etc. R. Co. (189 Mass. 358; 75 N. E. Rep. 704), 269.
Rice *v.* Kansas, etc., R. Co. (63 Mo. 314), 850.
Rice *v.* Smith (171 Mo. 331; 71 S. W. Rep. 123), 276.
Rice *v.* Wabash R. Co. (92 Mo. App. 35), 529.
Rich *v.* Chicago, etc., R. Co. (149 Fed. Rep. 79), 876.
Rich *v.* New York, etc., R. Co. (87 N. Y. 382), 16.
Richards *v.* Chicago, etc., R. Co. (81 Iowa 426; 47 N. W. Rep. 63; 45 Am. & Eng. R. Cas. 54), 875.
Richards *v.* Great Eastern R. Co. (28 L. T. 711), 649.
Richardson *v.* Corlean Hill Coal Co. (10 Wash. 648; 39 Pac. Rep. 95), 222.
Richardson *v.* Great Eastern R. Co. (24 W. R. 907; L. R., 1 C. P. D. 342), 637.
Richardson *v.* New York, etc., R. Co. (61 Hun 624; 133 N. Y. 563; 30 N. E. Rep. 1148; 44 N. Y. S. R. 930), 940.
Richardson *v.* New York, etc., R. Co. (45 N. Y. 846), 959.
Richardson *v.* New York, etc., R. Co. (98 Mass. 85), 49.
Richardson *v.* Wilmington, etc., R. Co. (8 Rich. [So. Car.] 120), 1100.
Richey *v.* Missouri Pacific Ry. Co. (7 Mo. App. 150), 1021.
Richey *v.* Southern Ry. Co. (69 S. C. 387; 48 S. E. Rep. 285), 257.
Richmond, etc., R. Co. *v.* Allison (86 Ga. 145; 12 S. E. Rep. 352; 48 Am. & Eng. R. Cas. 101), 174.
Richmond, etc., R. Co. *v.* Burnsed (70 Miss. 437; 12 So. Rep. 958), 1087.
Richmond *v.* Chicago, etc., R. Co. (87 Mich. 374; 49 N. W. Rep. 621; 49 Am. & Eng. R. Cas. 367), 1005.
Richmond, etc., R. Co. *v.* Childress (82 Ga. 719; 9 S. E. Rep. 602; 3 L. R. A. 808; 41 Am. & Eng. R. Cas. 216), 93.
Richmond, etc., R. Co. *v.* Elliott (149 U. S. 266), 266.
Richmond, etc., R. Co. *v.* Hammond (93 Ala. 181; 9 So. Rep. 577), 510.
Richmond, etc., R. Co. *v.* Hissong (97 Ala. 187; 13 So. Rep. 209), 105.
Richmond, etc., R. Co. *v.* Howard (79 Ga. 44; 3 S. E. Rep. 426), 1034.
Richmond, etc., R. Co. *v.* Jefferson (52 Am. & Eng. R. Cas. 438), 756.
Richmond, etc., R. Co. *v.* Johnson (89 Ga. 560; 15 S. E. Rep. 908), 957.
Richmond, etc., R. Co. *v.* Jones (92 Ala. 218; 9 So. Rep. 276), 253.
Richmond, etc., R. Co. *v.* Moffett (88 Va. 785; 14 S. E. Rep. 370), 605.
Richmond, etc., R. Co. *v.* Morris (31 Gratt. [Va.] 200), 388.
Richmond, etc., R. Co. *v.* Norment (84 Va. 167; 4 S. E. Rep. 211), 184.
Richmond *v.* Quincy, etc., R. Co. (49 Mo. App. 104), 708.
Richmond, etc., R. Co. *v.* Risdon (87 Va. 335; 12 S. E. Rep. 786; 48 Am. & Eng. R. Cas. 244), 325.
Richmond, etc., R. Co. *v.* Scott (86 Va. 902; 11 S. E. Rep. 404; 44 Am. & Eng. R. Cas. 418), 582.
Richmond, etc., R. Co. *v.* Scott (88 Va. 958; 14 S. E. Rep. 763; 52 Am. & Eng. R. Cas. 405), 833.
Richmond *v.* Sitterling (101 Va. 354; 43 S. E. Rep. 562; 65 L. R. A. 445), 290.
Richmond, etc., R. Co. *v.* Smith (92 Ala. 237; 9 So. Rep. 223), 787.
Richmond, etc., R. Co. *v.* Tribble (24 S. E. Rep. 278; 3 Am. & Eng. R. Cas. [N. S.] 632), 39.
Richmond, etc., R. Co. *v.* Vance (93 Ala. 144; 9 So. Rep. 574), 177.
Richmond, etc., R. Co. *v.* Weems (97 Ala. 270; 12 So. Rep. 186), 153.
Richmond, etc., R. Co. *v.* Williams (86 Va. 165; 9 S. E. Rep. 990), 491.
Rickard *v.* Chicago, etc., R. Co. (141 Fed. Rep. 905; 73 C. C. A. 139), 99.
Ricker *v.* Central Railroad Co. (N. J., 64 Atl. Rep. 1068), 488.
Ricketts *v.* Chesapeake, etc., R. Co. (33 W. Va. 433; 10 S. E. Rep. 801; 41 Am. & Eng. R. Cas. 42), 178.
Ricks *v.* Georgia Southern R. Co. (118 Ga. 259; Harvey *v.* Easton R. Co. 116 Mass. 269), 716.
Ridenhour *v.* Kansas City R. Co. (102 Mo. 270; 13 S. W. Rep. 889), 666.
Rider *v.* Syracuse, etc., R. Co. (171 N. Y. 139), 398.
Ries *v.* Transit Co. (179 Mo. 1; 77 S. W. Rep. 734), 392.
Rigby *v.* Hewitt (5 Exch. 240), 1046.
Rigg *v.* Boston, etc., R. Co. (158 Mass. 309; 33 N. E. Rep. 512), 413.

[*References are to sections.*]

Riggs *v.* Metropolitan Ry. Co. (115 S. W. Rep. 969), 1100.
Riggs *v.* St. Francois, etc., R. Co. (120 Mo. App. 353; 96 S. W. Rep. 707), 602.
Rigler *v.* Charlotte, etc., R. Co. (94 No. Car. 604), 1029.
Riley *v.* Chicago & Q. Ry. Co. (111 N. W. Rep. 847), 567.
Riley *v.* Connecticut River R. Co. (135 Mass. 292; 15 Am. & Eng. R. Cas. 181), 399.
Riley *v.* Louisville, etc., R. Co. (133 Fed. Rep. 904), 325.
Riley *v.* Missouri Pacific Ry. Co. (68 Mo. App. 652), 1078.
Riley *v.* West Virginia R. Co. (27 W. Va. 145), 321.
Rine *v.* Chicago, etc., R. Co. (88 Mo. 392), 1061.
Ring *v.* Cohoes (77 N. Y. 83), 27.
Ring *v.* Missouri Pac. Ry. Co. (112 Mo. 220), 476.
Ringue *v.* Oregon, etc., Co. (75 Pac. Rep. 703), 78.
Rintoul *v.* New York, etc., R. Co. (21 Blatchf. U. S. 439; 17 Fed. Rep. 905), 849.
Rio Grande, etc., R. Co. *v.* Lynch (66 S. W. Rep. 712), 335.
Riska *v.* Union Depot Ry. Co. (180 Mo. 168; 79 S. W. Rep. 445), 507.
Ritger *v.* Milwaukee (99 Wis. 190; 74 N. W. Rep. 815), 1053.
Riverton Coal Co. *v.* Shepard (207 Ill. 395; 69 N. E. Rep. 921), 6.
Riverton, etc., R. Co. *v.* Shepard (111 Ill. App. 294; 207 Ill. 395; 60 N. E. Rep. 921), 88.
Roach *v.* Western, etc., R. Co. (93 Ga. 785; 21 S. E. Rep. 67), 1055.
Robb *v.* Hackler (23 Wend. 50), 101.
Robbins *v.* Big Circle Co. (Mo., 79 S. W. Rep. 480), 155.
Roberts *v.* Alexandria, etc., R. Co. (83 Va. 312; 2 S. E. Rep. 518), 952.
Roberts *v.* Central, etc., R. Co. (124 Fed. Rep. 471), 61.
Roberts *v.* Chicago, etc., R. Co. (33 Minn. 218; 22 N. W. Rep. 389), 490.
Roberts *v.* Chicago, etc., R. Co. (35 Wis. 679), 915.
Roberts *v.* Fielder Salt Works, 72 S. W. Rep. 618), 158.
Roberts *v.* Johnson (58 N. Y. 613), 125.
Roberts *v.* Port Blakely, etc., Co. (30 Wash. 25; 70 Pac. Rep. 111), 154.
Robertson *v.* New York, etc., R. Co. (22 Barb. [N. Y.] 91), 561.
Robertson *v.* Terre Haute, etc. R. Co. (78 Ind. 77; 41 Am. Rep. 552; 8 Am. & Eng. R. Cas. 175), 488.
Robertson *v.* Wabash R. Co. (152 Mo. 382; 53 S. W. Rep. 1082), 703.
Robinson *v.* Georgia, etc., R. Co. (117 Ga. 168; 43 S. E. Rep. 452), 64.
Robinson *v.* Houston, etc., R. Co. (46 Tex., 540; 13 Am. Ry. Rep. 303), 354.
Robinson *v.* Metropolitan, etc., R. Co. 91 App. Div. 158; 86 N. Y. Supp. 442; 179 N. Y. 593; 72 N. E. Rep. 1150), 1059.
Robinson *v.* New York, etc., R. Co. (66 N. Y. 11), 1042.
Robinson *v.* Railroad (7 Gray [Mass.] 92), 95.
Robinson, etc., R. Co. *v.* Railway (57 Mo. 494), 602.
Robinson *v.* St. Johnsbury & L. C. R. Co. (66 Atl. Rep. 814), 564.
Robinson *v.* United States, etc., Ass'n (132 Mich. 659; 94 N. W. Rep. 211; 102 Am. St. Rep. 436), 649.
Robinson *v.* Western Pacific R. Co. (48 Cal. 409), 947.
Robostelli *v.* New York, etc., R. Co. (33 Fed. Rep. 796; 34 Am. & Eng. R. Cas. 515), 632.
Roche *v.* Denver & R. G. R. Co. (73 Pac. Rep. 880), 79.
Roche *v.* Llewellen Iron Co. (140 Cal. 563; 74 Pac. Rep. 147), 97.
Rock Island *v.* Van Landschoot (78 Ill. 485), 1056.
Rockford, etc., R. Co. *v.* Byam (80 Ill. 528), 991.
Rockford, etc., R. Co. *v.* Coultas (67 Ill. 398), 801.
Rockford, etc., R. Co. *v.* Delaney (82 Ill. 198), 198.
Rockford, etc., R. Co. *v.* Hillmer (72 Ill. 235), 1019.
Roddy *v.* Missouri Pacific Ry. Co. (104 Mo. 234; 15 S. W. Rep. 1112; 12 L. R. A. 746; 24 Am. St. Rep. 333), 860.
Roden *v.* Chicago, etc., R. Co. (133 Ill. 72; 24 N. E. Rep. 425; 30 Ill. App. 354), 1081.
Rogers *v.* St. Louis, etc., R. Co. (Ark., 89 S. W. Rep. 468; 1 L. R. A. [N. S.] 1145), 647.
Rodman *v.* Missouri Pac. Ry. Co. (65 Kan. 645; 70 Pac. Rep. 642; 59 L. R. A. 704), 55.
Rodrian *v.* New York, etc., R. Co. (125 N. Y. 526; 26 N. E. Rep. 741; 35 N. Y. S. R. 814), 1005.
Rodrian *v.* New York, etc., R. Co. (28 N. Y. S. R. 625; 7 N. Y. Supp. 811), 954.
Roe *v.* Jerome (18 Conn. 158), 463.
Roe *v.* Winston (86 Minn. 77; 90 N. W. Rep. 122), 210.
Rogers *v.* Chicago, etc., R. Co. (117 Ill. 116), 388.
Rogers *v.* Florence, etc., R. Co. (31 So. Car. 378; 9 S. E. Rep. 1059; 39 Am. & Eng. R. Cas. 348), 280.
Rogers *v.* Galveston, etc., R. Co. (76 Tex. 502; 13 S. W. Rep. 540), 343.
Rogers *v.* Kennebec S. B. Co. (86 Me. 261; 25 L. R. A. 491; 29 Atl. Rep. 1069), 852.
Rogers *v.* Rio Grande Western R. Co. (90 Pac. Rep. 1075), 200.
Rogers *v.* West Jersey & S. R. Co. (68 Atl. Rep. 148), 935.
Rohback *v.* Pacific R. Co. (43 Mo. 187), 492.
Roland *v.* Railroad (20 Mo. App. 463), 311.

[*References are to sections.*]

Roll *v.* Northern C. R. Co. (15 Hun [N. Y.] 496; 80 N. Y. 647), 399.
Roman *v.* Boston, etc., Co. (87 Mo. App. 186), 150.
Rome, etc., R. Co. *v.* Chasteen (88 Ala. 591; 7 So. Rep. 94; 40 Am. & Eng. R. Cas. 559), 277.
Rome, etc., Ry. Co. *v.* Keel (60 S. E. Rep. 468), 692.
Rome, etc., R. Co. *v.* Tolbert (85 Ga. 447; 11 S. E. Rep. 849), 1090.
Romick *v.* Chicago, etc., R. Co. (62 Iowa 167; 17 N. W. Rep. 458; 15 Am. & Eng. R. Cas. 288), 398.
Rook *v.* N. J., etc., Co. (76 Hun [N. Y.] 54; 148 N. Y. 758; 43 N. E. Rep. 989), 226.
Root *v.* Kansas City, etc., Ry. Co. (195 Mo. 348; 92 S. W. Rep. 621; 6. L. R. A. [N. S.] 212), 463.
Rose *v.* Des Moines Valley R. Co. (39 Iowa 246; 9 Am. Ry. Rep. 7; 20 Am. Ry. Rep. 326), 202.
Roseman *v.* Carolina, etc., R. Co. (112 No. Car. 709; 16 S. E. Rep. 766; 52 Am. & Eng. R. Cas. 638; 19 L. R. A. 327), 734.
Roseman *v.* Southern Ry. Co. (66 S. C. 91; 44 S. E. Rep. 574), 354.
Rosen *v.* Chicago, etc., R. Co. (83 Fed. Rep. 300; 49 U. S. App. 647; 27 C. C. A. 534; 7 Am. & Eng. Enc. Law [2 Ed.] 370), 4.
Rosenbaum *v.* St. Paul, etc., R. Co. (38 Minn. 173; 34 Am. & Eng. R. Cas. 274; 36 N. W. Rep. 447), 568.
Rosenberg, etc., R. Co. *v.* Third Ave. R. Co. (61 N. Y. S. 1052), 557.
Rosenkranz *v.* Lindell R. Co. (108 Mo. 9; 18 S. W. Rep. 890), 184.
Rosne *v.* Erie R. Co. (135 Fed. Rep. 311; 68 C. C. A. 155), 273.
Ross *v.* Double Shoals, etc., Co. (52 S. E. Rep. 121; 1 L. R. A. [N. S.] 298), 73.
Ross *v.* Great Northern R. Co. (111 N. W. Rep. 951), 170.
Ross *v.* New York, etc., R. Co. (5 Hun 488; 74 N. Y. 617), 568.
Ross *v.* North. Pac. Ry. Co. (5 Dak. 308; 40 N. W. Rep. 590), 258.
Ross *v.* Walker (139 Pa. St. 42; 21 Atl. Rep. 157), 309.
Roth *v.* Milwaukee, etc., R. Co. (21 Wis. 256), 1012.
Rou *v.* Blodgett, etc., R. Co. (85 Mich. 519; 48 N. E. Rep. 1092), 375.
Rounds *v.* Delaware, etc., R. Co. (64 N. Y. 129; 21 Am. Rep. 597), 153.
Roundtree *v.* Charleston, etc., R. Co. (72 S. C. 474; 52 S. E. Rep. 231) 149.
Rouston *v.* Detroit United Ry. (115 N. W. Rep. 62), 654.
Routledge *v.* Rambler Automobile Co. (95 S. W. Rep. 749), 1049.
Rowdin *v.* Pennsylvania R. Co. (208 Pa. St. 623; 57 Atl. Rep. 1125), 566.
Rowe *v.* Southern California R. Co. (Cal., 87 Pa. Rep. 220), 388.
Rowell *v.* Boston, etc., R. Co. (68 N. H. 358; 44 Atl. Rep. 488), 733.
Rowen *v.* New York, etc., R. Co. (59 Conn. 364; 21 Atl. Rep. 1073), 392.
Rowland *v.* Missouri Pacific Ry. Co. (20 Mo. App. 463), 475.
Rowley *v.* Chicago, etc., R. Co. (115 N. W. Rep. 865), 873.
Rowley *v.* London, etc., R. Co. (29 L. T. 180; L. R., 8 Ex. 221; 21 W. R. 869), 57.
Roxbury *v.* Central Vermont R. Co. (60 Vt. 121; 14 Atl. Rep. 92), 905.
Royster *v.* Southern Ry. Co. (61 S. E. Rep. 179), 1029.
Rozwadosfski *v.* International, etc., R. Co. (1 Tex. Civ. App. 487; 20 S. W. Rep. 872), 557.
Rozzelle *v.* Hannibal, etc., R. Co. (79 Mo. 351), 602.
Rucker *v.* Missouri Pacific Ry. Co. (61 Tex., 499; 21 Am. & Eng. R. Cas. 245), 97.
Rudard *v.* Chesapeake & Ohio R. Co. (88 Ky. 280; 11 S. W. Rep. 70), 6.
Rummel *v.* Dilworth (131 Pa. St. 509), 309.
Rumpel *v.* Railroad (35 Pac. Rep. 700; 22 L. R. A. 725; 4 Idaho 13), 95.
Rumsey *v.* Delaware, etc., R. Co. (6 Kulp [Pa.] 359; 53 Am. & Eng. R. Cas. 376), 341.
Rumsey *v.* Delaware, etc., R. Co. (151 Pa. St. 74; 25 Atl. Rep. 37), 333.
Runt *v.* Illinois Cent. R. Co. (Miss., 41 So. Rep. 1), 50.
Rupard *v.* Chesapeake & O. R. Co. (88 Ky. 280; 7 L. R. A. 316), 902.
Rush *v.* Missouri Pac. Ry. Co. (36 Kan. 129; 12 Pac. Rep. 582; 28 Am. & Eng. R. Cas. 484), 341.
Russ *v.* The War Eagle (14 Iowa 363), 571.
Russ *v.* Wabash R. Co. (112 Mo. 45; 20 S. W. Rep. 472), 495.
Russell *v.* Atchison, etc., R. Co. (70 Mo. App. 88), 962.
Russell *v.* Hudson River R. Co. (17 N. Y. 134), 568.
Russell *v.* Minneapolis, etc. R. Co. (32 Minn. 230; 20 N. W. Rep. 147), 372.
Russell *v.* New York, etc., R. Co. (89 N. Y. S. 429; 96 App. Div. 151), 94.
Russell *v.* Tillottson (4 N. E. Rep. 231), 145.
Rutledge *v.* Missouri Pacific Ry. Co. (123 Mo. 121; 24 S. W. Rep. 1053), 492.
Rutledge *v.* Missouri Pacific Ry. Co. 110 Mo. 312; 19 S. W. Rep. 38), 331.
Ryall *v.* Central Pacific Ry. Co. (76 Cal. 474; 18 Pac. Rep. 430), 413.
Ryan *v.* Chicago, etc., R. Co. (60 Ill. 171; 12 Am. Ry. Rep. 327), 479.
Ryan *v.* Chicago, etc., R. Co. (115 Fed. Rep. 197), 866.
Ryan *v.* Cumberland Valley R. Co. (23 Pa. St. 284), 568.
Ryan *v.* Delaware, etc., R. Co. (99 N. Y. S. 794; 114 App. Div. 268), 264.
Ryan *v.* Long Island, etc., R. Co. (51 Hun 607; 22 N. Y. S. R. 655; 4 N. Y. Supp. 381), 341.

[*References are to sections.*]

Ryan *v.* Pennsylvania R. Co. (132 Pa. St. 304; 19 Atl. Rep. 81), 894.
Ryan *v.* Railroad Co. (169 Mass. 267; 47 N. E. Rep. 877), 326.
Ryan *v.* Third Ave. R. Co. (86 N. Y. S. R. 1070; 92 App. Div. 306), 321.
Ryker *v.* New York, etc., R. Co. (72 N. Y. S. R. 168; 64 App. Div. 357), 372.

S

Sabine, etc., R. Co. *v.* Dean (76 Tex. 73; 13 S. W. Rep. 45), 1013.
Sabine, etc., R. Co. *v.* Ewing (1 Tex. Civ. App. 531; 21 S. W. Rep. 700), 492.
Sachau *v.* Miller, etc., Co. (123 Iowa 387; 98 N. W. Rep. 900), 307.
Sachrowitz *v.* Atchison, etc., R. Co. (37 Kan. 212; 34 Am. & Eng. R. Cas. 382), 749.
Sacker *v.* Waddell (Md., 56 Atl. Rep. 399), 280.
Sackewitz *v.* Am. Biscuit Co. (78 Mo. App. 151), 120.
Sadowski *v.* Michigan Car Co. (84 Mich. 100; 47 N. W. Rep. 598), 470.
Saeger *v.* Wabash R. Co. (110 S. W. Rep. 686), 708.
Safford *v.* Green Island (74 Hun 306; 56 N. Y. S. R. 269; 26 N. Y. Supp. 669), 136.
Sage *v.* Baltimore & O. R. Co. (67 Atl. Rep. 985; 219 Pa. 129), 482.
Sahaibe *v.* Lake Shore, etc., R. Co. (97 Mich. 318; 56 N. W. Rep. 565), 265.
St. Clair, etc., R. Co. *v.* Eadie (43 Ohio St. 91; 54 Am. Rep. 144; 23 Am. & Eng. R. Cas. 269), 1043.
St. Clair *v.* St. Louis, etc. R. Co. (122 Mo. App. 519; 99 S. W. Rep. 775), 568.
St. Joseph, etc., R. Co. *v.* Wheeler (Kan., 26 Am. & Eng. R. Cas. 173), 561.
St. Lawrence, etc., R. Co. *v.* Lett (11 Can. Sup. Ct. 422; 26 Am. & Eng. R. Cas. 454), 197.
St. Louis, etc., R. Co. *v.* Adcock (52 Ark. 406; 12 S. W. Rep. 874; 40 Am. & Eng. R. Cas. 682), 658.
St. Louis & S. F. R. Co. *v.* Ames (Tex., 94 S. W. Rep. 1112), 271.
St. Louis, etc., R. Co. *v.* Andres (16 Ill. App. 292), 395.
St. Louis, etc., R. Co. *v.* Arnold (Tex. 87 S. W. Rep. 173), 94.
St. Louis, etc., R. Co. *v.* Baker (67 Ark. 531; 55 S. W. Rep. 941), 789.
St. Louis, etc., R. Co. *v.* Barnett (65 Ark. 255; 45 S. W. Rep. 550), 626.
St. Louis, etc., R. Co. *v.* Barrett (Tex., 72 S. W. Rep. 884), 332.
St. Louis, etc., R. Co. *v.* Bell (81 Ill. 76; 25 Am. Rep. 269), 1073.
St. Louis, etc., R. Co. *v.* Berryhill (3 Tex. Civ. App. 387), 686.
St. Louis, etc., R. Co. *v.* Biggs (53 Ill. App. 550), 499.
St. Louis, etc., R. Co. *v.* Billingsley (96 S. W. Rep. 357), 668.
St. Louis R. Co. *v.* Boyer (97 S. W. Rep. 1070), 594.
St. Louis, etc., R. Co. *v.* Boyles (Ark., 95 S. W. Rep. 783), 386.
St. Louis, etc., R. Co. *v.* Brennen (20 Ill. App. 555), 400.
St. Louis, etc., R. Co. *v.* Britz (72 Ill. 256), 455.
St. Louis, etc., R. Co. *v.* Burrows (Kan., 61 Pac. Rep. 439), 576.
St. Louis, etc., R. Co. *v.* Callahan (194 U. S. 628; 24 Sup. Ct. Rep. 857; 48 L. Ed. 1157), 529.
St. Louis, etc., R. Co. *v.* Cantrell (37 Ark. 519; 40 Am. Rep. 105; 8 Am. & Eng. R. Cas. 198), 711.
St. Louis, etc., R. Co. *v.* Carlisle (75 Ark. 560; 88 S. W. Rep. 584), 328.
St. Louis, etc., R. Co. *v.* Carr (47 Ill. App. 353), 805.
St. Louis, etc., R. Co. *v.* Corgan (49 Ill. App. 239), 321.
St. Louis, etc., R. Co. *v.* Crosnoe (72 Tex., 79; 10 S. W. Rep. 342; 37 Am. & Eng. R. Cas. 313), 874.
St. Louis, etc., R. Co. *v.* Davis (55 Ark. 462; 18 S. W. Rep. 628), 198.
St. Louis, etc., R. Co. *v.* Davis (54 Ark. 389; 15 S. W. Rep. 895), 341.
St. Louis, etc., R. Co. *v.* Dewees (Kan., 153 Fed. Rep. 56), 395.
St. Louis, etc., R. Co. *v.* Dowgiallo (101 S. W. Rep. 412), 737.
St. Louis, etc., R. Co. *v.* Doyle (Tex., 25 S. W. Rep. 461), 298.
St. Louis, etc., R. Co. *v.* Dunn (78 Ill. 197), 943.
St. Louis, etc., R. Co. *v.* Fairbourne (48 Ark. 491), 861.
St. Louis, etc., R. Co. *v.* Farr (56 Fed. Rep. 994), 196.
St. Louis, etc., R. Co. *v.* Ferrell (105 S. W. Rep. 263), 411.
St. Louis, etc., R. Co. *v.* Finley (79 Tex. 85; 15 S. W. Rep. 266), 708.
St. Louis, etc., R. Co. *v.* Freeman (36 Ark. 41; 4 Am. & Eng. R. Cas. 608), 395.
St. Louis, etc., R. Co. *v.* Fritts (108 S. W. Rep. 841), 866.
St. Louis, etc., R. Co. *v.* Gaines (46 Ark. 555), 494.
St. Louis, etc., R. Co. *v.* Gordon (157 Mo. 71; 57 S. W. Rep. 742), 908.
St. Louis, etc., Ry. Co. *v.* Green (107 S. W. Rep. 168), 694.
St. Louis, etc., R. Co. *v.* Hackett (58 Ark. 581; 24 S. W. Rep. 881), 245.
St. Louis, etc., R. Co. *v.* Haney (Tex., 94 S. W. Rep. 386), 647.
St. Louis, etc., Ry. Co. *v.* Harmon (109 S. W. Rep.. 295), 568.
St. Louis, etc., R. Co. *v.* Harper (44 Ark. 524), 471.
St. Louis, etc., R. Co. *v.* Henson (61 Ark. 302; 32 S. W. Rep. 1079), 490.
St. Louis, etc., R. Co. *v.* Hill (94 S. W. Rep. 914), 258.
St. Louis, etc., R. Co. *v.* Holman (155 Ill. 21; 39 N. E. Rep. 573), 494.
St. Louis, etc., R. Co. *v.* Hook (Ark. 104 S. W. Rep. 217), 622.

[References are to sections.]

St. Louis, etc., R. Co. *v.* Irwin (37 Kan. 701; 16 Pac. Rep. 146), 321.
St. Louis, S. W. R. Co. *v.* Jacobson (Tex., 66 S. W. Rep. 111), 273.
St. Louis, etc., R. Co. *v.* Johnson (59 Ark. 122; 26 S. W. Rep. 593), 632.
St. Louis, etc., R. Co. *v.* Johnson (78 Tex. 536; 15 S. W. Rep. 104), 203.
St. Louis, etc., R. Co. *v.* Kelton (28 Tex. Civ. App. 137; 66 S. W. Rep. 887), 492.
St. Louis, etc., R. Co. *v.* Kelton (55 Ark. 483; 18 S. W. Rep. 933), 375.
St. Louis, etc., R. Co. *v.* Kilpatrick (67 Ark. 47; 54 S. W. Rep. 971), 729.
St. Louis, etc., R. Co. *v.* Knott (54 Ark. 424; 16 S. W. Rep. 9), 283.
St. Louis, etc., R. Co. *v.* Leamons (102 S. W. Rep. 363), 184.
St. Louis, etc., R. Co. *v.* Ledbetter (45 Ark. 246), 1101.
St. Louis, etc., R. Co. *v.* Lemon (83 Tex. 143; 18 S. W. Rep. 331), 485.
St. Louis, etc., R. Co. *v.* Lester (46 Ark. 236), 849.
St. Louis, etc., R. Co. *v.* Mackie (71 Tex. 491; 9 S. W. Rep. 451; 37 Am. & Eng. R. Cas. 94; 1 L. R. A. 667), 164.
St. Louis, etc., R. Co. *v.* McClain (80 Tex. 85; 15 S. W. Rep. 789), 419.
St. Louis, etc., R. Co. *v.* Madden (93 Pac. Rep. 586), 281.
St. Louis, etc., R. Co. *v.* Madry (57 Ark. 306; 21 S. W. Rep. 472; 58 Am. & Eng. R. Cas. 327), 195.
St. Louis, etc., R. Co. *v.* McLain (80 Tex. 85; 15 S. W. Rep. 789), 467.
St. Louis, etc. R. Co. *v.* Manley (58 Ill. 300), 884.
St. Louis, etc., R. Co. *v.* Marker (41 Ark. 542), 337.
St. Louis, etc., R. Co. *v.* Marshall (78 Mo. 610), 39.
St. Louis, etc., R. Co. *v.* Mathias (50 Ind. 65; 8 Am. Ry. Rep. 381), 1011.
St. Louis, etc., R. Co. *v.* Mitchell (57 Ark. 418; 21 S. W. Rep. 883), 608.
St. Louis I. M. & S. Ry. Co. *v.* Mize (Ark., 95 S. W. Rep. 488), 258.
St. Louis, etc., R. Co. *v.* Monday (49 Ark. 257; 4 S. W. Rep. 782; 31 Am. & Eng. R. Cas. 424), 413.
St. Louis, etc., R. Co. *v.* Moore (14 Ill. App. 510), 597.
St. Louis, etc., R. Co. *v.* Morgert (45 Ark. 318), 482.
St. Louis, etc., R. Co. *v.* Murray (55 Ark. 248; 18 S. W. Rep. 50; 16 L. R. A. 787), 39.
St. Louis Rv. Co. *v.* Mynott (102 S. W. Rep. 380), 737.
St. Louis, etc., R. Co. *v.* Needham (52 Fed. Rep. 371; 10 U. S. App. 339; 3 C. C. A. 129; 54 Am. & Eng. R. Cas. 88), 65.
St. Louis, etc., R. Co. *v.* Needham (63 Fed. Rep. 107; 11 C. C. A. 56; 25 L. R. A. 833), 493.
St. Louis, etc., R. Co. *v.* Neely (101 S. W. Rep. 481), 682.
St. Louis, etc., R. Co. *v.* Parks (97 Tex. 131; 76 S. W. Rep. 740; 90 S. W. Rep. 343), 656.
St. Louis, etc., R. Co. *v.* Payne (13 Am. & Eng. R. Cas. 632), 886.
St. Louis, etc., R. Co. *v.* Persons (49 Ark. 182; 4 S. W. Rep. 755; 30 Am. & Eng. R. Cas. 567), 708.
St. Louis, etc., R. Co. *v.* Pitcock (101 S. W. Rep. 725), 851.
St. Louis, etc., Ry. Co. *v.* Pope (Tex., 86 S. W. Rep. 5), 380.
St. Louis & S. F. R. Co. *v.* Portis (99 S. W. Rep. 66), 1014.
St. Louis, etc., R. Co. *v.* Raines (111 S. W. Rep. 262), 1099.
St. Louis, etc., R. Co. *v.* Rea (Tex., 87 S. W. Rep. 324), 338.
St. Louis, etc., R. Co. *v.* Reagen (52 Ill. App. 488), 732.
St. Louis, etc., R. Co. *v.* Rexroad (Ark., 58 Am. & Eng. R. Cas. 615), 682.
St. Louis, etc., R. Co. *v.* Rice (51 Ark. 467; 11 S. W. Rep. 699; 4 L. R. A. 173), 494.
St. Louis, etc., R. Co. *v.* Rickman (65 Ark. 138; 45 S. W. Rep. 56), 495.
St. Louis, etc., R. Co. *v.* Ritz (Kan., 11 Am. & Eng. R. Cas. 35), 292.
St. Louis, etc., R. Co. *v.* Robbins (57 Ark. 377; 21 S. W. Rep. 886), 202.
St. Louis, etc., R. Co. *v.* Rosenberry (45 Ark. 256), 768.
St. Louis, etc., R. Co. *v.* Sharp (3 Tex. Civ. App. 394), 1094.
St. Louis, etc., R. Co. *v.* Shaw (116 Fed. Rep. 621), 866.
St. Louis, etc., R. Co. *v.* Shifflett (98 Tex. 326; 83 S. W. Rep. 677), 1096.
St. Louis, etc., R. Co. *v.* Smith (90 S. W. Rep. 926), 529.
St. Louis, etc., R. Co. *v.* Smith (86 S. W. Rep. 943), 184.
St. Louis, etc., R. Co. *v.* Snell (100 S. W. Rep. 67), 667.
St. Louis, etc., R. Co. *v.* State (22 S. W. Rep. 918), 956.
St. Louis, etc., R. Co. *v.* State (56 Ark. 166; 19 S. W. Rep. 572; 55 Ark. 200), 949.
St. Louis, etc., R. Co. *v.* Sweet (57 Ark. 287; 21 S. W. Rep. 587), 583.
St. Louis, etc., Ry. Co. *v.* Tomlinson (94 S. W. Rep. 613), 947.
St. Louis, etc., R. Co. *v.* Trigg (74 Mo. 174), 39.
St. Louis, etc., R. Co. *v.* Triplett (54 Ark. 289; 15 S. W. Rep. 831; 48 Am. & Eng. R. Cas. 283), 376.
St. Louis, etc., R. Co. *v.* Valarius (56 Ind. 511; 18 Am. Ry. Rep. 116), 313.
St. Louis, etc., R. Co. *v.* Vestal (Tex., 86 S. W. Rep. 790), 360.
St. Louis & S. F. R. Co. *v.* Bricker (Kan., 69 Pac. Rep. 328), 238.
St. Louis & S. F. R. Co. *v.* Bussong (90 S. W. Rep. 73), 543.
St. Louis, etc., R. Co. *v.* Vickers (122 U. S. 360), 105.
St. Louis, etc., R. Co. *v.* Weaver (35 Kan. 412; 11 Pac. Rep. 408; 28 Am. & Eng. R. Cas. 341), 94.
St. Louis, etc., R. Co. *v.* Welsh (72

[*References are to sections.*]

Tex. 298; 10 S. W. Rep. 529; 2 L. R. A. 839), 490.
St. Louis, etc., R. Co. *v.* Whittier (74 Fed. Rep. 296), 782.
St. Louis, etc., R. Co. *v.* Wilkerson (46 Ark. 513), 1103.
St. Louis, etc., R. Co. *v.* Willis (38 Kan. 330; 16 Pac. Rep. 728; 33 Am. & Eng. R. Cas. 397), 292.
St. Louis, etc., R. Co. *v.* Yonley (53 Ark. 503; 14 S. W. Rep. 800; 45 Am. & Eng. R. Cas. 578), 284.
St. Louis, I. M. & S. Ry. Co. *v.* Andrews (96 S. W. Rep. 183), 255.
St. Louis, I. M. & S. Ry. Co. *v.* Block (Ark., 95 S. W. Rep. 155), 206.
St. Louis, I. M. & S. R. Co. *v.* Cain (104 S. W. Rep. 533), 1083.
St. Louis, I. M. & S. Ry. Co. *v.* Caraway (91 S. W. Rep. 749), 263.
St. Louis, I. M. & S. Ry. Co. *v.* Dillard (94 S. W. Rep. 617), 408.
St. Louis, I. M. & S. Ry. Co. *v.* Dupree (105 S. W. Rep. 878), 514.
St. Louis, I. M. & S. Ry. Co. *v.* Hatch (94 S. W. Rep. 671), 591.
St. Louis, I. M. & S. Ry. Co. *v.* Hudson (110 S. W. Rep. 590), 875.
St. Louis, I. M. & S. Ry. Co. *v.* London (102 S. W. Rep. 212), 412.
St. Louis, I. M. & S. Ry. Co. *v.* McCormick (71 Tex. 660; 9 S. W. Rep. 540), 50.
St. Louis, I. M. & S. Ry. Co. *v.* Touhey (67 Ark. 209; 54 S. W. Rep. 577; 77 Am. St. Rep. 109), 360.
St. Louis Southwestern Ry. Co. *v.* Adams (112 S. W. Rep. 186), 967.
St. Louis S. W. Ry. Co. *v.* Arnold (87 S. W. Rep. 173), 95.
St. Louis S. W. Ry. Co. *v.* Corrigan (Tex., 81 S. W. Rep. 554), 268.
St. Louis Southwestern Ry. Co. *v.* Cunningham (106 S. W. Rep. 407), 646.
St. Louis Southwestern Ry. Co. *v.* Davis (110 S. W. Rep. 939), 1102.
St. Louis, S. W. Ry. Co. *v.* Dempsey (Tex., 89 S. W. Rep. 789), 323.
St. Louis Southwestern Ry. Co. *v.* Fussell (97 S. W. Rep. 332), 555.
St. Louis S. W. Ry. Co. *v.* Harkie (88 S. W. Rep. 506), 122.
St. Louis S. W. Ry. *v.* Kelton (Tex., 66 S. W. Rep. 887), 258.
St. Louis Southwestern Ry. Co. *v.* Kennedy (96 S. W. Rep. 653), 721.
St. Louis Southwestern Ry. Co. of Texas *v.* Kern (100 S. W. Rep. 971), 406.
St. Louis Southwestern Ry. Co. *v.* Moore (107 S. W. Rep. 658), 933.
St. Louis Southwestern Ry. Co. *v.* Morgan (98 S. W. Rep. 408), 659.
St. Louis Southwestern Ry. Co. *v.* Pope (97 S. W. Rep. 534), 407.
St. Louis Southwestern R. Co. *v.* Rowe (Tex., 86 S. W. Rep. 1059), 20.
St. Louis Southwestern Ry. Co. *v.* Smith (Tex., 107 S. W. Rep. 638), 904.
St. Louis S. W. Ry. Co. *v.* Spivey (Tex., 76 S. W. Rep. 748), 270.
St. Louis Southwestern Ry. Co. *v.* Thornton (103 S. W. Rep. 437), 543.
St. Louis Stock Yards Co. *v.* Burns (97 Ill. App. 175), 328.
St. Paul, etc., Co. *v.* Ware (6 Wall. [U. S.] 566; 21 L. Ed. 485) 300.
Sakewitz *v.* American, etc., Co. (78 Mo. App. 144), 127.
Sala *v.* Chicago, etc., R. Co. (85 Iowa 678; 52 N. W. Rep. 664), 1001.
Saldana *v.* Galveston, etc., R. Co. (43 Fed. Rep. 862), 966.
Salliott *v.* King Bridge Co. (122 Fed. Rep. 378; 58 C. C. A. 466; 65 L. R. A. 620), 278.
Salmon *v.* Delaware, etc., R. Co. (9 Vt. 5), 4.
Salter *v.* Mersereau (64 N. Y. 138), 292.
Salter *v.* Utica, etc., R. Co. (75 N. Y. 273), 1006.
Salter *v.* Utica, etc., R. Co. (88 N. Y. 42; 8 Am. & Eng. R. Cas. 437), 979.
Salter *v.* Utica, etc., R. Co. (59 N. Y. 631), 1012.
Saltonstall *v.* Stockton (Taney [U. S.] 11), 806.
Sams *v.* St. Louis, etc., R. Co. (174 Mo. 53; 73 S. W. Rep. 686; 61 L. R. A. 475), 529.
Samuels *v.* Richmond, etc., R. Co. (35 So. Car. 493; 14 S. E. Rep. 943; 52 Am. & Eng. R. Cas. 315), 179.
San Antonio R. Co. *v.* Bennett (76 Tex. 151; 13 S. W. Rep. 319), 192.
San Antonio, etc., Ry. Co. *v.* Brock (Tex., 80 S. W. Rep. 422), 361.
San Antonio, etc., R. Co. *v.* Clark (Tex., 62 S. W. Rep. 546), 328.
San Antonio, etc., Ry. Co. *v.* Drake (Tex., 85 S. W. Rep. 447; 89 S. W. Rep. 107), 253.
San Antonio, etc., Ry. Co. *v.* Hahl (Tex., 83 S. W. Rep. 27), 271.
San Antonio, etc., R. Co. *v.* Harding (11 Tex. Civ. App. 497; 33 S. W. Rep. 373; 3 Am. & Eng. R. Cas. [N. S.] 389), 487.
San Antonio & A. P. Ry. Co. *v.* Heller (11 Tex. Civ. App. 569; 32 S. W. Rep. 847), 51.
San Antonio, etc., R. Co. *v.* Lindsay (Tex., 65 S. W. Rep. 668), 267.
San Antonio, etc., R. Co. *v.* Lynch (Tex., 55 S. W. Rep. 517), 604.
San Antonio, etc., R. Co. *v.* McMillan (102 S. W. Rep. 103), 1104.
San Antonio, etc., R. Co. *v.* Robinson (73 Tex. 277; 11 S. W. Rep. 327), 92.
San Antonio, etc., R. Co. *v.* Taylor (Tex., 35 S. W. Rep. 855), 490.
San Antonio & A. P. Ry. Co. *v.* Trigo (101 S. W. Rep. 254), 842.
San Antonio, etc., R. Co. *v.* Wallace (76 Tex. 636; 44 Am. & Eng. R. Cas. 564; 13 S. W. Rep. 565), 397.
San Antonio, etc., R. Co. *v.* Waller (Tex., 65 S. W. Rep. 210), 360.
San Antonio, etc., Co. *v.* Wilson (Tex., 19 S. W. Rep. 910), 382.
Sanborn *v.* Atchison, etc., R. Co. (35 Kan. 292; 10 Pac. Rep. 860), 307.

[*References are to sections.*]

Sanborn *v.* Detroit, etc., R. Co. (91 Mich. 538; 52 N. W. Rep. 153; 50 Am. & Eng. R. Cas. 114), 962.
Sanchez *v.* San Antonio, etc., R. Co. (3 Co. (196 Mo. 491; 95 S. W. Rep. 242), 795.
Sanders *v.* Central of Georgia Ry. Co. (123 Ga. 763; 51 S. E. Rep. 728), 452.
Sanders *v.* Southern R. Co. (107 Ga. 132), 789.
Sanderson *v.* Missouri Pacific Ry. Co. (64 Mo. App. 655), 715.
Sands *v.* Louisville & N. R. Co. (47 So. Rep. 323), 1029.
Sanford *v.* Pawtucket, etc., R. Co. (19 R. I. 537; 35 Atl. Rep. 67; 33 L. R. A. 564; 4 Am. & Eng. R. Cas. [N. S.] 318), 281.
Sanguinette *v.* Mississippi River, etc., R. Co. (196 Mo. p. 491; 95 S. W. Rep. 386), 1014.
Sanker *v.* Pennsylvania R. Co. (205 Pa. St. 609; 55 Atl. Rep. 833), 328.
Sanks *v.* Chicago, etc., R. Co. (112 Ill. App. 385), 109.
Sante Fe Pacific R. Co. *v.* Holmes (136 Fed. Rep. 66; 68 C. C. A. 634; 202 U. S. 438; 26 Sup. Ct. Rep. 676; 50 L. Ed. 1094), 273.
Sargent *v.* St. Louis, etc., R. Co. (114 Mo. 348; 21 S. W. Rep. 823; 19 L. R. A. 460), 793.
Sauerborn *v.* New York, etc., R. Co. (23 N. Y. Supp. 478; 52 N. Y. S. R. 784; 141 N. Y. 553), 974.
Sauls *v.* Chicago, etc., Ry. Co. (Tex., 81 S. W. Rep. 89), 352.
Sauter *v.* New York, etc., R. Co. (66 N. Y. 50; 6 Hun 446), 722.
Savage *v.* Marlborough, etc., R. Co. (186 Mass. 203; 71 N. E. Rep. 531), 116.
Savage *v.* Nassau, etc., R. Co. (168 N. Y. 680; 61 N. E. Rep. 1134), 500.
Savannah, etc., R. Co. *v.* Boyle (115 Ga. 836; 42 S. E. Rep. 242; 59 L. R. A. 104), 762.
Savannah, etc., R. Co. *v.* Flannaghan (82 Ga. 579; 9 S. E. Rep. 471; 39 Am. & Eng. R. Cas. 661), 95.
Savannah, etc., R. Co. *v.* Folks (76 Ga. 527), 844.
Savannah, etc., R. Co. *v.* Harper (70 Ga. 119), 165.
Savannah, etc., R. Co. *v.* Holland (82 Ga. 257; 10 S. E. Rep. 200; 41 Am. & Eng. R. Cas. 196), 179.
Savannah, etc., R. Co. *v.* Meadows (95 Ala. 137; 10 So. Rep. 141), 1063.
Savannah, etc., R. Co. *v.* Phillips (90 Ga. 829; 17 S. E. Rep. 82), 283.
Savannah, etc., R. Co. *v.* Shearer (58 Ala. 672; 20 Am. Ry. Rep. 451), 200.
Savannah, etc., R. Co. *v.* Stewart (71 Ga. 427), 580.
Savannah, etc., R. Co. *v.* Watts (82 Ga. 229; 9 S. E. Rep. 129), 789.
Savannah, etc., R. Co. *v.* Williams (117 Ga. 414; 43 S. E. Rep. 751; 61 L. R. A. 249), 519.
Sawyer *v.* Arnold (90 Me. 369; 38 Atl. Rep. 333), 108.
Sawyer *v.* Hannibal, etc., R. Co. (37 Mo. 240), 618.
Sawyer *v.* Roanoke R. & Lumber Co. (58 S. E. Rep. 598), 398.
Sawyer *v.* Rutland R. Co. (27 Vt. 370), 481.
Saxe *v.* Wolworth, etc., Co. (191 Mass. 338; 77 N. E. Rep. 883), 341.
Saxton *v.* Missouri Pacific Ry. Co. (98 Mo. App. 494; 72 S. W. Rep. 717), 570.
Scagel *v.* Chicago, etc., R. Co. (83 Iowa 380; 49 N. W. Rep. 990), 105.
Scanlon *v.* Boston, etc., R. Co. (147 Mass. 484; 18 N. E. Rep. 209; 38 Am. & Eng. R. Cas. 48), 327.
Scanlon *v.* Boston, etc., R. Co. (140 Mass. 84; 2 N. E. Rep. 787), 910.
Scanlon *v.* Railroad Co. (147 Mass. 484; 18 N. E. Rep. 209), 369.
Scarborough *v.* Alabama Midland R. Co. (94 Ala. 497; 10 So. Rep. 316), 295.
Schadewald *v.* Milwaukee, etc., R. Co. (55 Wis. 569; 13 N. W. Rep. 458), 196.
Schaefert *v.* Chicago, etc., R. Co. (62 Iowa 624; 17 N. W. Rep. 893), 1033.
Schaeffer *v.* St. Louis, etc., R. Co. (128 Mo. 64; 30 S. W. Rep. 331), 687.
Schaeffer *v.* Washington, etc., R. Co. (105 U. S. 251; 26 L. Ed. 1070), 702.
Schaible *v.* Lake Shore, etc., R. Co. (97 Mich. 318; 56 N. W. Rep. 565), 408.
Schafery *v.* Chicago, etc., R. Co. (62 Iowa 624), 1017.
Schaldewald *v.* Milwaukee, etc., R. Co. (55 Wis. 569; 13 N. W. Rep. 458), 841.
Scharf *v.* Southern Ill., etc., Co. (115 Mo. App. 157; 92 S. W. Rep. 126), 276.
Schaub *v.* Hannibal, etc., R. Co. (106 Mo. 74; 16 S. W. Rep. 924), 400.
Schauk *v.* Northern C. R. Co. (25 Md. 462), 482.
Scheffler *v.* Minneapolis, etc., R. Co. (32 Minn. 518; 21 N. W. Rep. 711; 19 Am. & Eng. R. Cas. 173), 105.
Schermerhorn *v.* New York, etc., R. Co. (53 N. Y. S. 279; 33 App. Div. 17), 27.
Schiffler *v.* Chicago, etc., R. Co. (96 Wis. 141; 71 N. W. Rep. 97; 8 Am. & Eng. R. Cas. [N. S.] 122), 789.
Schilling *v.* Chicago, etc., R. Co. (71 Wis. 255; 37 N. W. Rep. 414; 40 N. W. Rep. 616; 34 Am. & Eng. R. Cas. 60), 1092.
Schilling *v.* Winona, etc., R. Co. (66 Minn. 252; 68 N. W. Rep. 1083), 725.
Schindler *v.* Milwaukee, etc., R. Co. (87 Mich. 400; 49 N. W. Rep. 670), 874.
Schlemmer *v.* Buffalo, etc., R. Co. (27 U. S. Sup. 407; 51 L. Ed. 689; 207 Pa. 198; 56 Atl. Rep. 417), 388.
Schlereth *v.* Missouri Pacific Ry. Co. (96 Mo. 509), 845.
Schlereth *v.* Missouri Pacific Ry. Co. (115 Mo. 87; 21 S. W. Rep. 1110), 413.
Schmidt *v.* Chicago, etc., R. Co. (83 Ill. 405), 5.

[References are to sections.]

Schmidt *v.* Missouri Pacific Ry. Co. (191 Mo. 215; 90 S. W. Rep. 136), 1011.
Schmidt *v.* North Jersey R. Co. (66 N. J. L. 424), 719.
Schmidt *v.* Philadelphia, etc., R. Co. (149 Pa. St. 357; 24 Atl. Rep. 218), 1027.
Schmolza *v.* Chicago, etc., R. Co. (83 Wis. 659; 53 N. W. Rep. 743; 54 N. W. Rep. 106), 1007.
Schonatz *v.* Railroad Co. (160 Pa. St. 602; 28 Atl. Rep. 958), 65.
Schneider *v.* American Bridge Co. (79 N. Y. S. 634; 78 App. Div. 163), 114.
Schneider & Co. *v.* Carlin (120 Ill. App. 538), 479.
Schneider *v.* Missouri Pacific Ry. Co. (Mo., 94 S. W. Rep. 730), 208.
Schneider *v.* Missouri Pacific Ry. Co. (75 Mo. 295), 946.
Schneider *v.* Second Avenue R. Co. (39 N. Y. S. R. 370), 637.
Schofield *v.* Chicago, etc., R. Co. (2 McCrary [U. S.] 268), 995.
Schofield *v.* Chicago, etc., R. Co. (114 U. S. 615; 5 Sup. Ct. Rep. 1125; 19 Am. & Eng. R. Cas. 353), 1006.
Scholes *v.* North London R. Co. (21 L. T. 835), 170.
Schopman *v.* Boston, etc., R. Co. (9 Cush. [Mass.] 24), 638.
Schroeder *v.* Chicago, etc., R. Co. (41 Iowa 344; 47 Iowa 375), 504.
Schroeder *v.* Chicago, etc., R. Co. (108 Mo. 322; 18 S. W. Rep. 1094; 53 Am. & Eng. R. Cas. 436), 410.
Schron *v.* Staten Island R. Co. (16 App. Div. 111; 45 N. Y. Supp. 124), 1049.
Schulte *v.* Louisville & N. R. Co. (108 S. W. Rep. 941), 919.
Schultz *v.* Chicago, etc., R. Co. (48 Wis. 375; 4 N. W. Rep. 399), 475.
Schultz *v.* Chicago, etc., R. Co. (Wis., 92 N. W. Rep. 377), 154.
Schultz *v.* Chicago, etc., R. Co. (67 Wis. 616; 31 N. W. Rep. 321; 58 Am. Rep. 881; 28 Am. & Eng. R. Cas. 404), 332.
Schultz *v.* Chicago, etc., R. Co. (44 Wis. 638; 18 Am. Ry. Rep. 146), 399.
Schultz *v.* Chicago, etc., R. Co. (40 Wis. 589), 212.
Schultz *v.* Missouri Pac. R. Co. (32 Mo. App. 438), 150.
Schultz *v.* Moon (33 Mo. App. 329), 1038.
Schultz *v.* Old Colony R. Co. (Mass., 79 N. E. Rep. 873; 8 L. R. A. [N. S.] 597), 1042.
Schultz *v.* Pacific R. Co. (36 Mo. 13), 581.
Schultz *v.* Union, etc., R. Co. (181 N. Y. 33; 73 N. E. Rep. 491), 98.
Schumaker *v.* St. Paul & D. R. Co. (46 Minn. 39; 48 N. W. Rep. 559; 12 L. R. A. 257), 274.
Schutt *v.* Cumberland Valley R. Co. (149 Pa. St. 266; 24 Atl. Rep. 305), 795.
Schwab *v.* Railway Co. (106 Mo. 368), 985.
Schwanenfeldt *v.* Chicago, etc., R. Co. (115 N. W. Rep. 285), 985.
Schwartz *v.* Hudson River Co. (4 Robt. [N. Y.] 347), 931.
Schwartz *v.* Interborough Rapid Transit Co. (103 N. Y. S. 80), 737.
Schwarz *v.* Delaware, L. & W. R. Co. (67 Atl. Rep. 213), 97.
Scidmore *v.* Railroad (89 Wis. 188; 61 N. W. Rep. 765), 369.
Scullin *v.* Wabash R. Co. (184 Mo. 707; 83 S. W. Rep. 760), 1094.
Scully *v.* New York, etc., R. Co. (80 Hun 197; 61 N. Y. S. R. 804; 151 N. Y. 672; 46 N. E. Rep. 1151), 789.
Scott *v.* Dock Co. (11 Jur. [N. S.] 1108), 665.
Scott *v.* London Dock (3 Hurl. & Colt. 596), 120.
Scott *v.* Oregon, etc., R. Co. (14 Oregon 211; 13 Pac. Rep. 98; 28 Am. & Eng. R. Cas. 414), 345.
Scott *v.* Wilmington, etc., R. Co. (96 No. Car. 428; 2 S. E. Rep. 151), 1006.
Scott *v.* Woods (18 N. Y. Week. Dig. 441), 1059.
Seaboard Air Line *v.* Chapman (62 S. E. Rep. 488), 1077.
Seaboard Air Line Ry. *v.* Scarborough (42 So. Rep. 706), 555.
Seaboard Air Line Ry. Co. *v.* Shanklin (148 Fed. Rep. 342), 263.
Seaboard Air Line Ry. *v.* Smith (43 So. Rep. 235), 412.
Seaboard Air Line Ry. *v.* Smith (59 S. E. Rep. 199), 731.
Seaboard, etc., R. Co. *v.* Spencer (111 Ga. 868; 36 S. E. Rep. 921), 33.
Seaboard, etc., R. Co. *v.* Woodson (98 Ala. 378; 11 So. Rep. 733), 172.
Seale *v.* Railroad Co. (65 Tex. 274), 28.
Seaman *v.* Koehler (122 N. Y. 646; 25 N. E. Rep. 353), 1050.
Searle *v.* Kanawha, etc., R. Co. (32 W. Va. 370) 9 S. E. Rep. 248; 37 Am. & Eng. R. Cas. 179), 593.
Searle *v.* Laverick (L. R., 9 Q. B. 122; 43 L. J. Q. B. 43; 30 L. T. 89; 22 W. R. 367), 652.
Searles *v.* Railway (101 N. Y. 662; 5 N. E. Rep. 66), 119.
Sears *v.* Eastern, etc., R. Co. (14 Allen [Mass.] 433), 102.
Sears *v.* Seattle, etc., R. Co. (Wash., 33 Pac. Rep. 390), 661.
Seaver *v.* Boston, etc., R. Co. (14 Gray [Mass.] 466), 568.
Seay *v.* Sanders (88 Mo. App. 478), 984.
Secord *v.* St. Paul, etc., R. Co. (5 McCrary [U. S.] 515; 18 Fed. Rep. 221), 561.
Seefeld *v.* Chicago, etc., R. Co. (70 Wis. 216; 35 N. W. Rep. 278; 32 Am. & Eng. R. Cas. 109), 991.
Seery *v.* Gulf, etc., Ry. Co. (Tex., 77 S. W. Rep. 950), 317.
Seital *v.* Middlesex, etc., R. Co. (109 Mass. 398), 608.
Seiter *v.* Bischoff (63 Mo. App. 157), 119.
Seldomridge *v.* Railway Co. (46 W. Va. 569), 368.
Seley *v.* Railway Co. (6 Utah 319; 23 Pac. Rep. 751), 372.

[*References are to sections.*]

Self *v.* London, etc., R. Co. (42 L. T. 173), 815.
Sellers *v.* Cleveland & St. L. Ry. Co. (81 N. E. Rep. 1087), 712.
Selma, etc., R. Co. *v.* Lacey (49 Ga. 106), 44.
Selman *v.* Gulf, etc., R. Co. (101 S. W. Rep. 1030), 788.
Sembler *v.* Cowperthwait (N. Y. Sup., 103 N. Y. S. 979; 53 Misc. Rep. 28), 206.
Senf *v.* St. Louis, etc., R. Co. (112 Mo. App. 74; 86 S. W. Rep. 887), 557.
Seney *v.* Chicago, etc., R. Co. (125 Iowa 290; 101 N. W. Rep. 76), 61.
Senior *v.* Ward (28 L. J. Q. B. 139), 6.
Senn *v.* Southern R. Co. (108 Mo. 142; 18 S. W. Rep. 1007), 92.
Serano *v.* New York, etc., R. Co. (80 N. E. Rep. 1025; 188 N. Y. 156), 982.
Serenson *v.* Northern Pac. R. Co. (45 Fed. Rep. 407), 58.
Setterstorm *v.* Railroad Co. (Minn., 14 Am. Neg. Rep. 106), 408.
Severy *v.* Nicherson (120 Mass. 306; 21 Am. Rep. 514), 860.
Sevier *v.* Vicksburg, etc., R. Co. (61 Miss. 8; 48 Am. Rep. 74; 18 Am. & Eng. R. Cas. 245), 705.
Sexton *v.* Turner (89 Va. 341; 15 S. E. Rep. 862), 396.
Seybolt *v.* New York, etc., R. Co. (95 N. Y. 562; 31 Hun 100; 47 Am. Rep. 75; 18 Am. & Eng. R. Cas. 162), 857.
Seymour *v.* Chicago, etc., R. Co. (3 Biss. [U. S.] 43), 581.
Seymour *v.* Citizens Ry. Co. (114 Mo. 266; 21 S. W. Rep. 739), 678.
Shaber *v.* St. Paul, etc., R. Co. (2 Am. & Eng. R. Cas. 185; 28 Minn. 103; 9 N. W. Rep. 575), 917.
Shackelford *v.* Louisville, etc., R. Co. (84 Ky. 43; 4 Am. St. Rep. 189; 28 Am. & Eng. R. Cas. 591), 1079.
Shafer *v.* Lehigh Valley R. Co. (66 Atl. Rep. 1072), 922.
Shaffert *v.* Chicago, etc., R. Co. (62 Iowa 624; 17 N. W. Rep. 893), 969.
Shandrew *v.* Chicago, etc., R. Co. (142 Fed. Rep. 320; 73 C. C. A. 430), 118.
Shanks *v.* Springfield Traction Co. (101 Mo. App. 702; 74 S. W. Rep. 386), 808.
Shannon *v.* Boston, etc., R. Co. (78 Me. 52; 2 Atl. Rep. 678; 23 Am. & Eng. R. Cas. 511), 556.
Shannon's Admr. *v.* Louisville, etc., R. Co. (Ky., 70 S. W. Rep. 626), 325.
Shareman *v.* Transit Co. (103 Mo. App. 515; 78 S. W. Rep. 846), 666.
Sharp *v.* Gray (9 Bing. 457; 2 M. & S. 621), 653.
Sharp *v.* Railroad (161 Mo. 241), 408.
Shaw *v.* Bambrick Bates Co. (102 Mo. App. 666; 77 S. W. Rep. 96), 87.
Shaw *v* Charleston (50 S. E. Rep. 527), 62.
Shaw *v.* Jewett (86 N. Y. 616; 6 Am. & Eng. R. Cas. 111), 1000.
Shaw *v.* Missouri Pacific Ry. Co. (104 Mo. 648; 16 S. W. Rep. 842), 1067.
Shaw *v.* Chicago, etc., R. Co. (128 Mich. 629; 82 N. W. Rep. 618; 81 Am. St. Rep. 230; 49 L. R. A. 308), 677.
Shaw *v.* Salt Lake R. Co. (21 Utah 76), 398.
Shea *v.* New York, etc., R. Co. (173 Mass. 177; 53 N. E. Rep. 396), 510.
Shea *v.* Potrero, etc., R. Co. (44 Cal. 414; 5 Am. Ry. Rep. 448), 180.
Sheehan *v.* New York, etc., R. Co. (91 N. Y. 332; 12 Am. & Eng. R. Cas. 235), 475.
Sheffield *v.* Rochester, etc., R. Co. (21 Barb. [N. Y.] 339), 1035.
Sheffler *v.* Minneapolis, etc., R. Co. (32 Minn. 518; 21 N. W. Rep. 711; 19 Am. & Eng. R. Cas. 173), 1082.
Shelby *v.* Cincinnati, etc., R. Co. (85 Ky. 224; 3 S. W. Rep. 157), 967.
Shemwell *v.* Owensboro, etc., Ry. Co. (Ky., 78 S. W. Rep. 448), 375.
Shenandoah Valley, etc., R. Co. *v.* Lucado's Admr. (86 Va. 390; 10 S. E. Rep. 423), 263.
Shenandoah Valley R. Co. *v.* Moose (83 Va. 827), 771.
Shepard *v.* Boston, etc., R. Co. (158 Mass. 174; 33 N. E. Rep. 508), 495.
Shepard *v.* Buffalo, etc., R. Co. (35 N. Y. 641), 602.
Shepard *v.* Missouri Pacific Ry. Co. (85 Mo. 629; 55 Am. Rep. 390), 93.
Shepard *v.* New York, etc., R. Co. (44 N. Y. S. R. 816; 63 Hun 634; 18 N. Y. Supp. 665), 142.
Shepard *v.* St. Louis Tr. Co. (189 Mo. 362; 87 S. W. Rep. 1007), 372.
Sheridan *v.* Brooklyn, etc., R. Co. (36 N. Y. 39; 34 How. Pr. 217), 769.
Sheridan *v.* Interborough Rapid Transit Co. (100 N. Y. S. 821), 255.
Sherley *v.* Billings (8 Bush. [Ky.] 147), 737.
Sherman *v.* Hannibal, etc., R. Co. (72 Mo. 62; 37 Am. Rep. 423; 4 Am. & Eng. R. Cas. 589), 561.
Sherman *v.* Railroad Co. (34 Minn. 259; 25 N. W. Rep. 593), 325.
Sherman *v.* Rochester, etc., R. Co. (17 N. Y. 153), 491.
Sherman *v.* Stage Co. (24 Iowa 515), 200.
Sherman *v.* Toronto, etc., R. Co. (34 N. C. Q. B. 451), 568.
Sherman *v.* Western Stage Co. (24 Iowa 515), 205.
Sherry *v.* New York, etc., R. Co. (104 N. Y. 652), 394.
Sherrin *v.* St. Joseph, etc., R. Co. (103 Mo. 378; 15 S. W. Rep. 442), 469.
Sherwood *v.* Chicago, etc., R. Co. (82 Mich. 374; 46 N. W. Rep. 773; 44 Am. & Eng. R. Cas. 337), 175.
Shields *v.* Kansas City, etc., Ry. Co. 87 Mo. App. 637), 323.
Shields *v.* New York, etc., R. Co. (4 Silv. App. 162; 30 N. E. Rep. 596), 419.
Shine *v.* Cocheco Co. (173 Mass. 558; 54 N. E. Rep. 245), 308.
Shinners *v.* Prof. Locks, etc., Co. (154 Mass. 168; 12 L. R. A. 554), 94.

[References are to sections.]

Shippy *v.* Au Sable (85 Mich. 280; 48 N. W. Rep. 584), 1058.
Shoemaker *v.* Bryant Lumber, etc., Co. (27 Wash. 637), 108.
Shoemaker *v.* Kingsbury (12 Wall. [U. S.] 369), 551.
Shoner *v.* Pennsylvania R. Co. (130 Ind. 170; 28 N. E. Rep. 616; 29 N. E. Rep. 775), 408.
Shore *v.* Bridge Co. (Mo., 86 S. W. Rep. 905), 360.
Shore, etc., R. Co. *v.* Johnson (135 Ill. 641; 26 N. E. Rep. 510; 35 Ill. App. 430), 931.
Shouler *v.* Omaha, etc., Ry. Co. (87 Mo. App. 624), 608.
Shufelt *v.* Flint, etc., R. Co. (96 Mich. 327; 55 N. W. Rep. 1013), 1021.
Shuler *v.* Omaha, etc., R. Co. (87 Mo. App. 623), 116.
Shumaker *v.* St. Paul, etc., R. Co. (46 Minn. 39; 48 N. W. Rep. 559), 37.
Shum's Admx. *v.* Rutland R. Co. (69 Atl. Rep. 945), 1032.
Shuster *v.* Philadelphia B. & W. R. Co. (Del., 62 Atl. Rep. 689), 264.
Sibley *v.* Ratcliff (50 Ark. 477; 8 S. W. Rep. 686; 37 Am. & Eng. R. Cas. 295), 1083.
Sidekum *v.* Wabash, etc., R. Co. (93 Mo. 400; 4 S. W. Rep. 701; 30 Am. & Eng. R. Cas. 640), 83.
Siefka *v.* Manhattan R. Co. (27 J. & S. 444; 39 N. Y. S. R. 355), 166.
Siegel, Cooper & Co. *v.* Trecka (115 Ill. App. 56; 75 N. E. Rep. 1053), 20.
Siegel *v.* Milwaukee, etc., R. Co. (79 Wis. 404; 48 N. W. Rep. 488), 1012.
Sievers *v.* Eyre (122 Fed. Rep. 734), 534.
Sigman *v.* Southern Ry. Co. (135 N. C. 181; 47 S. E. Rep. 420), 535.
Simeone *v.* Lindsay (65 Atl. Rep. 778), 181.
Simkoff *v.* Lehigh Valley R. Co. (83 N. E. Rep. 15; 190 N. Y. 256), 1036.
Simmons *v.* Chicago, etc., R. Co. (110 Ill. 340; 18 Am. & Eng. R. Cas. 50), 399.
Simmons *v.* Louisville, etc., R. Co. (Ky., 18 S. W. Rep. 1024), 328.
Simmons *v.* Southern Tr. Co. (207 Pa. St. 589; 57 Atl. Rep. 45), 341.
Simonds *v.* Georgia Iron Co. (133 Fed. Rep. 776), 109.
Simpson *v.* Manhattan, etc., R. Co. (17 N. Y. S. R. 68; 1 N. Y. Supp. 673), 94.
Sims *v.* East, etc., R. Co. (84 Ga. 152; 10 S. E. Rep. 543), 308.
Sims *v.* St. Louis, etc., Ry. Co. (116 Mo. App. 572; 92 S. W. Rep. 909), 1003.
Simms *v.* South Carolina, etc., R. Co. (27 So. Car. 268; 3 S. E. Rep. 301; 30 Am. & Eng. R. Cas. 571), 713.
Sinclair *v.* Chicago, etc., R. Co. (133 Mo. 233; 34 S. W. Rep. 76), 1061.
Sinclair, etc., Co. *v.* Waddle (200 Ill. 17; 65 N. E. Rep. 437), 154.
Sioux City, etc., R. Co. *v.* Finlayson (16 Neb. 578; 49 Am. Rep. 724), 419.
Sioux City, etc., R. Co. *v.* Stout (17 Wall. 657; 21 L. Ed. 745), 1073.
Sipple *v.* Laclede Gaslight Co. (102 S. W. Rep. 608), 204.
Sira *v.* Wabash R. Co. (115 Mo. 127; 21 S. W. Rep. 905; 58 Am. & Eng. R. Cas. 538), 746.
Sites *v.* Knott (96 S. W. Rep. 206), 883.
Sizer *v.* Syracuse, etc., R. Co. (7 Lans. [N. Y.] 67), 464.
Skidmore *v.* West Virginia, etc., R. Co. (W. Va., 23 S. E. Rep. 713), 353.
Skiles *v.* St. Louis, etc., Ry. Co. (108 S. W. Rep. 1082), 835.
Skinner *v.* Atchison, etc., R. Co. (39 Fed. Rep. 188), 702.
Skinner *v.* Central Vt. Ry. Co. (73 Vt. 336; 50 Atl. Rep. 1099), 330.
Skinner *v.* Railroad Co. (5 Exch. 786), 122.
Skipp *v.* Eastern, etc., Ry. Co. (9 Ex. 223; 23 L. J. Ex. 23; 3 C. L. R. 185), 145.
Skipton *v.* St. Joseph, etc., R. Co. (82 Mo. App. 134), 883.
Skirvin *v.* L. & N. R. R. (100 S. W. Rep. 308; 30 Ky. Law Rep. 1208), 414.
Skottowe *v.* Oregon, etc., R. Co. (22 Oregon 430; 30 Pac. Rep. 222; 16 L. R. A. 593), 625.
Slack *v.* Northern Central R. Co. (25 Md. 462), 461.
Slanahan *v.* Transit Co. (109 Mo. App. 228; 83 S. W. Rep. 783), 695.
Slater *v.* Burlington, etc., R. Co. (71 Iowa 209; 32 N. W. Rep. 264), 1058.
Slater *v.* Jewett (85 N. Y. 61; 39 Am. Rep. 627; 5 Am. & Eng. R. Cas. 515), 488.
Slater *v.* Mexican Nat. R. Co. (115 Fed. Rep. 593; 53 C. C. A. 239; 194 U. S. 120; 48 L. Ed. 900), 50.
Slatten *v.* Des Moines, etc., R. Co. (29 Iowa 148), 166.
Slatterly *v.* New York, etc., R. Co. (21 N. Y. S. R. 552; 51 Hun 638; 4 N. Y. Supp. 910), 465.
Slattery *v.* Toledo, etc., R. Co. (23 Ind. 81), 500.
Slaughter *v.* Metropolitan R. Co. (116 Mo. 269; 23 S. W. Rep. 760; 58 Am. & Eng. R. Cas. 604), 185.
Slavens *v.* Northern Pac. R. Co. (97 Fed. Rep. 255; 38 C. C. A. 151), 317.
Slavin *v.* New York, etc., R. Co. (63 Conn. 573), 401.
Sleete *v.* Great Northern R. Co. (53 Minn. 341; 55 N. W. Rep. 137), 475.
Slema, etc., R. Co. *v.* Lacy (43 Ga. 461), 53.
Sliney *v.* Duluth, etc., R. Co. (46 Minn. 384; 49 N. W. Rep. 187), 347.
Sloan *v.* Georgia, etc., R. Co. (86 Ga. 15; 12 S. E. Rep. 179), 263.
Sloss-Sheffield Co. *v.* Mobley (139 Ala. 425; 36 So. Rep. 181), 152.
Sluder *v.* Transit Co. (189 Mo. 107; 88 S. W. Rep. 648; 5 L. R. A. [N. S.] 186), 1039.

[*References are to sections.*]

Sly *v.* Edgley (6 Esp. 6), 278.
Sly *v.* Union Depot Ry. Co. (134 Mo. 681; 36 S. W. Rep. 235), 692.
Smallwood *v.* Baltimore & O. R. Co. (64 Atl. Rep. 782; 215 Pa. 540), 500.
Smallwood *v.* Baltimore, etc., R. Co. (20 Am. Neg. Rep. 718), 566.
Smedis *v.* Brooklyn, etc., R. Co. (88 N. Y. 13; 8 Am. & Eng. R. Cas. 445), 973.
Smith *v.* Atchison, etc., R. Co. (122 Mo. App. 85), 171.
Smith *v.* Atlanta, etc., R. Co. (130 N. C. 344; 42 S. E. Rep. 139), 235.
Smith *v.* Baltimore, etc., R. Co. (158 Pa. St. 82; 27 Atl. Rep. 847), 1014.
Smith *v.* Benick (87 Md. 610; 41 Atl. Rep. 59; 42 L. R. A. 277), 284.
Smith *v.* Boston, etc., R. Co. (73 N. H. 325; 61 Atl. Rep. 359), 273.
Smith *v.* Box Co. (193 Mo. 715; 92 S. W. Rep. 394), 269.
Smith *v.* Burlington, etc., R. Co. (59 Iowa 73; 12 N. W. Rep. 763; 6 Am. & Eng. R. Cas. 149), 522.
Smith *v.* Chicago, etc., R. Co. (108 Mo. 243; 18 S. W. Rep. 971; 52 Am. & Eng. R. Cas. 483), 664.
Smith *v.* Chicago, etc., R. Co. (55 Iowa 33; 7 N. W. Rep. 398), 804.
Smith *v.* Chicago, etc., R. Co. (91 Wis. 503; 65 N. W. Rep. 183), 494.
Smith *v.* Citizens R. Co. (52 Mo. App. 36), 1003.
Smith *v.* Electric Co. (188 Mass. 371; 74 N. E. Rep. 664), 271.
Smith *v.* Empire State M. & D. Co. (127 Fed. Rep. 462), 40.
Smith *v.* Erie R. Co. (67 N. J. L. 636; 52 Atl. Rep. 634), 367.
Smith *v.* Fordyce (190 Mo. 1; 88 S. W. Rep. 679), 249.
Smith *v.* Great Eastern, etc., R. Co. (L. R., 2 C. P. 4), 766.
Smith *v.* Gulf, etc., R. Co. (Tex., 65 S. W. Rep. 83), 79.
Smith *v.* Hestonville, etc., R. Co. (92 Pa. St. 450), 1058.
Smith *v.* Humeston, etc., R. Co. (78 Iowa 583; 43 N. W. Rep. 545; 41 Am. & Eng. R. Cas. 278), 522.
Smith *v.* Irwin (51 N. J. L. 507; 18 Atl. Rep. 852), 301.
Smith *v.* Lancashire, etc., R. Co. (1 Q. B. 141; 79 L. T. [N. S.] 633; 68 L. J. Q. B. 51; 47 Weekly Rep. 146), 227.
Smith *v.* Los Angeles, etc., R. (98 Cal. 210), 22.
Smith *v.* Louisville, etc., R. Co. (124 Ind. 394; 24 N. E. Rep. 753), 829.
Smith *v.* L. & S. W. R. Co. (L. R., 6 C. P. 14), 23.
Smith *v.* Maine, etc., R. Co. (87 Me. 339; 32 Atl. Rep. 967), 1039.
Smith *v.* Manhattan R. Co. (45 N. Y. S. R. 865), 728.
Smith *v.* Memphis, etc., R. Co. (18 Fed. Rep. 304), 469.
Smith *v.* Michigan Central R. Co. (73 N. E. Rep. 928), 67.
Smith *v.* Milwaukee, etc., R. Co. (32 Minn. 1), 665.
Smith *v.* Minneapolis, etc., R. Co. (32 Minn. 1), 641.
Smith *v.* New York, N. H. & H. R. Co. (96 Fed. Rep. 504), 231.
Smith *v.* New York, etc., R. Co. (11 N. Y. S. R. 795; 46 Hun 679), 1029.
Smith *v.* New York, etc., R. Co. (44 N. Y. S. R. 55; 63 Hun 624; 137 N. Y. 562), 413.
Smith *v.* New York, etc., R. Co. (4 App. Div. 493; 38 N. Y. Supp. 666; 39 N. Y. Supp. 1119), 1051.
Smith *v.* New York, etc., R. Co. (38 Hun [N. Y.] 33), 1039.
Smith *v.* Norfolk, etc., R. Co. (114 No. Car. 728; 60 Am. & Eng. R. Cas. 102), 861.
Smith *v.* North Carolina (N. C., 61 S. E. Rep. 266), 708.
Smith *v.* Peninsular Car Works (60 Mich. 501; 27 N. W. Rep. 662; 1 Am. St. Rep. 542), 406.
Smith *v.* Potter (46 Mich. 258; 9 N. W. Rep. 273), 268.
Smith *v.* Potter (46 Mich. 258; 9 N. W. Rep. 273; 2 Am. & Eng. R. Cas. 140), 462.
Smith *v.* Railway Co. (113 Mo. 70; 20 S. W. Rep. 896), 119.
Smith *v.* Railway Co. (48 L. R. A. 392), 262.
Smith *v.* Railway Co. (42 Wis. 520), 266.
Smith *v.* Rock Island & L. Co. (44 So. Rep. 290), 465.
Smith *v.* St. Louis, etc., R. Co. (151 Mo. 391; 52 S. W. Rep. 378; 14 Am. & Eng. R. Cas. [N. S.] 609), 493.
Smith *v.* St. Louis, etc., R. Co. (9 Mo. App. 598; 85 Mo. 418), 811.
Smith *v.* St. Paul, etc., R. Co. (30 Minn. 169; 9 Am. & Eng. R. Cas. 262), 30.
Smith *v.* St. Paul, etc., R. Co. (44 Minn. 17; 46 N. W. Rep. 149), 527.
Smith *v.* Savannah, etc., R. Co. (84 Ga. 698; 42 Am. & Eng. R. Cas. 105; 11 S. E. Rep. 455), 153.
Smith *v.* Simmons (103 Pa. St. 32; 49 Am. Rep. 113), 276.
Smith *v.* Sioux City R. Co. (15 Neb. 583; 19 N. W. Rep. 638; 17 Am. & Eng. R. Cas. 561), 485.
Smith *v.* Texas & Pac. R. Co. (58 S. W. Rep. 151), 39.
Smith *v.* Thomas, etc., Co. (N. J., 54 Atl. Rep. 562), 808.
Smith *v.* Union Ry. Co. (61 Mo. 588), 388.
Smith *v.* Wabash R. Co. (92 Mo. 359; 4 S. W. Rep. 129; 31 Am. & Eng. R. Cas. 331), 488.
Smith *v.* Wabash, etc., R. Co. (19 Mo. App. 120), 106.
Smith *v.* Wilmington, etc., R. Co. (129 N. C. 173; 39 S. E. Rep. 805), 379.
Smith *v.* Winona, etc., R. Co. (42 Minn. 87; 43 N. W. Rep. 968; 41 Am. & Eng. R. Cas. 289), 826.
Smotherman *v.* St. Louis, etc., R. Co. (29 Mo. App. 265), 670.
Smithers *v.* Wilmington City Ry. Co. (67 Atl. Rep. 167), 634.

[*References are to sections.*]

Smith's Admr. *v.* Illinois, etc., R. Co. (90 S. W. Rep. 254; 28 Ky. Rep. 723), 1067.
Smithson *v.* Southern, etc., R. Co. (37 Oregon 74; 60 Pac. Rep. 907), 708.
Smoot *v.* Mobile, etc., R. Co. (67 Ala. 13), 461.
Snellen *v.* Kansas, etc., R. Co. (Ark., 102 S. W. Rep. 193), 265.
Sniberg *v.* Falk (98 Mo. App. 546; 72 S. W. Rep. 947), 162.
Snoniker *v.* Great Northern R. Co. (76 Minn. 306), 398.
Snow *v.* Fitchburg, etc., R. Co. (136 Mass. 552; 49 Am. Rep. 40; 18 Am. & Eng. R. Cas. 161), 628.
Snow *v.* Housatonic R. Co. (8 Allen [Mass.] 447), 340.
Snow *v.* New York, etc., R. Co. (185 Mass. 321; 70 N. E. Rep. 205), 39.
Snowden *v.* Boston, etc., R. Co. (151 Mass. 220; 24 N. E. Rep. 40), 774.
Snyder *v.* Hannibal, etc., R. Co. (60 Mo. 413; Eaton *v.* New York, etc., R. Co., 57 N. Y. 382), 698.
Snyder *v.* Natchez, etc., R. Co. (42 La. Ann. 302; 7 So. Rep. 582; 44 Am. & Eng. R. Cas. 278), 553.
Snyder *v.* Pennsylvania R. Co. (205 Pa. 619; 55 Atl. Rep. 778), 260.
Snyder *v.* Pittsburg, etc., R. Co. (11 W. Va. 14; 18 Am. Ry. Rep. 154), 388.
Snyder *v.* Wheeling, etc., R. Co. (43 W. Va. 661; 28 S. E. Rep. 733; 39 L. R. A. 499), 110.
Sobieski *v.* St. Paul, etc., R. Co. (41 Minn. 169; 42 N. W. Rep. 863), 90.
Soeder *v.* St. Louis, etc., R. Co. (100 Mo. 673; 13 S. W. Rep. 714), 406.
Soldanels *v.* Missouri Pacific Ry. Co. (23 Mo. App. 516), 301.
Solen *v.* Virginia, etc., R. Co. (13 Nev. 106), 955.
Solomon R. Co. *v.* Jones (30 Kan. 601; 2 Pac. Rep. 657; 15 Am. & Eng. R. Cas. 201), 523.
Soloman *v.* Manhattan R. Co. (103 N. Y. 437; 9 N. E. Rep. 430; 56 Am. Rep. 843; 27 Am. & Eng. R. Cas. 155), 783.
Somonson *v.* Chicago, etc., R. Co. (49 Iowa 87), 186.
Songstad *v.* Burlington, etc., R. Co. (5 Dak. 517; 41 N. W. Rep. 755; 38 Am. & Eng. R. Cas. 211), 323.
Sonneborn, etc., Co. *v.* Southern R. Co. (65 S. C. 502; 44 S. E. Rep. 77), 32.
Soule *v.* New York, etc., R. Co. (24 Conn. 575), 69.
Soutar *v.* Electric R. Co. (68 Minn. 18), 159.
South Alabama R. Co. *v.* Sullivan (59 Ala. 272), 456.
South Carolina R. Co. *v.* Nix (68 Ga. 572), 47.
South Covington R. Co. *v.* Berry (93 Ky. 43; 18 S. W. Rep. 1026; 50 Am. & Eng. R. Cas. 434), 934.
South Covington R. Co. *v.* Cleveland (100 S. W. Rep. 283), 177.
South Covington R. Co. *v.* Ware (84 Ky. 267; 1 S. W. Rep. 493; 27 Am. & Eng. R. Cas. 206), 185.
South Florida R. Co. *v.* Price (32 Fla. 46; 13 So. Rep. 638), 215.
South Florida R. Co. *v.* Rhodes (25 Fla. 40; 5 So. Rep. 633; 3 L. R. A. 733; 37 Am. & Eng. R. Cas. 100), 658.
South Florida R. Co. *v.* Weese (32 Fla. 212; 13 So. Rep. 436), 340.
South Indiana R. Co. *v.* Harrell (Ind., 68 N. E. Rep. 262), 504.
South Side, etc., R. Co. *v.* Trick (117 Pa. 390; 11 Atl. Rep. 627), 36.
South, etc., R. Co. *v.* Donovan (84 Ala. 141; 4 So. Rep. 142; 36 Am. & Eng. R. Cas. 151), 1016.
South, etc., R. Co. *v.* Huffman (76 Ala. 492; 52 Am. Rep. 349), 854.
South, etc., R. Co. *v.* Schauffer (75 Ala. 136; 21 Am. & Eng. R. Cas. 405), 791.
South, etc., R. Co. *v.* Thompson (62 Ala. 494), 988.
Southcote *v.* Stanley (1 Hurl. & N. 247), 860.
Southeast, etc., R. Co. *v.* Stotler (43 Ill. App. 94), 1092.
Southerland *v.* Troy, etc., R. Co. (28 N. Y. S. R. 201; 125 N. Y. 737; 54 Hun 639), 145.
Southern Kansas E. Co. *v.* Crocker (41 Kan. 747; 21 Pac. Rep. 785; 38 Am. & Eng. R. Cas. 203), 376.
Southern Kansas R. Co. *v.* Moore (49 Kan. 616; 31 Pac. Rep. 138), 345.
Southern Kansas R. Co. *v.* Peavey (43 Kan. 452; 29 Pac. Rep. 593), 787.
Southern Kan. R. R. *v.* Robbins (43 Kan. 145; 23 Pac. 113), 95.
Southern Kansas, etc., R. Co. *v.* Sage (80 S. W. Rep. 1038), 229.
Southern Kansas R. Co. *v.* Sanford (45 Kan. 372; 25 Pac. Rep. 891; 47 Am. & Eng. R. Cas. 615), 1088.
Southern Kansas R. Co. *v.* Walsh (45 Kan. 653; 26 Pac. Rep. 45; 47 Am. & Eng. R. Cas. 493), 594.
Southern Ohio R. Co. *v.* Morey (47 Ohio St. 207; 24 N. E. Rep. 269; 7 L. R. A. 701; 43 Am. & Eng. R. Cas. 97), 284.
Southern Pac. R. Co. *v.* Gloyd (Utah, 138 Fed. Rep. 388), 342.
Southern Pac. R. Co. *v.* Hetzer (135 Fed. Rep. 272; 68 C. C. A. 26), 85.
Southern Pacific R. Co. *v.* Lafferty (57 Fed. Rep. 536), 401.
Southern Pacific R. Co. *v.* Pool (160 U. S. 438), 265.
Southern Pac. R. Co. *v.* Seley (152 U. S. 145; 38 L. Ed. 391), 325.
Southern Pacific R. Co. *v.* Winton (Tex., 66 S. W. Rep. 477), 372.
Southern Ry. Co. *v.* Blanford's Admr. (54 S. E. Rep. 1), 83.
Southern Ry. Co. *v.* Blevins (130 Fed. Rep. 688), 521.
Southern R. Co. *v.* Bonner (141 Ala. 517; 37 So. Rep. 702), 100.
Southern, etc., Co. *v.* Bradley (52 Tex. 587), 200.
Southern Ry. Co. *v.* Brewer (105 S. W. Rep. 160), 607.
Southern Ry. Co. *v.* Burgess (42 So. Rep. 35), 562.
Southern Ry. Co. *v.* Carson (68 G. C.

55; 46 S. E. Rep. 525; 194 U. S. 136; 48 L. Ed. 907), 385.
Southern Ry. Co. *v.* Cheaves (36 So. Rep. 691), 528.
Southern Ry. Co. *v.* Clark (Ky., 105 S. W. Rep. 385), 414.
Southern R. Co. *v.* Clifford (110 Ky. 727; 62 S. W. Rep. 514), 500.
Southern, etc., R. Co. *v.* Cook (121 Ga. 416; 49 S. E. Rep. 287), 328.
Southern Ry. Co. *v.* Craig (113 Fed. Rep. 76), 273.
Southern, etc., R. Co. *v.* Cullen (122 Ill. App. 293; 77 N. E. Rep. 470; 221 Ill. 392), 567.
Southern Ry. Co. *v.* Cunningham (123 Ga. 90; 50 S. E. Rep. 979), 122.
Southern Ry. Co. *v.* Cunningham (44 So. Rep. 658), 583.
Southern Ry. Co. *v.* Elliott (82 N. E. Rep. 1051; 81 N. E. Rep. 1180), 492.
Southern Ry. Co. *v.* Fisk (159 Fed. Rep. 373), 878.
Southern R. Co. *v.* Flynt (58 S. E. Rep. 374), 964.
Southern Ry. Co. *v.* Gullatt (43 So. Rep. 577), 412.
Southern R. Co. *v.* Guyton (122 Ala. 231; 25 So. Rep. 34), 227.
Southern Ry. Co. *v.* Hansbrough's Admx. (60 S. E. Rep. 58), 878.
Southern Ry. Co. *v.* Harrell (161 Ind. 689; 63 L. R. A. 460; 68 N. E. Rep. 262), 381.
Southern Ry. Co. *v.* Hart (23 Ky. L. R. 1054; 64 S. W. Rep. 650), 379.
Southern Ry. Co. *v.* Hobbs (43 So. Rep. 844), 955.
Southern Ry. Co. *v.* Holbrook (124 Ga. 679), 39.
Southern R. Co. *v.* Jones (56 S. E. Rep. 155), 1019.
Southern R. Co. *v.* Kendrick (46 So. Rep. 588), 879.
Southern Ry. Co. *v.* King (57 S. E. Rep. 687), 1056.
Southern, etc., R. Co. *v.* Kinsdale (38 Kan. 507; 16 Pac. Rep. 937; 34 Am. & Eng. R. Cas. 256), 659.
Southern Ry. Co. *v.* Lambert (116 Ill. App. 52), 358.
Southern Ry. Co. *v.* Lee (101 S. W. Rep. 307), 559.
Southern Ry. Co. *v.* Logan (S. C., 138 Fed. Rep. 725), 351.
South, etc., R. Co. *v.* McLendon (63 Ala. 266), 182.
Southern R. Co. *v.* Mitchell (98 Tenn. 27; 40 S. W. Rep. 72), 708.
Southern Ry. Co. *v.* Morris (42 So. Rep. 19), 904.
Southern Ry. Co. *v.* Mouchet (59 S. E. Rep. 927), 909.
Southern, etc., R. Co. *v.* Nix (68 Ga. 572), 38.
Southern Ry. Co. *v.* Otis' Admr. (78 S. W. Rep. 480; 25 Ky. L. R. 1686), 869.
Southern R. Co. *v.* Prather (119 Ala. 588; 24 So. Rep. 836; 14 Am. & Eng. R. Cas. [N. S.] 832), 38.
Southern Ry. *v.* Reynolds (55 S. E. Rep. 1039), 889.
Southern R. Co. *v.* Rice (38 Kan. 398; 16 Pac. Rep. 817), 732.
Southern Ry. Co. *v.* Roach (78 N. E. Rep. 201), 777.
Southern Ry. Co. *v.* Sandford (45 Kan. 372; 25 Pac. Rep. 891; 11 L. R. A. 432), 732.
Southern Railway Co. *v.* Simmons (105 Va. 651; 55 S. E. Rep. 459), 545.
Southern R. Co. *v.* Simpson (131 Fed. Rep. 705; 65 C. C. A. 563), 94.
Southern Ry. Co. *v.* Sittasen (Ind. App., 74 N. E. Rep. 898), 235.
Southern Ry. Co. *v.* Smith (59 S. E. Rep. 372), 484.
Southern Ry. Co. *v.* Stewart (45 So. Rep. 51), 1082.
Southern R. Co. *v.* Stewart (108 Ill. App. 652), 87.
Southern Ry. Co. *v.* Stockdon (56 S. E. Rep. 713), 411.
Southern Ry. Co. *v.* Stutts (Ala., 144 Fed. Rep. 948), 389.
South, etc., Co. *v.* Sullivan (59 Ala. 272), 458.
Southern R. Co. *v.* Thomas (Ky., 92 S. W. Rep. 578), 414.
Southern R. Co. *v.* Webb (116 Ga. 152; 42 S. E. Rep. 395; 59 L. R. A. 109), 25.
Southern R. Co. *v.* Wiley (Miss., 41 So. Rep. 511), 271.
Southern R. Co. *v.* Williams (Miss., 36 So. Rep. 394), 715.
Southern Ry. Co. *v.* Winchester's Ex. (105 S. W. Rep. 167), 947.
Southwestern R. Co. *v.* Paulk (24 Ga. 356), 792.
Southwestern, etc., Co. *v.* Woughter (56 Ark. 206; 19 S. W. Rep. 575), 321.
Southwestern R. Co. *v.* Singleton (67 Ga. 306), 807.
Southwestern R. Co. *v.* Singleton (66 Ga. 252), 772.
Sowden *v.* Idaho, etc., Co. (55 Cal. 443), 359.
Spain *v.* St. Louis & San Francisco R. R. Co. (64 Cent. Law J. 269), 449.
Spanake *v.* Philadelphia, etc., R. Co. (148 Pa. St. 184; 23 Atl. Rep. 1006), 495.
Spangler *v.* B. & O. R. Co. (213 Pa. 320; 62 Atl. Rep. 919), 265.
Spangler *v.* St. Joseph, etc., R. Co. (68 Kan. 47; 74 Pac. Rep. 607; 104 Am. St. Rep. 391; 63 L. R. A. 634), 752.
Spannagle *v.* Chicago, etc., R. Co. (31 Ill. App. 460), 869.
Sparks *v.* Kansas City S. & M. R. Co. (31 Mo. App. 111), 304.
Spaulding *v.* Metropolitan R. Co. (129 Mo. App. 607; 111 S. W. Rep. 960), 823.
Spear *v.* Pennsylvania R. Co. (119 Pa. St. 68), 609.
Speed *v.* Atl. & Pac. R. R. Co. (71 Mo. 303; 2 Am. & Eng. R. Cas. 77), 235.
Spellman *v.* Lincoln, etc., R. Co. (36 Neb. 890; 58 Am. & Eng. R. Cas. 297; 55 N. W. Rep. 270), 580.
Spellman *v.* Transit Co. (36 Neb. 890; 55 N. W. Rep. 270; 58 Am. & Eng. R. Cas. 297), 581.

[*References are to sections.*]

Spencer *v.* Baltimore, etc., R. Co. (4 Mackey [D. C.] 138; 54 Am. Rep. 269), 398.
Spencer *v.* Brooks (97 Ga. 681; 25 S. E. Rep. 480; 5 Am. & Eng. R. Cas. [N. S.] 202), 491.
Spencer *v.* Chicago, etc., R. Co. (105 Wis. 311; 81 N. W. Rep. 407), 759.
Spencer *v.* Illinois, etc., R. Co. (29 Iowa 298), 946.
Spencer *v.* Milwaukee, etc., R. Co. (17 Wis. 487), 802.
Spencer *v.* New York, etc., R. Co. (51 N. Y. S. R. 386; 67 Hun 196), 336.
Spencer *v.* Ohio, etc., R. Co. (130 Ind. 181; 29 N. E. Rep. 915), 415.
Spencer *v.* St. Paul, etc., R. Co. (21 Minn. 362), 185.
Spicer *v.* Chesapeake, etc., R. Co. (34 W. Va. 514; 12 S. E. Rep. 553; 45 Am. & Eng. R. Cas. 28), 1077.
Spilane *v.* Missouri Pacific Ry. Co. (135 Mo. 414; 37 S. W. Rep. 198; 58 Am. St. Rep. 580), 934.
Spillane *v.* Missouri Pacific Ry. Co. (111 Mo. 555; 20 S. W. Rep. 293), 1036.
Spisak *v.* Baltimore, etc., R. Co. (152 Pa. St. 281; 25 Atl. Rep. 497), 540.
Spiva *v.* Osage Coal, etc., Co. (88 Mo. 68), 6.
Spohn *v.* Missouri Pacific Ry. Co. (87 Mo. 74; 101 Mo. 417; 14 S. W. Rep. 880), 740.
Spooner *v.* Brooklyn City R. Co. (54 N. Y. 230; 13 Am. Rep. 570), 1041.
Spooner *v.* Delaware, etc., R. Co. (115 N. Y. 22; 21 N. E. Rep. 696; 41 Hun 643; 39 Am. & Eng. R. Cas. 599), 915.
Spoonick *v.* Backus-Brooks Co. (89 Minn. 354), 109.
Spotts *v.* Wabash Ry. Co. (111 Mo. 380; 20 S. W. Rep. 190; 33 Am. St. Rep. 531), 866.
Sprague *v.* Smith (29 Vt. 421), 811.
Spring Valley Co. *v.* Patting (Ill., 71 N. E. Rep. 371), 506.
Spring Valley Co. *v.* Robias (207 Ill. 226; 69 N. E. Rep. 925), 161.
Spring Valley Coal Co. *v.* Rowatt (196 Ill. 156; 63 N. E. Rep. 649), 520.
Springer *v.* Ford (189 Ill. 430; 59 N. E. Rep. 953; 52 L. R. A. 930; 82 Am. St. Rep. 464), 120.
Springer Trans. Co. *v.* Smith (16 Lea [Tenn.] 498; 1 S. W. Rep. 280), 574.
Springside Coal Co. *v.* Patting (Ill., 71 N. E. Rep. 371), 356.
Sprong *v.* Boston, etc., R. Co. (58 N. Y. 56; 9 Am. Ry. Rep. 475), 397.
Staal *v.* Grand Street R. Co. (107 N. Y. 625; 13 N. E. Rep. 624; 31 Am. & Eng. R. Cas. 21), 172.
Staal *v.* Grand Rapids R. Co. (57 Mich. 239; 23 N. W. Rep. 795), 203.
Stack *v.* New York, etc., R. Co. (89 N. Y. S. 112; 96 App. Div. 575), 88.
Stackpole *v.* Wray (74 App. Div. 310; 77 N. Y. Supp. 633), 119.
Stackus *v.* New York, etc., R. Co. (79 N. Y. 464; 7 Hun 559), 1025.
Staeffler *v.* Menasha, etc., Co. (111 Wis. 483; 87 N. W. Rep. 480), 55.
Stafford *v.* Chicago, etc., R. Co. (114 Ill. 244; 2 N. E. Rep. 185), 340.
Stafford *v.* Hannibal, etc., R. Co. (23 Mo. App. 333), 625.
Stahler *v.* Philadelphia, etc., R. Co. (199 Pa. St. 383; 49 Atl. Rep. 273), 65.
Stanley *v.* Chicago, etc., R. Co. (112 Mo. App. 601; 87 S. W. Rep. 112), 175.
Stanton, etc., Co. *v.* Fischer (119 Ill. App. 284), 55.
Stanton *v.* Louisville, etc., R. Co. (91 Ala. 382), 886.
Stapley *v.* London, etc., R. Co. (4 H. & C. 93; L. R., 1 Ex. 21; 11 Jur. [N. S.] 954; 35 L. J. Ex. 7; 14 W. R. 132; 13 L. T. 406), 919.
Starer *v.* Stern (100 App. Div. 393; 91 N. Y. Supp. 821), 119.
Starr *v.* Southern Ry. Co. (61 S. E. Rep. 735), 872.
State *v.* Atchison, etc., R. Co. (150 Fed. Rep. 442), 545.
State *v.* Baltimore & O. R. Co. (30 Md. 47), 395.
State *v.* Baltimore, etc., R. Co. (69 Md. 339; 14 Atl. Rep. 688; 35 Am. & Eng. R. Cas. 412), 966.
State *v.* Boston, etc., R. Co. (58 N. H. 410), 104.
State *v.* Boston, etc., R. Co. (80 Me. 430; 15 Atl. Rep. 36; 35 Am. & Eng. R. Cas. 356), 919.
State *v.* Clark (29 N. J. L. 98), 14.
State *v.* Dusenberry (112 Mo. 278), 98.
State *v.* East Orange (41 N. J. L. 127), 931.
State, *ex rel.* Delaware, etc., R. Co. *v.* East Orange (41 N. J. L. 127), 934.
State, *ex rel.* Essex *v.* Kansas City, etc., R. Co. (70 Mo. App. 634), 106.
State, *ex rel. v.* Missouri Pacific R. Co. (149 Mo. 104; 50 S. W. Rep. 278), 950.
State *v.* Foley (144 Mo. 600), 98.
State *v.* Grand Trunk R. Co. (58 Me. 176; 4 Am. Rep. 258), 557.
State *v.* Greene (95 Md. 217; 52 Atl. Rep. 673), 117.
State *v.* Hoopes (14 Atl. Rep. 658), 145.
State *v.* Julow (129 Mo. 163; 31 S. W. Rep. 781; 29 L. R. A. 257; 50 Am. St. Rep. 443), 382.
State *v.* Loomis (115 Mo. 307; 22 S. W. Rep. 350), 382.
State *v.* Maine, etc., R. Co. (76 Me. 357; 49 Am. Rep. 622; 19 Am. & Eng. R. Cas. 312), 1029.
State *v.* Manchester, etc., R. Co. (52 N. H. 528, 552), 20.
State *v.* Missouri Fir, etc., Co. (181 Mo. 536; 80 S. W. Rep. 933), 382.
State *v.* Overton (24 N. J. L. 435), 263.
State *v.* Philadelphia, etc., R. Co. (47 Md. 76; 18 Am. Ry. Rep. 253), 936.
State *v.* Philadelphia, etc., R. Co. (Md., 15 Am. & Eng. R. Cas. 481), 1067.
State *v.* Pittsburg, etc., R. Co. (45 Md. 41), 49.
State *v.* Railway Co. (67 Me. 479), 236.
State *v.* St. Joseph, etc., R. Co. (46 Mo. App. 466), 960.

[References are to sections.]

State *v.* South Baltimore Car Works (Md., 58 Atl. Rep. 447), 352.
State *v.* Union, etc., R. Co. (70 Md. 69; 18 Atl. Rep. 1032; 42 Am. & Eng. R. Cas. 167), 1036.
State *v.* Western Maryland R. Co. (63 Md. 433; 21 Am. & Eng. R. Cas. 503), 851.
State *v.* Wisconsin Cent. Ry. Co. (113 N. W. Rep. 952), 976.
Steamboat New World *v.* King (16 How. 469; 14 L. Ed. 1019), 15.
Steamship Belgenland *v.* Jansen (114 U. S. 355), 738.
Stearns *v.* Ontario Spinning Co. (184 Pa. 519; 39 Atl. Rep. 292; 39 L. R. A. 842; 63 Am. St. Rep. 807), 120.
State *v.* Central R. Co. (43 Iowa 109), 408.
Steele *v.* Southeastern R. Co. (16 C. B. 550; 81 E. C. L. 550), 278.
Steffe *v.* Old Colony R. Co. (156 Mass. 262; 30 N. E. Rep. 1137), 526.
Steffen *v.* Chicago & N. W. R. Co. (46 Wis. 259; 50 N. W. Rep. 348), 321.
Steffenson *v.* Chicago, etc., R. Co. (45 Minn. 355; 48 Minn. 285; 47 N. W. Rep. 1068; 51 N. W. Rep. 610), 527.
Steinbruner *v.* Pittsburg, etc., R. Co. (146 Pa. St. 580; 23 Atl. Rep. 239), 192.
Steiner *v.* Philadelphia, etc., R. Co. (134 Pa. St. 199; 41 Am. & Eng. R. Cas. 535), 886.
Stephan *v.* Lake Shore, etc., R. Co. (106 Ill. App. 13), 55.
Stephani *v.* Southern, etc., R. Co. (19 Utah 196; 57 Pac. Rep. 34; 14 Am. & Eng. R. Cas. [N. S.] 575), 498.
Stephens *v.* Hannibal, etc., R. Co. (86 Mo. 221; 28 Am. & Eng. R. Cas. 538), 378.
Stephens *v.* Hannibal, etc., R. Co. (96 Mo. 207; 9 S. W. Rep. 589; 38 Am. & Eng. R. Cas. 110), 175.
Stephens *v.* Nashville, etc., R. Co. (10 Lea [Tenn.] 448; 11 Am. & Eng. R. Cas. 671), 59.
Stephens *v.* Nichols (155 Mass. 472), 872.
Stepp *v.* Chicago, etc., R. Co. (85 Mo. 229), 1009.
Sterger *v.* Van Sticklen (132 N. Y. 499), 872.
Stern *v.* La Campagnie Generale Tranatlantique (110 Fed. Rep. 996), 55.
Stetler *v.* Chicago, etc., R. Co. (46 Wis. 497; 21 Am. Ry. Rep. 402), 471.
Stevens *v.* Boston, etc., R. Co. (184 Mass. 476; 69 N. E. Rep. 338), 94.
Stevens *v.* Central R. Co. (80 Ga. 19; 5 S. E. Rep. 253; 34 Am. & Eng. R. Cas. 413), 100.
Stevens *v.* Gair (96 N. Y. S. 303; 109 App. Div. 621), 356.
Stevens *v.* Kansas City Ry. Co. (105 S. W. Rep. 26), 823.
Stevens *v.* Missouri Pacific Ry. Co. (67 Mo. App. 356), 942.
Stevens *v.* Oswego, etc., R. Co. (18 N. Y. 422), 950.
Stevens *v.* Woodward (6 Q. B. D. 318), 209.
Stevick *v.* Northern Pac. R. Co. (89 Wash. 501; 81 Pac. Rep. 1001), 234.
Stewart *v.* Boston, etc., R. Co. (146 Mass. 605; 16 N. E. Rep. 466; 34 Am. & Eng. R. Cas. 499), 774.
Stewart *v.* Brooklyn, etc., R. Co. (90 N. Y. 591), 735.
Stewart *v.* California, etc., R. Co. (131 Cal. 125; 63 Pac. Rep. 177; 52 L. R. A. 205), 278.
Stewart *v.* Cincinnati, etc., R. Co. (89 Mich. 315), 863.
Stewart *v.* Everts (76 Wis. 35; 44 N. W. Rep. 1092; 44 Am. & Eng. R. Cas. 313), 83.
Stewart *v.* International, etc., R. Co. (53 Tex. 289; 2 Am. & Eng. R. Cas. 497), 830.
Stewart *v.* Louisville & N. R. Co. (83 Ala. 493; 4 So. Rep. 373), 69.
Stewart *v.* New York, etc., R. Co. (8 N. Y. Supp. 19), 344.
Stewart *v.* Raleigh, etc., R. Co. (N. C., 53 S. E. Rep. 877), 273.
Stewart *v.* Texas & P. R. Co. (La. Ann., 37 So. Rep. 129), 379.
Stewart *v.* Walterboro & W. R. Co. (64 S. C. 92; 41 S. E. Rep. 827), 240.
Stiles *v.* Atlanta, etc., Ry. Co. (65 Ga. 370; 8 Am. & Eng. R. Cas. 195), 570.
Stockmeyer *v.* Reed (55 Fed. Rep. 259.
Stockwell *v.* Boston, etc., R. Co. (131 Fed. Rep. 153), 50.
Stoddard *v.* Boston, etc., R. Co. (181 Mass. 422; 63 N. E. Rep. 927), 645.
Stodder *v.* New York, etc., R. Co. (50 Hun [N. Y.] 221; 19 N. Y. S. R. 772; 121 N. Y. 655), 607.
Stoeckman *v.* Terre Haute, etc., R. Co. (15 Mo. App. 503), 327.
Stoher *v.* St. Louis, etc., R. Co. (91 Mo. 509; 4 S. W. Rep. 389; 31 Am. & Eng. R. Cas. 229), 83.
Stokes *v.* Saltonstill (13 Pet. 181), 635.
Stone *v.* Cheshire, etc., R. Co. (19 N. H. 427), 283.
Stone *v.* Chicago, etc., R. Co. (47 Iowa 82; 17 Am. Ry. Rep. 461), 557.
Stone *v.* Lewiston, etc., R. Co. (99 Me. 243; 59 Atl. Rep. 56), 96.
Stone *v.* Pennsylvania R. Co. (132 Pa. St. 206; 19 Atl. Rep. 67; 41 Am. & Eng. R. Cas. 522), 540.
Stone *v.* Railroad (88 Wis. 98), 101.
Stone *v.* Union Pac. R. Co. (89 Pac. Rep. 715, 723), 471.
Stoneman *v.* Atlantic, etc., R. Co. (58 Mo. 503), 948.
Stoner *v.* Pennsylvania R. Co. (98 Ind. 384; 49 Am. Rep. 764; 21 Am. & Eng. R. Cas. 340), 782.
Story *v.* Concord, etc., R. Co. (70 N. H. 364; 48 Atl. Rep. 288), 229.
Stotler *v.* Chicago & A. Ry. Co. (103 S. W. Rep. 1), 411.
Stotler *v.* Chicago & A. R. Co. (98 S. W. Rep. 509), 233.
Stowe *v.* LeConnor Transfer Co. (39 Wash. 27; 80 Pac. Rep. 856), 175.
Strand *v.* Chicago, etc., R. Co. (64 Mich. 380; 34 N. W. Rep. 712; 31 Am. & Eng. R. Cas. 54), 785.
Strand *v.* Chicago, etc., R. Co. (64 Mich.

[*References are to sections.*]

216; 31 N. W. Rep. 184; 28 Am. & Eng. R. Cas. 213), 790.
Strange *v.* Bodcaw, etc., Co. (Ark., 96 S. W. Rep. 152), 26.
Stratton *v.* Central City R. Co. (95 Ill. 25; 1 Am. & Eng. R. Cas. 115), 455.
Straub *v.* Soderer (53 Mo. 38), 929.
Straugh *v.* Detroit, etc., R. Co. (65 Mich. 706; 36 N. W. Rep. 161; 32 Am. & Eng. R. Cas. 164) 1006.
Straus *v.* Kansas City, etc., R. Co. (75 Mo. 185; 6 Am. & Eng. R. Cas. 384), 392.
Strauss *v.* Kansas City, etc., R. Co. (86 Mo. 421; 75 Mo. 185; 27 Am. & Eng. R. Cas. 170), 708.
Strauss *v.* New York, etc., R. Co. (87 N. Y. S. 67; 91 App. Div. 583), 268.
Strauss *v.* Railroad (17 Fed. Rep. 209), 32.
Street *v.* Railroad Co. (14 Am. Neg. Rep. 644), 408.
Street's Western Car, etc., Co. *v.* Bonander (97 Ill. App. 601; 63 N. E. Rep. 688), 380.
Stringer *v.* Missouri Pacific Ry. Co. (96 Mo. 299; 9 S. W. Rep. 905), 1101.
Stroble *v.* Chicago, etc., R. Co. (70 Iowa 555; 31 N. W. Rep. 63; 28 Am. & Eng. R. Cas. 510), 522.
Strode *v.* Soderer (53 Mo. 38), 1086.
Strong *v.* Sacramento, etc., R. Co. (61 Cal. 326; 8 Am. & Eng. R. Cas. 273), 977.
Strottman *v.* St. Louis, etc., Ry. Co. (Mo., 109 S. W. Rep. 769), 529.
Struble *v.* Burlington, etc., R. Co. (Iowa, 103 N. W. Rep. 142), 273.
Stuart *v.* Ry. Co. (163 Mass. 391; 40 N. E. Rep. 180), 310.
Stubbs *v.* Omaha, etc., R. Co. (85 Mo. App. 192), 529.
Stubley *v.* London, etc., R. Co. (4 H. & C. 83; L. R., 1 Ex. 13; 11 Jur. [N. S.] 954; 35 L. J. Ex. 3; 14 W. R. 133; 13 L. T. 376), 931.
Studenroth *v.* Hammond, etc., Co. (106 Mo. App. 480; 81 S. W. Rep. 487), 375.
Studeroth *v.* Hammond Co. (106 Mo. App. 480; 81 S. W. Rep. 487), 109.
Studley *v.* St. Paul, etc., R. Co. (48 Minn. 249; 51 N. W. Rep. 115), 1029.
Stultz *v.* Chicago, etc., R. Co. (73 Wis. 147; 40 N. W. Rep. 653; 37 Am. & Eng. R. Cas. 187), 183.
Sturgeon *v.* St. Louis, etc., R. Co. (65 Mo. 569), 850.
Sturgis *v.* Detroit, etc., R. Co. (72 Mich. 619; 40 N. W. Rep. 914), 1074.
Suber *v.* Georgia, etc., R. Co. (96 Ga. 42; 23 S. E. Rep. 387), 789.
Sullivan *v.* Hannibal, etc., R. Co. (72 Mo. 195), 106.
Sullivan *v.* Missouri Pacific Ry. Co. (97 Mo. 113; 10 S. W. Rep. 852), 479.
Sullivan *v.* Missouri Pacific Ry. Co. (117 Mo. 214; 23 S. W. Rep. 149), 876.
Sullivan *v.* New York, etc., R. Co. (62 Conn. 209; 25 Atl. Rep. 711), 485.
Sullivan *v.* Old Colony R. Co. (18 N. E. Rep. 678), 730.
Sullivan *v.* Oregon, etc., R. Co. (12 Oregon 392; 7 Pac. Rep. 508; 21 Am. & Eng. R. Cas. 391), 92.
Sullivan *v.* Pennsylvania R. Co. (30 Pa. St. 239), 599.
Sullivan *v.* Ry. Co. (133 Mo. 1), 592.
Sullivan *v.* Seattle Electric Co. (86 Pac. Rep. 786), 588.
Sullivan *v.* Tioga, etc., R. Co. (112 N. Y. 634; 8 Am. St. Rep. 793; 20 N. E. Rep. 569). 481.
Sullivan *v.* Toledo, etc., R. Co. (58 Ind. 26), 469.
Summerhays *v.* Kansas Pacific R. Co. (2 Colo. 484; 20 Am. Ry. Rep. 359), 461.
Sunnyside Coal Co. *v.* Perry Center (100 Ill. App. 546), 506.
Suppard *v.* Agnew (191 Ill. 439; 61 N. E. Rep. 392), 262.
Supple *v.* Agnew (191 Ill. 439; 61 N. E. Rep. 392), 161.
Sutherland *v.* Great Western R. Co. (7 U. C. C. P. 409), 851.
Sutherland *v.* New York, etc., R. Co. (9 J. & S. [N. Y.] 17), 931.
Suttle *v.* Choctaw, etc., Ry. Co. (144 Fed. Rep. 668), 358.
Sutton *v.* New York, etc., R. Co. (66 N. Y. 243), 874.
Swaddle *v.* Missouri Pacific Ry. Co. (118 Mo. 268; 24 S. W. Rep. 140), 498.
Swanson *v.* Great Northern Co. (68 Minn. 184; 70 N. W. Rep. 978), 128.
Swartwood's Guardian *v.* Louisville, etc., R. Co. (111 S. W. Rep. 305), 1102.
Sweat *v.* Boston, etc., R. Co. (156 Mass. 284; 31 N. E. Rep. 296), 82.
Sweeney *v.* Central Pac. R. Co. (57 Cal. 15; 8 Am. & Eng. R. Cas. 151), 336.
Sweeney *v.* Gulf, etc., R. Co. (84 Tex. 433; 19 S. W. Rep. 555), 472.
Sweeney *v.* Old Colony R. Co. (10 Allen [Mass.] 368), 862.
Sweeny *v.* Boston, etc., R. Co. (10 Allen 372), 1076.
Sweeney *v.* Boston, etc., R. Co. (128 Mass. 5; 1 Am. & Eng. R. Cas. 138), 416.
Sweeny *v.* Kansas City, etc., R. Co. (150 Mo. 385; 51 S. W. Rep. 682), 838.
Sweeny *v.* New York, etc., R. Co. (25 N. Y. S. R. 598; 6 N. Y. Supp. 528; 117 N. Y. 642; 22 N. E. Rep. 1131), 381.
Sweet *v.* Railroad Co. (87 Mich. 559; 49 N. W. Rep. 882), 369.
Swift, etc., Co. *v.* Johnson (138 Fed. Rep. 867), 64.
Swift *v.* Staten Island R. Co. (123 N. Y. 645; 25 N. E. Rep. 378; 33 N. Y. S. R. 604; 52 Hun 614; 45 Am. & Eng. R. Cas. 180), 1004.
Swigert *v.* Hannibal, etc., R. Co. (75 Mo. 475; 9 Am. & Eng. R. Cas. 322), 691.
Swisher *v.* Illinois, etc., R. Co. (182 Ill. 533; 55 N. E. Rep. 555), 487.
Sykes *v.* Northeastern R. Co. (44 L. J. C. P. 191; 32 L. T. 199; 23 W. R. 473), 70.
Sykes *v.* St. Louis & S. F. R. Co. (178 Mo. 693; 77 S. W. Rep. 723), 268.

[*References are to sections.*]

Syme *v.* Richmond, etc., R. Co. (113 No. Car. 558; 18 S. E. Rep. 114), 1092.

T

Taber *v.* Delaware, etc., R. Co. (71 N. Y. 489; 4 Hun 765), 840.
Tabler *v.* Hannibal, etc., R. Co. (93 Mo. 79; 5 S. W. Rep. 810; 31 Am. & Eng. R. Cas. 184), 788.
Tabor *v.* Missouri Valley R. Co. (46 Mo. 353), 1000.
Tagg *v.* McGeorge (155 Pa. St. 368; 26 Atl. Rep. 671), 269.
Tall *v.* Baltimore, etc., Co. (90 Md. 248; 44 Atl. Rep. 1007; 47 L. R. A. A. 120), 744.
Tankham *v.* Sawyer (153 Mass. 485), 308.
Tanner *v.* Louisville, etc., R. Co. (60 Ala. 621), 391.
Tanner *v.* Missouri Pacific Ry. Co. (161 Mo. 497; 61 S. W. Rep. 826), 1029.
Tarball *v.* Rutland, etc., R. Co. (73 Vt. 347; 51 Atl. Rep. 6), 243.
Tateman *v.* Railway Co. (96 Mo. App. 448; 70 S. W. Rep. 514), 119.
Taylor *v.* Atlantic Coast Line R. Co. (59 S. E. Rep. 641), 557.
Taylor *v.* Baltimore & Ohio R. Co. (33 W. Va. 39; 10 S. E. Rep. 29; 39 Am. & Eng. R. Cas. 259), 6.
Taylor *v.* Carew (142 Mass. 470), 6.
Taylor *v.* Central R. Co. (79 Ga. 330), 204.
Taylor *v.* Delaware, etc., R. Co. (113 Pa. St. 162; 8 Atl. Rep. 43; 28 Am. & Eng. R. Cas. 656), 875.
Taylor *v.* Dunn (80 Tex. 652; 16 S. W. Rep. 732), 285.
Taylor *v.* Evansville, etc., R. Co. (121 Ind. 124; 22 N. E. Rep. 876; 6 L. R. A. 584; 41 Alb. L. J. 173; 41 Am. & Eng. R. Cas. 437), 472.
Taylor *v.* Grand Trunk R. Co. (48 N. H. 304), 640.
Taylor *v.* Missouri Pacific Ry. Co. (26 Mo. App. 336), 785.
Taylor *v.* Missouri Pacific Ry. Co. (86 Mo. 457; 16 S. W. Rep. 206), 399.
Taylor *v.* Pennsylvania R. Co. (78 Ky. 348; 7 Am. & Eng. R. Cas. 23), 49.
Taylor *v.* Pennsylvania R. Co. (50 Fed. Rep. 755), 620.
Taylor *v.* Railroad (185 Mo. 255), 100.
Taylor *v.* St. Louis, etc., R. Co. (88 Mo. 386), 91.
Taylor, etc., R. Co. *v.* Taylor (79 Tex. 104; 14 S. W. Rep. 918), 345.
Taylor, etc., R. Co. *v.* Warner (Tex., 60 S. W. Rep. 442), 1059.
Taylor, etc., R. Co. *v.* Warner (88 Tex. 642; 32 S. W. Rep. 868), 287.
Taylor *v.* Western Pac. R. Co. (45 Cal. 323), 160.
Teakle *v.* San Pedro, L. A. & S. L. R. Co. (90 Pac. Rep. 402), 1029.
Teal *v.* American Mining Co. (87 N. W. Rep. 837), 229.
Teal *v.* St. Paul, etc., R. Co. (96 Minn. 379; 104 N. W. Rep. 945), 115.
Telephone Co. *v.* Loomis (87 Tenn. 504; 11 S. W. Rep. 356), 311.
Telfer *v.* Northern, etc., R. Co. (30 N. J. L. 188), 661.
Tennenbrook *v.* Southern, etc., R. Co. (59 Cal. 269; 6 Am. & Eng. R. Cas. 8), 1096.
Tennery *v.* Pippinger (1 Phila. [Pa.] 543), 574.
Tennessee C. I. & R. Co. *v.* Bridges (39 So. Rep. 902), 360.
Tennessee, etc., Co. *v.* Currier (108 Fed. Rep. 19; 47 C. C. A. 161), 150.
Tennessee, etc., R. Co. *v.* Hayes (97 Ala. 201; 12 So. Rep. 98), 311.
Tennis *v.* Inter-State, etc., R. Co. (45 Kan. 503), 413.
Terminal Transfer Co. *v.* Helberg (124 Ill. App. 113), 411.
Terre Haute, etc., R. Co. *v.* Brunker (128 Ind. 542; 26 N. E. Rep. 178), 93.
Terre Haute, etc., R. Co. *v.* Buck (96 Ind. 346; 49 Am. Rep. 168; 18 Am. & Eng. R. Cas. 234), 708.
Terre Haute, etc., R. Co. *v.* Clark (73 Ind. 168; 6 Am. & Eng. R. Cas. 84), 661.
Terre Haute, etc., R. Co. *v.* Clenn (123 Ind. 15; 23 N. E. Rep. 965; 42 Am. & Eng. R. Cas. 965; 7 L. R. A. 588), 94.
Terre Haute, etc., R. Co. *v.* Graham (95 Ind. 286; 48 Am. Rep. 719; 12 Am. & Eng. R. Cas. 77), 1078.
Terre Haute, etc., R. Co. *v.* Jackson (81 Ind. 19; 6 Am. & Eng. R. Cas. 178), 590.
Terre Haute, etc., R. Co. *v.* Mansberger (65 Fed. Rep. 196; 12 C. C. A. 574), 39.
Terre Haute, etc., R. Co. *v.* McMurray (98 Ind. 358; 49 Am. Rep. 752; 22 Am. & Eng. R. Cas. 371), 1043.
Terre Haute, etc., R. Co. *v.* Rittenhouse (28 Ind. App. 633; 62 N. E. Rep. 295), 493.
Terre Haute, etc., R. Co. *v.* Sheets (155 Ind. 74; 56 N. E. Rep. 434), 576.
Terre Haute, etc., R. Co. *v.* Sherwood (132 Ind. 129), 849.
Terre Haute, etc., R. Co. *v.* Voelker (129 Ill. 540; 22 N. E. Rep. 20; 39 Am. & Eng. R. Cas. 615), 953.
Terry *v.* Jewett (78 N. Y. 338), 661.
Terry *v.* St. Louis, etc., R. Co. (89 Mo. 586; 1 S. W. Rep. 746), 956.
Teteur *v.* Chicago, etc., R. Co. (77 Wis. 505; 46 N. W. Rep. 897), 65.
Tetherow *v.* St. Joseph, etc., R. Co. (98 Mo. 74; 11 S. W. Rep. 310), 909.
Texas & N. O. Ry. Co. *v.* Conway (98 S. W. Rep. 1070), 263.
Texas & N. O. Ry. Co. *v.* Crowder (61 Tex. 262), 275.
Texas & N. O. R. Co. *v.* Kelly (Tex., 80 S. W. Rep. 1073), 257.
Texas & N. O. R. Co. *v.* Sherman (Tex., 87 S. W. Rep. 887), 262.
Texas & N. O. R. Co. *v.* Walton (104 S. W. Rep. 415), 543.
Texas & Pacific Ry. *v.* Barrett (166 U.

[*References are to sections.*]

S. 617; 17 Sup. Ct. 707; 41 L. Ed. 1136), 119.
Texas & P. Ry. *v.* Beezly (101 S. W. Rep. 1051), 634.
Texas & Pac. R. Co. *v.* Behymer (189 U. S. 468; 47 L. Ed. 905), 4.
Texas & Pac. R. Co. *v.* Brick (Tex., 18 S. W. Rep. 947), 303.
Texas & Pac. R. Co. *v.* Carlin (189 U. S. 354; 47 L. Ed. 849), 473.
Texas & Pac. Coal Co. *v.* Connaughton (20 Tex. Civ. App. 642; 50 S. W. Rep. 173), 299.
Texas & Pac. R. Co. *v.* Cox (145 U. S. 593; 12 Sup. Ct. Rep. 905), 71.
Texas & Pac. R. Co. *v.* French (86 Tex. 96; 23 S. W. Rep. 642), 128.
Texas & Pac. R. Co. *v.* Hemphill (Tex., 86 S. W. Rep. 350), 249.
Texas & Pac. R. Co. *v.* Hoffman (83 Tex. 286; 18 S. W. Rep. 741), 249.
Texas & Pac. R. Co. *v.* McKenzie (70 S. W. Rep. 237), 31.
Texas & Pac. R. Co. *v.* Mosely (58 S. W. Rep. 48), 38.
Texas & P. Ry. Co. *v.* Shivers (106 S. W. Rep. 894), 947.
Texas & P. Ry. Co. *v.* Whiteley (96 S. W. Rep. 109), 718.
Texas Central R. Co. *v.* Bender (Tex., 75 S. W. Rep. 561), 338.
Texas Central R. Co. *v.* George (89 S. W. Rep. 1091), 254.
Texas Mexican Ry. Co. *v.* De Hernandez (108 S. W. Rep. 765), 973.
Texas Mexican Ry. Co. *v.* Higgins (99 S. W. Rep. 200), 204.
Texas Midland R. Co. *v.* Byrd (Tex., 90 S. W. Rep. 185), 1096.
Texas Midland R. *v.* Byrd (110 S. W. Rep. 199), 1096.
Texas Midland R. Co. *v.* Griggs (Tex., 106 S. W. Rep. 411), 282.
Texas Midland R. Co. *v.* Ritchey (108 S. W. Rep. 732), 721.
Texas Short Line R. Co. *v.* Waymire (89 S. W. Rep. 452), 266.
Texas Trunk R. Co. *v.* Ayers (83 Tex. 268; 18 S. W. Rep. 684), 181.
Texas, etc., R. Co. *v.* Anderson (61 S. W. Rep. 424), 31.
Texas, etc., R. Co. *v.* Bailey (83 Tex. 19; 18 S. W. Rep. 481), 952.
Texas, etc., R. Co. *v.* Barfield (Tex., 3 S. W. Rep. 665), 1097.
Texas, etc., R. Co. *v.* Barron (78 Tex. 421; 14 S. W. Rep. 698), 601.
Texas, etc., R. Co. *v.* Berry (67 Tex. 238; 5 S. W. Rep. 817; 31 Am. & Eng. R. Cas. 147), 469.
Texas, etc., R. Co. *v.* Best (66 Tex. 116; 18 S. W. Rep. 224), 867.
Texas, etc., R. Co. *v.* Bingham (2 Tex. Civ. App. 278; 21 S. W. Rep. 569), 707.
Texas, etc., R. Co. *v.* Bradford (66 Tex. 732; 2 S. W. Rep. 595; 28 Am. & Eng. R. Cas. 479), 419.
Texas, etc., R. Co. *v.* Bryant (56 Fed. Rep. 799), 958.
Texas, etc., R. Co. *v.* Carlton (60 Tex. 397; 15 Am. & Eng. R. Cas. 350), 301.
Texas, etc., R. Co. *v.* Chapman (57 Tex. 75), 886.
Texas, etc., R. Co. *v.* Crowder (70 Tex. 222; 7 S. W. Rep. 709), 92.
Texas, etc., R. Co. *v.* Curlin (13 Tex. Civ. App. 505), 4.
Texas, etc., R. Co. *v.* Curry (64 Tex. 85; 21 Am. & Eng. R. Cas. 448), 185.
Texas, etc., R. Co. *v.* Davidson (68 Tex. 370; 4 S. W. Rep. 636), 691.
Texas, etc., R. Co. *v.* DeMilley (60 Tex. 194), 83.
Texas, etc., R. Co. *v.* Dudley (1 Tex. Civ. App. 271), 277.
Texas, etc., R. Co. *v.* Easton (2 Tex. Civ. App. 378; 21 S. W. Rep. 575), 479.
Texas, etc., R. Co. *v.* French (Tex. Civ. App., 22 S. W. Rep. 866), 403.
Texas, etc., R. Co. *v.* Garcia (62 Tex. 280; 21 Am. & Eng. R. Cas. 384), 787.
Texas, etc., R. Co. *v.* Geiger (79 Tex. 13; 15 S. W. Rep. 214), 204.
Texas, etc., R. Co. *v.* Hamilton (66 Tex. 92; 26 Am. & Eng. R. Cas. 182), 652.
Texas, etc., R. Co. *v.* Harrington (98 S. W. Rep. 653), 842.
Texas, etc., R. Co. *v.* Harrington (62 Tex. 597; 21 Am. & Eng. R. Cas. 571), 478.
Texas, etc., Ry. Co. *v.* Hervey (89 S. W. Rep. 1095), 543.
Texas, etc., R. Co. *v.* Humble (97 Fed. Rep. 837), 621.
Texas, etc., R. Co. *v.* Johnson (2 Tex. Civ. App. 154), 742.
Texas, etc., R. Co. *v.* Jumper (24 Tex. Civ. App. 671; 60 S. W. Rep. 797), 759.
Texas, etc., R. Co. *v.* Juneman (71 Fed. Rep. 939; 18 C. C. A. 394), 282.
Texas, etc., R. Co. *v.* Kane (15 Am. & Eng. R. Cas. 218), 376.
Texas, etc., R. Co. *v.* Kelley (Tex., 80 S. W. Rep. 79), 369.
Texas, etc., R. Co. *v.* Kirk (62 Tex. 227), 471.
Texas, etc., R. Co. *v.* Lester (75 Tex. 56; 12 S. W. Rep. 955), 206.
Texas, etc., R. Co. *v.* Lowry (61 Tex. 149), 947.
Texas, etc., R. Co. *v.* Martin (60 S. W. Rep. 803), 65.
Texas, etc., Ry. Co. *v.* McCraw (95 S. W. Rep. 82), 543.
Texas, etc., R. Co. *v.* Miller (79 Tex. 78; 15 S. W. Rep. 264), 557.
Texas, etc., Ry. Co. *v.* Miller (Tex., 81 S. W. Rep. 535), 339.
Texas, etc., R. Co. *v.* Minnick (57 Fed. Rep. 362), 341.
Texas & P. Ry. Co. *v.* Modawell (151 Fed. Rep. 421), 1075.
Texas, etc., R. Co. *v.* Moore (8 Tex. Civ. App. 289; 27 S. W. Rep. 962), 229.
Texas, etc., R. Co. *v.* Moran (66 Tex. 133; 25 Am. & Eng. R. Cas. 539), 167.
Texas, etc., R. Co. *v.* Nunn (98 Fed. Rep. 963), 722.
Texas, etc., R. Co. *v.* Overall (82 Tex. 247; 18 S. W. Rep. 142), 799.

[*References are to sections.*]

Texas, etc., Ry. Co. *v.* Putnam (120 Fed. Rep. 754; 57 C. C. A. 58), 386.
Texas, etc., R. Co. *v.* Reed (88 Tex. 439; 31 S. W. Rep. 1058), 28.
Texas, etc., R. Co. *v.* Roberts (2 Tex. Civ. App. 111; 20 S. W. Rep. 960), 1080.
Texas, etc., R. Co. *v.* Rogers (57 Fed. Rep. 378), 337.
Texas, etc., R. Co. *v.* Scarborough (104 S. W. Rep. 408), 401.
Texas, etc., R. Co. *v.* Scott (64 Tex. 549), 568.
Texas, etc., R. Co. *v.* Scruggs (Tex., 58 S. W. Rep. 186), 493.
Texas, etc., R. Co. *v.* Smith (Tex., 10 Am. Neg. Cas. 326), 649.
Texas, etc., R. Co. *v.* Smith (114 Fed. Rep. 728; 52 C. C. A. 360), 543.
Texas, etc., R. Co. *v.* Stewart (1 Tex. Civ. App. 642; 20 S. W. Rep. 962), 835.
Texas, etc., R. Co. *v.* Storey (Tex., 83 S. W. Rep. 852), 752.
Texas, etc., R. Co. *v.* Suggs (62 Tex. 323; 21 Am. & Eng. R. Cas. 475), 637.
Texas, etc., R. Co. *v.* Tattman (Tex., 31 S. W. Rep. 333), 493.
Texas, etc., R. Co. *v.* Thompson (Tex., 77 S. W. Rep. 439), 602.
Texas & Pac. R. Co. *v.* Utley (66 S. W. Rep. 311), 270.
Texas, etc., R. Co. *v.* Vallie (60 Tex. 481), 369.
Texas, etc., R. Co. *v.* Wagner (2 Tex. Civ. App. 291), 416.
Texas, etc., R. Co. *v.* Whitmore (58 Tex. 276; 11 Am. & Eng. R. Cas. 195), 475.
Texas, etc., R. Co. *v.* Wright (62 Tex. 515; 23 Am. & Eng. R. Cas. 304), 969.
Thacher *v.* Chicago, etc., R. Co. (159 Ind. 82; 64 N. E. Rep. 605), 495.
Thacher *v.* Great Western R. Co. (4 U. C. C. P. 543), 653.
Thayer *v.* Flint, etc., R. Co. (93 Mich. 150; 53 N. W. Rep. 216), 977.
Thayer *v.* St. Louis, etc., R. Co. (22 Ind. 26), 476.
Thayer *v.* Smoky Hollow Co. (98 N. W. Rep. 718), 79.
The Bernina (L. R., 12 P. D. 58; L. R., 13 App. Cas. 1), 1048.
The Chico (140 Fed. Rep. 568), 253.
The City of Alexandria (17 Fed. Rep. 390), 43.
The Edwin (87 Fed. Rep. 540), 95.
Theleman *v.* Mueller (73 Iowa 108; 34 N. W. Rep. 765), 461.
The New World *v.* King (16 How. 469), 635.
Thirteenth, etc., R. Co. *v.* Boudrox (92 Pa. St. 475; 37 Am. Rep. 707; 2 Am. & Eng. R. Cas. 30), 771.
Thomas *v.* Altoona, etc., R. Co. (191 Pa. St. 361; 43 Atl. Rep. 215), 279.
Thomas *v.* Charlotte, etc., R. Co. (38 So. Car. 485; 17 S. E. Rep. 226), 703.
Thomas *v.* Chicago, etc., R. Co. (86 Mich. 496; 49 N. W. Rep. 547), 104.
Thomas *v.* Cincinnati, etc., R. Co. (97 Fed. Rep. 245), 493.
Thomas *v.* Delaware, etc., R. Co. (19 Blatchf. [U. S.] 533; 8 Fed. Rep. 729), 1020.
Thomas *v.* London, etc., R. Co. (L. R., 5 Q. B. 226), 683.
Thomas *v.* Missouri Pac. Ry. Co. (109 Mo. 187; 18 S. W. Rep. 980; 53 Am. & Eng. R. Cas. 146), 335.
Thomas *v.* Philadelphia, etc., R. Co. (148 Pa. St. 180; 23 Atl. Rep. 989; 15 L. R. A. 416), 759.
Thomas *v.* Raleigh, etc., R. Co. (129 N. C. 392; 40 S. E. Rep. 201), 382.
Thomas *v.* W. J. Ry. Co. (101 U. S. 71; 11 Otto 71; 25 L. Ed. 950), 285.
Thomason *v.* Southern Ry. Co. (72 S. C. 1; 51 S. E. Rep. 443), 176.
Thompson *v.* Belfast, etc., R. Co. (5 Ir. C. L. 517), 713.
Thompson *v.* Chappell (91 Mo. App. 297), 386.
Thompson *v.* Chicago, etc., R. Co. (4 McCrary [U. S.] 629; 14 Fed. Rep. 564), 379.
Thompson *v.* Flint, etc., R. Co. (57 Mich. 300; 23 N. W. Rep. 820; 23 Am. & Eng. R. Cas. 289), 1035.
Thompson *v.* Great North. R. Co. (79 Minn. 291; 82 N. W. Rep. 637), 254.
Thompson *v.* Lake Shore, etc., R. Co. (84 Mich. 281; 47 N. W. Rep. 584), 492.
Thompson *v.* Louisville, etc., R. Co. (91 Ala. 496; 8 So. Rep. 406; 11 L. R. A. 146), 298.
Thompson *v.* Missouri, etc., R. Co. (93 Mo. App. 548; 67 S. W. Rep. 693), 992.
Thompson *v.* New Orleans, etc., R. Co. (50 Miss. 315) 724.
Thompson *v.* Pennsylvania R. Co. (215 Pa. St. 113; 64 Atl. Rep. 323), 1050.
Thompson *v.* St. Louis, etc., R. Co. (Mo., 86 S. W. Rep. 465), 122.
Thompson *v.* Toledo, etc., R. Co. (91 Mich. 255; 51 N. W. Rep. 995), 94.
Thornton *v.* Cleveland, etc., R. Co. (131 Ind. 492; 31 N. E. Rep. 185), 1005.
Thorpe *v.* Missouri Pacific Ry. Co. (89 Mo. 650; 2 S. W. Rep. 3), 406.
Thrall *v.* Carme (24 N. Y. S. R. 270; 5 N. Y. Supp. 244), 308.
Thrussell *v.* Handyside (20 Q. B. D. 359), 378.
Thurston *v.* Union Pacific R. Co. (4 Dill. [U. S.] 321), 586.
Thweatt *v.* Houston, etc., R. Co. (31 Tex. Civ. App. 227; 71 S. W. Rep. 976), 762.
Thyng *v.* Fitchburg, etc., R. Co. (156 Mass. 13; 30 N. E. Rep. 169), 510.
Tibbett *v.* Knox, etc., R. Co. (62 Me. 437), 300.
Tibbey *v.* Missouri Pacific Ry. Co. (82 Mo. 292), 669.
Tiernay *v.* Chicago, etc., R. Co. (84 Iowa 641; 5 N. W. Rep. 175), 945.
Tierney *v.* Minneapolis, etc., R. Co. (33 Minn. 311; 23 N. W. Rep. 229; 53 Am. Rep. 35; 21 Am. & Eng. R. Cas. 545), 474.
Tilburg *v.* Northern Cent. Ry. Co. (66 Atl. Rep. 846), 731.
Tillery *v.* Bond (38 Fed. Rep. 825), 705.

[*References are to sections.*]

Tilley *v.* Hudson River R. Co. (24 N. Y. 474), 197.
Tillman *v.* St. Louis Transit Co. (102 Mo. App. 553; 77 S. W. Rep. 320), 657.
Tillotson *v.* Texas, etc., R. Co. (44 La. Ann. 95; 10 So. Rep. 400; 53 Am. & Eng. R. Cas. 104), 307.
Tilson *v.* Maine Cent. R. Co. (67 Atl. Rep. 407), 492.
Timlow *v.* Pennsylvania R. Co. (99 Pa. St. 284), 7.
Timpson *v.* Manhattan R. Co. (24 N. Y. S. R. 629; 52 Hun 489; 5 N. Y. Supp. 684), 557.
Tingle *v.* Long Island R. Co. (96 N. Y. S. 865; 109 App. Div. 793), 500.
Tinsley *v.* Western Union Co. (S. C., 51 S. E. Rep. 913; 72 S. C. 350), 14.
Titcomb *v.* Fitchburg, etc. R. Co. (2 Allen 254), 33.
Titus *v.* Bradford, etc., R. Co. (136 Pa. St. 618; 20 Atl. Rep. 517), 347.
Tobin *v.* Cable Co. (Cal., 34 Pac. Rep. 124; 58 Am. & Eng. R. Cas. 223), 768.
Tobin *v.* Cent. Vt. Ry. Co. (185 Mass. 337; 70 N. E. Rep. 431), 238.
Tobin *v.* Missouri Pac. R. Co. (18 S. W. Rep. 996), 153.
Todd *v.* Missouri Pacific Ry. Co. (126 Mo. App. 692; 105 S. W. Rep. 671), 112.
Todd *v.* Old Colony R. Co. (3 Allen [Mass.] 18), 802.
Toledo, etc., R. Co. *v.* Apperson (49 Ill. 480), 595.
Toledo, etc., R. Co. *v.* Baddeley (54 Ill. 19), 709.
Toledo, etc., R. Co. *v.* Beggs (85 Ill. 80), 1070.
Toledo, etc., R. Co. *v.* Black (88 Ill. 112), 268.
Toledo, etc., R. Co. *v.* Brooks (81 Ill. 245), 571.
Toledo, etc., R. Co. *v.* Cline (135 Ill. 41; 25 N. E. Rep. 846; 45 Am. & Eng. R. Cas. 150), 453.
Toledo, etc., R. Co. *v.* Connolly (149 Fed. Rep. 398), 68.
Toledo, etc., R. Co. *v.* Conroy (39 Ill. App. 351), 276.
Toledo, etc., R. Co. *v.* Crittenden (42 Ill. App. 469), 1056.
Toledo, etc., R. Co. *v.* Deacon (63 Ill. 91; 7 Am. Ry. Rep. 150), 976.
Toledo, etc., R. Co. *v.* Durkin (76 Ill. 395), 354.
Toledo, etc., R. Co. *v.* Eatherton (20 Ohio C. C. 297), 1039.
Toledo, etc., R. Co. *v.* Eddy (72 Ill. 138), 168.
Toledo, etc., R. Co. *v.* Foster (43 Ill. 415), 968.
Toledo, etc., R. Co. *v.* Goddard (25 Ind. 185), 390.
Toledo, etc., R. Co. *v.* Jones (76 Ill. 311), 950.
Toledo, etc., R. Co. *v.* Jump (50 Ohio St. 651; 35 N. E. Rep. 1054), 900.
Toledo, etc., R. Co. *v.* Miller (76 Ill. 278), 987.
Toledo, etc., R. Co. *v.* O'Connor (77 Ill. 391), 477.
Toledo & W. R. Co. *v.* Pavey (79 N. E. Rep. 529), 521.
Toledo, etc., R. Co. *v.* Rumbold (40 Ill. 143), 683.
Toledo, etc., R. Co. *v.* Shuckman (50 Ind. 42), 932.
Toledo, etc., R. Co. *v.* Spencer (66 Ill. 529), 455.
Toledo & W. R. Co. *v.* Stevenson (122 Ill. App. 654), 625.
Toledo, etc., R. Co. *v.* Wingate (143 Ind. 125; 37 N. E. Rep. 274), 626.
Tollit *v.* Sherstone (5 M. & W. 283), 18.
Tollman *v.* Reed (115 Mich. 71; 72 N. W. Rep. 1104), 463.
Tomkins *v.* Clay Street R. Co. (66 Cal. 163; 4. Pac. Rep. 1165), 1041.
Toms *v.* Buffalo Crek R. Co. (70 Hun 84; 53 N. Y. S. R. 640; 23 N. Y. Supp. 1112), 468.
Toomey *v.* Eureka Works (89 Mich. 249; 50 N. W. Rep. 850), 118.
Toomey *v.* Southern, etc., R. Co. (86 Cal. 374; 24 Pac. Rep. 1074), 1063.
Toner *v.* Chicago, etc., R. Co. (69 Wis. 188; 31 N. W. Rep. 104; 28 Am. & Eng. R. Cas. 449), 482.
Torpey *v.* Grand Trunk R. Co. (20 N. C. L. B. 446), 568.
Torrey *v.* Boston, etc., R. Co. (147 Mass. 412; 18 N. E. Rep. 213), 801.
Toten *v.* Pennsylvania R. Co. (11 Fed. Rep. 564), 461.
Towle *v.* Stimson Co. (Wash., 74 Pac. Rep. 471), 155.
Traction Co. *v.* McFall (28 Ohio Cir. Ct. R. 362), 586.
Traction Co. *v.* Wilson (120 Ill. App. 371; 75 N. E. Rep. 436; 217 Ill. 47), 661.
Tracy *v.* Troy, etc., R. Co. (38 N. Y. 433; 55 Barb. 529), 602.
Trakal *v.* Heusner Co. (204 Ill. 179; 68 N. E. Rep. 399), 269.
Transportation Co. *v.* Downer (11 Wallace 129), 116.
Transportation Co. *v.* Ullman (89 Ill. 244), 237.
Traphagen *v.* Erie R. Co. (64 Atl. Rep. 1072), 651.
Trask *v.* California, etc., R. Co. (63 Cal. 96; 11 Am. & Eng. R. Cas. 192), 471.
Traux *v.* Chicago, etc., R. Co. (83 Wis. 547; 53 N. W. Rep. 842), 872.
Travers *v.* Kansas City, etc., R. Co. (63 Mo. 421), 736.
Treadwell *v.* Whittier (80 Cal. 574; 22 Pac. Rep. 266), 639.
Treadwell *v.* Whittier (5 L. R. 498), 120.
Tremantle *v.* North Star, etc., Co. (57 Minn. 52), 308.
Trenton, etc., R. Co. *v.* Cooper (60 N. J. L. 219; 37 Atl. Rep. 730; 38 L. R. A. 637), 110.
Treux *v.* Erie R. Co. (4 Lans. [N. Y.] 198), 674.
Trinity, etc., R. Co. *v.* Mitchell (72 Tex. 609; 10 S. W. Rep. 698), 482.

[*References are to sections.*]

Trinity, etc., R. Co. v. O'Brien, 18 Tex. Civ. App. 690; 46 S. W. Rep. 389), 579.
Tripp *v.* Gifford (155 Mass. 108), 314.
Trotten *v.* Pennsylvania R. Co. (11 Fed. Rep. 564), 175.
Trotter *v.* St. Louis & Sub. Ry. Co. (Mo. App., 99 S. W. Rep. 508), 119.
Trow *v.* Vermont, etc., R. Co. (24 Vt. 487), 398.
Troy *v.* Cape Fear, etc., R. Co. (99 N. Car. 298; 6 S. E. Rep. 77; 6 Am. St. Rep. 521; 34 Am. & Eng. R. Cas. 13), 398.
Truitt *v.* Hannibal & St. Joe R. Co. (62 Mo. 527), 32.
Tucker *v.* American Car & Foundry Co.. (67 Atl. Rep. 616), 482.
Tucker *v.* Duncan (9 Fed. Rep. 867; 6 Am. & Eng. R. Cas. 268), 166.
Tucker *v.* New York, etc., R. Co. (124 N. Y. 308; 26 N. E. Rep. 916), 991.
Tucker *v.* Northern Pacific Co. (41 Ore. 82; 68 Pac. Rep. 426), 332.
Tuff *v.* Warman (5 C. B. N. S. 573), 388.
Tuley *v.* Chicago, etc., R. Co. (41 Mo. App. 432), 798.
Tuller *v.* Talbot (23 Ill. 357), 593.
Tullis *v.* Lake Erie, etc., R. Co. (175 U. S. 348), 504.
Turess *v.* New York, etc., R. Co. (61 N. J. L. 320; 40 Atl. Rep. 614), 1073.
Turley *v.* Atlanta, etc., Ry. Co. (56 S. E. Rep. 748), 717.
Turner *v.* Boston, etc., R. Co. (158 Mass., 261; 33 N. E. Rep. 520), 864.
Turner *v.* Detroit Southern R. Co. (Mich., 100 N. W. Rep. 268), 254.
Turner *v.* Great Eastern R. Co. (33 L. T. 431), 481.
Turner *v.* Haar (114 Mo. 335, 347; 21 S. W. Rep. 737; 120.
Turner *v.* Hannibal, etc., R. Co. (74 Mo. 602; 6 Am. & Eng. R. Cas. 38), 1033.
Turner *v.* Kansas City, etc., R. Co. (78 Mo. 578; 19 Am. & Eng. R. Cas. 506), 956.
Turner *v.* St. Clair Tunnel Co. (111 Mich. 578; 70 N. W. Rep. 146; 66 Am. St. Rep. 397; 36 L. R. A. 134), 463.
Tuttle *v.* Atlantic City R. Co. (49 Atl. Rep. 450), 30.
Tuttle *v.* Detroit, etc., R. Co. (122 U. S. 189; 7 Sup. Ct. Rep. 1166; 31 Am. & Eng. R. Cas. 217), 348.
Twitchell *v.* Grand Trunk R. Co. (39 Fed. Rep. 419), 325.
Twomley *v.* Central Park R. Co. (69 N. Y. 158; 18 Am. Ry. Rep. 113), 792.
Tyler *v.* Boston, etc., R. Co. (157 Mass. 336; 32 N. E. Rep. 229), 1001.
Tyler *v.* New York, etc., R. Co. (137 Mass. 238; 19 Am. & Eng. R. Cas. 296), 1021.
Tyler *v.* Old Colony R. Co. (157 Mass. 336; 32 N. E. Rep. 227), 956.
Tyrrell *v.* Eastern R. Co. (111 Mass. 546), 611.

U

Ubelman *v.* American, etc., Co. (209 Pa. 398; 58 Atl. Rep. 849), 88.
Ulini *v.* New York, etc., R. Co. (101 N. Y. 98; 4 N. E. Rep. 536; 23 Am. & Eng. R. Cas. 3), 74.
Ulrich *v.* New York, etc., R. Co. (108 N. Y. 80; 15 N. E. Rep. 60; 2 Am. St. Rep. 369), 852.
Umback *v.* Lake Shore, etc., R. Co. (83 Ind. 191; 8 Am. & Eng. R. Cas. 98), 313.
Underwood *v.* Metropolitan St. Ry. Co. (102 S. W. Rep. 1045), 842.
Unger *v.* Philadelphia, B. & W. R. Co. (66 Atl. Rep. 235; 217 Pa. 106), 1036.
Union Pacific R. Co. *v.* Adams (33 Kan. 427; 6 Pac. Rep. 529; 19 Am. & Eng. R. Cas. 376), 1009.
Union Pacific R. Co. *v.* Artist (60 Fed. Rep. 365; 9 C. C. A. 14; 19 U. S. App. 612), 214.
Union Pacific R. Co. *v.* Billeter (28 Neb. 422; 44 N. W. Rep. 483; 41 Am. & Eng. R. Cas. 431), 477.
Union Pacific R. Co. *v.* Botsford (141 U. S. 250; 11 Sup. Ct. Rep. 1000; 47 Am. & Eng. R. Cas. 406), 93.
Union Pac. R. Co. *v.* Callaghan (56 Fed. Rep. 988; 19 C. C. A. 205), 22.
Union Pac. Ry. Co. *v.* Connolly (109 N. W. Rep. 368), 929.
Union Pacific R. Co. *v.* Estes (37 Kan. 715; 16 Pac. Rep. 131), 403.
Union Pacific R. Co. *v.* Evans (52 Neb. 50; 71 N. W. Rep. 1062), 619.
Union Pacific R. Co. *v.* Fort (17 Wall. [U. S.] 553), 475.
Union Pacific R. Co. *v.* Gallagher (114 Ill. 325), 731.
Union Pacific R. Co. *v.* Greary (52 Kan. 308; 34 Pac. Rep. 887), 498.
Union Pacific R. Co. *v.* House (1 Wyom. 27), 176.
Union Pacific R. Co. *v.* Jones (49 Fed. Rep. 343; 4 U. S. App. 115), 183.
Union Pacific R. Co. *v.* Kelly (4 Colo. App. 325; 35 Pac. Rep. 923), 500.
Union Pacific R. Co. *v.* Lapsley (51 Fed. Rep. 174; 2 C. C. A. 149; 4 U. S. App. 542; 16 L. R. A. 800), 1057.
Union Pacific R. Co. *v.* Mertes (35 Neb. 204; 52 N. W. Rep. 1099), 398.
Union Pacific R. Co. *v.* Milliken (8 Kan. 647), 482.
Union Pacific R. Co. *v.* Monden (50 Kan. 539; 31 Pac. Rep. 1002; 53 Am. & Eng. R. Cas. 363), 343.
Union Pacific R. Co. *v.* Nichols (8 Kan. 505; 12 Am. Rep. 475), 564.
Union Pacific R. Co. *v.* O'Brien (49 Fed. Rep. 538; 4 U. S. App. 221; 1 C. C. A. 354), 367.
Union Pacific R. Co. *v.* Rollins (5 Kan. 167), 133.
Union Pacific R. Co. *v.* Rosewater (157 Fed. Rep. 168), 941.
Union Pac. R. Co. *v.* Springsten (41 Kan. 724; 21 Pac. Rep. 774), 263.
Union Pacific R. Co. *v.* Young (19 Kan. 488), 245.

[*References are to sections.*]

Union, etc., R. Co. *v.* Hand (7 Kan. 380; 1 Am. Ry. Rep. 548), 594.
Union, etc., R. Co. *v.* Harris (158 U. S. 326; 39 L. Ed. 1003; 15 Sup. Ct. Rep. 843), 576.
Union, etc., R. Co. *v.* Kallahr (12 Ill. App. 400), 453.
Union, etc., R. Co. *v.* Roark (10 Ill. App. 474), 1086.
Union R. Co. *v.* State (72 Md. 153; 19 Atl. Rep. 449; 42 Am. & Eng. R. Cas. 172), 999.
Union Tr. Co. *v.* Sawusch (218 Ill. 130; 75 N. E. Rep. 797; 1 L. R. A. [N. S.] 670), 246.
Union Traction Co. *v.* Sullivan (76 N. E. Rep. 116), 184.
Union Trust Co. *v.* Thomason (25 Kan. 1; 5 Am. & Eng. R. Cas. 589), 523.
United Railroad, etc., Co. *v.* Biedler (98 Md. 564; 56 Atl. Rep. 813), 1053.
United States *v.* Central Pacific R. Co. (118 U. S. 235; 6 Sup. Ct. Rep. 1038), 858.
United States *v.* Chicago, etc., R. Co. (149 Fed. Rep. 486), 545.
United States Fidelity & Guaranty Co. *v.* Des Moines Nat. Bank (145 Fed. Rep. 273), 23.
United States *v.* Great Northern R. Co. (150 Fed. Rep. 229), 545.
United States, etc., Co. *v.* Wilder (116 Ill. 100; 5 N. E. Rep. 92; 25 Am. & Eng. R. Cas. 414), 881.
Urias *v.* Pennsylvania R. Co (152 Pa. St. 326; 25 Atl. Rep. 566), 1014.
Usher *v.* West Jersey R. Co. (126 Pa. St. 206; 17 Atl. Rep. 597; 41 Am. & Eng. R. Cas. 508), 52.

V

Vail *v.* Jacobs (62 Mo. 130), 106.
Valente *v.* Sierra Ry. Co. (91 Pac. Rep. 481), 576.
Valin *v.* Milwaukee, etc., R. Co. (82 Wis. 1; 51 N. W. Rep. 1084), 876.
Vallance *v.* Boston, etc., R. Co. (55 Fed. Rep. 364), 916.
Valley *v.* Hall (184 Mass. 358; 68 N. E. Rep. 829), 78.
Vallo *v.* U. S. Express Co. (147 Pa. St. 404; 23 Atl. Rep. 594), 168.
Van Amburg *v.* Vicksburg, etc., R. Co. (37 La. Ann. 650; 55 Am. Rep. 517), 491.
Van Avery *v.* Union Pacific R. Co. (35 Fed. Rep. 40), 492.
Van Blarcom *v.* Central R. Co. (N. J. 64 Atl. Rep. 111), 271.
Van Derhoff *v.* New York Cent. R. Co. (84 N. Y. S. 650; 88 App. Div. 418), 257.
Vandeventer *v.* New York, etc., R. Co. (27 Barb. 244), 45.
Vandewater *v.* New York, etc., R. Co. (135 N. Y. 583; 32 N. E. Rep. 636; 49 N. Y. S. R. 55), 962.
Vandewater *v.* New York, etc., R. Co. (74 Hun 32; 56 N. Y. S. R. 208), 881.
Van Gent *v.* Chicago, etc., R. Co. (80 Iowa 526; 45 N. W. Rep. 913), 191.
Van Horn *v.* Boston, etc., R. Co. (42 Hun [N. Y.] 654; 113 N. Y. 634; 20 N. E. Rep. 878; 22 N. Y. S. R. 994), 327.
Van Horn *v.* Burlington, etc., R. Co. (59 Iowa 33; 12 N. W. Rep. 752; 7 Am. & Eng. R. Cas. 591), 104.
Van Horn *v.* St. Louis Transit Co. (Mo., 95 S. W. Rep. 326), 408.
Vannata *v.* Central, etc., R. Co. (154 Pa. St. 262; 26 Atl. Rep. 384), 481.
Van Ostran *v.* New York, etc., R. Co. (35 Hun [N. Y.] 590; 104 N. Y. 683), 788.
Van Riper *v.* New York, etc., R. Co. (71 N. J. 345; 59 Atl. Rep. 26), 88.
Vant *v.* Roelofs (66 Atl. Rep. 749), 473.
Vant Hul *v.* Great Northern R. Co. (90 Minn. 329; 96 N. W. Rep. 789), 252.
Van Tassell *v.* New York, etc., R. Co. (1 Miss. 299; 48 N. Y. S. R. 767; 20 N. Y. Supp. 708), 370.
Van Vactor's Admr. *v.* Louisville & N. R. Co. (23 Ky. L. R. 1743; 66 S. W. Rep. 4), 55.
Van Wickle *v.* Manhattan R. Co. (23 Blatchf. [U. S.] 422; 32 Fed. Rep. 278), 468.
Van Wort *v.* New Brunswick, etc., R. Co. (27 N. Brun. 59), 969.
Vartanian *v.* New York, etc., R. Co. (25 R. I. 398; 56 Atl. Rep. 184), 374.
Vary *v.* Burlington, etc., R. Co. (42 Iowa 246), 228.
Vassor *v.* Atlantic Coast Line R. Co. (54 S. E. Rep. 849), 561.
Vaughan *v.* California, etc., R. Co. (83 Cal. 18; 23 Pac. Rep. 215), 352.
Vautrain *v.* St. Louis, etc., R. Co. (8 Mo. App. 538; 78 Mo. 44), 479.
Vawter *v.* Missouri Pac. R. Co. (84 Mo. 679; 54 Am. Rep. 105; 19 Am. & Eng. R. Cas. 176), 47.
Veazie *v.* Penobscot, etc., R. Co. (49 Me. 119), 914.
Vecchioni *v.* New York, etc., Ry. Co. (191 Mass. 9; 77 N. E. Rep. 306), 526.
Vedder *v.* Fellows (20 N. Y. 126), 143.
Vessels *v.* Metropolitan St. Ry. Co. (108 S. W. Rep. 578), 801.
Vicars *v.* Wilcox (8 East. 1; 2 Greenl. Evid. 210), 24.
Vickery *v.* Omaha, K. C. & E. R. Co. (93 Mo. App. 1), 9.
Vick *v.* New York, etc., R. Co. (95 N. Y. 267; 17 Am. & Eng. R. Cas. 609), 139.
Vicksburg, etc., R. Co. *v.* McGowan (62 Miss. 682), 391.
Vicksburg *v.* McLain (67 Miss. 4; 6 So. Rep. 774), 198.
Vicksburg, etc., R. Co. *v.* O'Brien (119 U. S. 99), 92.
Vicksburg, etc., R. Co. *v.* Putnam (118 N. S. 545; 27 Am. & Eng. R. Cas. 291), 105.
Victor, etc., Co. *v.* Muir (20 Colo. 320; 38 Pac. Rep. 378; 26 L. R. A. 435), 356.

[*References are to sections.*]

Victor *v.* Pennsylvania R. Co. (164 Pa. St. 195; 30 Atl. Rep. 381), 789.
Victorian Ry. Co. *v.* Coultas (13 App. Cas. 222; 6 Ry. & C. T. Cas. 68), 171.
Viets *v.* Toledo, etc., R. Co. (55 Mich. 120; 20 N. W. Rep. 818; 18 Am. & Eng. R. Cas. 11), 301.
Vimont *v.* Chicago, etc., R. Co. (71 Iowa 58; 32 N. W. Rep. 100; 28 Am. & Eng. R. Cas. 210), 791.
Vincennes *v.* Thuis (28 Ind. App. 523; 63 N. E. Rep. 315), 1039.
Vincennes, etc., Co. *v.* White (Ind., 24 N. E. Rep. 745), 353.
Vindicator Consolidated, etc., Co. *v.* Firstbrook (86 Pac. Rep. 313), 504.
Vinson *v.* Los Angeles & Pac. R. Co. (2 Pac. Rep. 53; 147 Cal. 479), 486.
Vinton *v.* Middlesex R. Co. (11 Allen [Mass.] 304), 588.
Vion *v.* Brooks-Scanlon Lumber Co. (99 Minn. 97), 109.
Virginia, etc., R. Co. *v.* Clower's Admr. (102 Va. 867; 47 S. E. Rep. 1003), 547.
Virginia, etc., Ry. Co. *v.* Hawk (160 Fed. Rep. 348), 964.
Virginia, etc., R. Co. *v.* Sangor (15 Gratt. [Va.] 230), 594.
Virginia, etc., R. Co. *v.* Sayers (26 Gratt. [Va.] 328), 92.
Virginia, etc., R. Co. *v.* White (84 Va. 498; 5 S. E. Rep. 573; 34 Am. & Eng. R. Cas. 22), 398.
Virginia Midland R. Co. *v.* Boswell (82 Va. 932; 7 S. E. Rep. 383), 1084.
Virginia Midland R. Co. *v.* Roach (83 Va. 375; 5 S. E. Rep. 175; 34 Am. & Eng. R. Cas. 271), 1071.
Virginia Midland R. Co. *v.* Washington (86 Va. 629; 10 S. E. Rep. 927; 43 Am. & Eng. R. Cas. 688), 817.
Vito *v.* West Chester & Electric Ry. Co. (66 Atl. Rep. 659), 500.
Voak *v.* Northern, etc., R. Co. (75 N. Y. 320), 951.
Voelker *v.* Chicago, etc., Ry. Co. (129 Fed. Rep. 522), 271.
Voigt *v.* Baltimore, etc., Ry. Co. (176 U. S. 498), 506.
Vosburg *v.* Lake Shore, etc., R. Co. (94 N. Y. 378), 255.
Vose *v.* Lancashire, etc., R. Co. (2 H. & N. 728; 4 Jur. [N. S.] 364; 24 L. & Ex. 244), 461.
Voshefsky *v.* Hillside Coal Co. (21 App. Div. 168; 47 N. Y. Supp. 386), 463.

W

Wabash R. Co. *v.* Burris (111 Ill. App. 258), 249.
Wabash R. Co. *v.* Coble (113 Ill. 115), 973.
Wabash, etc., R. Co. *v.* Conkling (15 Ill. App. 157), 328.
Wabash, etc., R. Co. *v.* Deardruff (14 Ill. App. 401), 332.
Wabash R. Co. *v.* Elliott (98 Ill. 481; 4 Am. & Eng. R. Cas. 651), 399.
Wabash, etc., R. Co. *v.* Farver (111 Ind. 195; 12 N. E. Rep. 296; 31 Am. & Eng. R. Cas. 134), 294.
Wabash R. Co. *v.* Fox (Ohio 59 N. E. Rep. 888; 64 Ohio St. 133), 50.
Wabash, etc., R. Co. *v.* Hawk (121 Ill. 259; 12 N. E. Rep. 253; 31 Am. & Eng. R. Cas. 306), 472.
Wabash R. R. Co. *v.* Hencks (91 Ill. 406), 451.
Wabash R. Co. *v.* Hicks (13 Ill App. 407), 990.
Wabash R. Co. *v.* Jellison (124 Ill. App. 652), 555.
Wabash R. Co. *v.* Jones (5 Ill. App. 607), 459.
Wabash R. Co. *v.* Keim (42 Ill. App. 272), 74.
Wabash R. Co. *v.* Kithcart (149 Fed. Rep. 108), 273.
Wabash, etc., R. Co. *v.* Koenigsam (13 Ill. App. 505), 605.
Wabash R. Co. *v.* Krugh (13 Ill. App. 431), 883.
Wabash R. Co. *v.* McDaniels (107 U. S. 454; 2 Sup. Ct. Rep. 932), 249.
Wabash R. Co. *v.* Mathew (199 U. S. 605; 50 L. Ed. 329), 578.
Wabash, etc., R. Co. *v.* Moran (13 Ill. App. 72), 453.
Wabash, etc., R. Co. *v.* Peyton (106 Ill. 534; 46 Am. Rep. 705; 18 Am. & Eng. R. Cas. 1), 167.
Wabash R. Co. *v.* Probst (92 Ill. App. 485), 358.
Wabash, etc., R. Co. *v.* Rector (104 Ill. 296), 692.
Wabash R. Co. *v.* Savage (110 Ind. 156), 736.
Wabash R. Co. *v.* Schevers (18 Ill. App. 52), 202.
Wabash R. Co. *v.* Shacklett (105 Ill. 364; 12 Am. & Eng. R. Cas. 106), 675.
Wabash R. Co. *v.* Thomas (117 Ill. App. 110), 368.
Wabash R. Co. *v.* Thompson (10 Ill. App. 271), 404.
Wabash R. Co. *v.* Trust Co. (23 Fed. Rep. 738), 997.
Wabash, St. L. & P. R. Co. *v.* Wallace (110 Ill. 114; 19 Am. & Eng. R. Cas. 359), 451.
Wabash, etc., R. Co. *v.* Weisback (14 Ill. App. 525), 453.
Waddell *v.* Metropolitan R. Co. (88 S. W. Rep. 765), 183.
Wadsworth *v.* Boston, etc., R. Co. (182 Mass. 572; 66 N. E. Rep. 421), 759.
Waechter *v.* St. Louis, etc., R. Co. (88 S. W. Rep. 147), 178.
Wagner *v.* Atlantic Coast Line R. Co. (61 S. E. Rep. 171), 625.
Wagner *v.* Boston, etc., Ry. Co. (188 Mass. 487; 74 N. E. Rep. 919), 374.
Wagner *v.* Elevated R. Co. (188 Mass. 487; 74 N. E. Rep. 919), 243.
Wagner *v.* Lamont (135 Mich. 521; 98 N. W. Rep. 1), 94.
Wagner *v.* Missouri Pacific Ry. Co. (97 Mo. 10 S. W. Rep. 486; 3 L. R. A. 156), 670.
Wagner *v.* New York, etc., R. Co. (86

[References are to sections.]

N. Y. S. R. 921; 93 App. Div. 14), 341.
Wagner *v.* New York, etc., R. Co. (78 N. Y. S. 696; 76 App. Div. 552), 254.
Wagoner *v.* Wabash R. Co. (94 S. W. Rep. 293), 682.
Wait *v.* Omaha, etc., Ry. Co. (165 Mo. 612; 65 S. W. Rep. 1028), 331.
Waite *v.* Northeastern R. Co. (3 El. Bl. & El. 719), 1058.
Wakefield *v.* Connecticut, etc., R. Co. (37 Vt. 330), 964.
Waldhier *v.* Hannibal, etc., R. Co. (87 Mo. 37), 419.
Waldhier *v.* Railroad (71 Mo. 515), 135.
Walker *v.* Boston, etc., R. Co. (128 Mass. 8), 486.
Walker *v.* Carolina Central R. Co. (135 N. C. 738; 47 S. E. Rep. 675), 382.
Walker *v.* Erie R. Co. (63 Barb. [N. Y.] 260), 576.
Walker *v.* Gillett (59 Kan. 214; 52 Pac. Rep. 442; 10 Am. & Eng. R. Cas. [N. S.] 140), 491.
Walker *v.* Louis Werner, etc., Co. (Ark., 88 S. W. Rep. 988), 399.
Walker *v.* Vicksburg, etc., R. Co. (41 La. Ann. 795; 6 So. Rep. 916; 7 L. R. A. 111; 41 Am. & Eng. R. Cas. 172), 787.
Walker *v.* Vicksburg, etc., R. Co. (La., 34 So. Rep. 749), 65.
Walkowski *v.* Penokee, etc., Con. Mines (115 Mich. 629; 73 N. W. Rep. 95; 41 L. R. A. 33), 146.
Wallace *v.* Boston, etc., R. Co. (72 N. H. 504; 57 Atl. Rep. 913), 263.
Wallace *v.* Central, etc., Ry. Co. (63 Hun 632; 18 N. Y. S. 280), 258.
Wallace *v.* Chicago, etc., R. Co. (99 N. W. Rep. 1135), 57.
Wallace *v.* St. Louis, etc., R. Co. (74 Mo. 594), 661.
Wallace *v.* Western, etc., R. Co. (98 N. Car. 494; 4 S. E. Rep. 503; 2 Am. St. Rep. 346; 34 Am. & Eng. R. Cas. 553), 669.
Wallace *v.* Western, etc., R. Co. (104 No. Car. 442; 10 S. E. Rep. 552; 41 Am. & Eng. R. Cas. 212), 182.
Wallace *v.* Western, etc., R. Co. (101 No. Car. 454; 8 S. E. Rep. 166; 37 Am. & Eng. R. Cas. 159), 799.
Wallace *v.* Wilmington, etc., R. Co. (Del., 18 Atl. Rep. 818), 620.
Waller *v.* Hannibal, etc., Ry. Co. (83 Mo. 608), 715.
Waller *v.* Missouri Pacific Ry. Co. (59 Mo. App. 410), 625.
Walling *v.* Trinity & Brazos Valley Ry. Co. (106 S. W. Rep. 417), 651.
Walsh *v.* Fitchburg, etc., R. Co. (145 N. Y. 301; 39 N. E. Rep. 1068; 45 Am. St. Rep. 615; 27 L. R. A. 724), 1073.
Walsh *v.* Missouri Pac. R. Co. (102 Mo. 582; 14 S. W. Rep. 873), 104.
Walsh *v.* New York, etc., R. Co. (160 Mass. 571; 36 N. E. Rep. 584; 39 Am. St. Rep. 514), 463.
Walter *v.* Chicago, etc., R. Co. (39 Iowa 33; 9 Am. Ry. Rep. 78; 20 Am. Ry. Rep. 319), 785.
Walters *v.* Chicago, etc., R. Co. (36 Iowa 458), 62.
Walters *v.* Chicago, etc., R. Co. (41 Iowa 71), 198.
Walthers *v.* Chicago, etc., R. Co. (72 Ill. App. 354), 715.
Wamsley *v.* Cleveland, etc., Ry. Co. (82 N. E. Rep. 490), 985.
Wandell *v.* Corbin (17 N. Y. S. R. 18; 1 N. Y. Supp. 795), 557.
Wanless *v.* Northeastern R. Co. (25 L. T. 103) 923.
Warburton *v.* Great Western R. Co. (2 Ex. 30; 36 L. J. Ex. 9; 4 H. & C. 695; 15 W. R. 108; 15 L. T. 361), 481.
Ward *v.* Bonner (80 Tex. 168; 15 S. W. Rep. 805), 333.
Ward *v.* Brooklyn Heights, etc., R. Co. (104 N. Y. Supp. 95; 115 App. Div. 104), 1055.
Ward *v.* Chesapeake, etc., R. Co. (39 W. Va. 46; 19 S. E. Rep. 389), 500.
Ward *v.* Chicago, etc., R. Co. (85 Wis. 601; 55 N. W. Rep. 771), 104.
Ward *v.* Manhattan Ry. Co. (88 N. Y. S. R. 758; 95 App. Div. 437), 383.
Ward *v.* Railway Co. (29 Wis. 148), 249.
Warden *v.* Humeston, etc., R. Co. (72 Iowa 201; 33 N. W. Rep. 629), 69.
Warden *v.* Humeston, etc., R. Co. (76 Iowa 310; 41 N. W. Rep. 26), 192.
Warden *v.* Missouri Pacific Ry. Co. (35 Mo. App. 631), 724.
Warden *v.* Railroad Co. (94 Ala. 277; 10 So. Rep. 276; 14 L. R. A. 552), 349.
Warden *v.* Railway Co. (137 Mass. 204), 249.
Warner *v.* Baltimore, etc., R. Co. (168 U. S. 339; 42 L. Ed. 491), 632.
Warner *v.* Erie R. Co. (39 N. Y. 468), 461.
Warner *v.* New York R. Co. (44 N. Y. 465), 661.
Warren *v.* Chicago, etc., R. Co. (113 Mo. App. 498; 87 S. W. Rep. 585), 360.
Warren *v.* Fitchburg, etc., R. Co. (8 Allen [Mass.] 227), 552.
Warren *v.* Southern, etc., R. Co. (37 Kan. 408; 15 Pac. Rep. 601; 31 Am. & Eng. R. Cas. 10), 779.
Washburn *v.* Nashville, etc., R. Co. (3 Head. [Tenn.] 638), 479.
Washington A. & G. R. Co. *v.* Brown (84 U. S. 453; 17 Wall. 445; 21 Ed. 675), 235.
Washington *v.* Baltimore & O. R. Co. (17 W. Va. 190; 10 Am. & Eng. R. Cas. 749), 4.
Washington, etc., Ry. Co. *v.* Chapman (26 App. [D. C.] 472), 576.
Washington, etc., R. Co. *v.* Harmon (147 U. S. 571; 13 Sup. Ct. Rep. 557), 708.
Washington, etc., R. Co. *v.* Hickey (166 U. S. 521; 41 L. Ed. 1101), 33.

[*References are to sections.*]

Washington, etc., Ry. Co. *v.* McDade (135 U. S. 554), 141.
Waterman *v.* Chicago, etc., R. Co. (82 Wis. 613; 52 N. W. Rep. 247; 52 Am. & Eng. R. Cas. 592), 183.
Watkins *v.* Birmingham, etc., R. Co. (120 Ala. 147), 789.
Watson *v.* Coal Co. (52 Mo. App. 366), 128.
Watson *v.* Erie R. Co. (8 Ohio N. P. 18; 10 Ohio S. & C. P. 454), 88.
Watson *v.* Georgia, etc., R. Co. (81 Ga. 476; 7 S. E. Rep. 854), 787.
Watson *v.* Houston, etc., R. Co. (58 Tex. 434; 11 Am. & Eng. R. Cas. 313), 352.
Watson *v.* Kansas, etc., Co. (52 Mo. App. 366), 320.
Watson *v.* Manitou & Pike's Peak Ry. Co. (92 Pac. Rep. 17), 861.
Watson *v.* Mound City, etc., Railroad (133 Mo. 246; 34 S. W. Rep. 573), 135.
Watson *v.* Wabash, etc., R. Co. (66 Iowa 164; 23 N. W. Rep. 380; 19 Am. & Eng. R. Cas. 114), 1069.
Watts *v.* Camours (115 U. S. 353), 858.
Watts *v.* Hart (7 Wash. 178; 34 Pac. Rep. 423, 771), 350.
Waxahachie Oil, etc., Co. *v.* McLain (Tex., 66 S. W. Rep. 226), 308.
Way *v.* Chicago, etc., R. Co. (73 Iowa 463; 35 N. W. Rep. 525; 34 Am. & Eng. R. Cas. 286), 657.
Wayne, etc., R. Co. *v.* Gildersleeve (33 Mich. 133), 348.
Weaver *v.* Columbus, etc., Ry. Co. (81 N. E. Rep. 180), 957.
Weaver *v.* Southern Ry. Co. (56 S. E. Rep. 657; 76 S. C. 49), 411.
Webb *v.* Denver, etc., R. Co. (7 Utah 363; 26 Pac. Rep. 981), 485.
Webb *v.* East Tenn. R. Co. (88 Tenn. 119; 12 S. W. Rep. 428; 42 Am. & Eng. R. Cas. 44), 58.
Webb *v.* Gulf, etc., R. Co. (Tex., 65 S. W. Rep. 684), 339.
Webb *v.* Penobscot, etc., R. Co. (57 Me. 119), 946.
Webb *v.* Portland R. Co. (57 Me. 117), 877.
Webb *v.* Richmond, etc., R. Co. (97 N. C. 387; 2 S. E. Rep. 440), 485.
Weber *v.* Kansas City, etc., R. Co. (100 Mo. 194; 12 S. W. Rep. 804; 18 Am. St. Rep. 541; 7 L. R. A. 819), 708.
Weber *v.* New York, etc., R. Co. (58 N. Y. 451), 916.
Webster *v.* Chesapeake & O. Ry. Co. (105 S. W. Rep. 945), 862.
Webster *v.* Fitchburg, etc., R. Co. (161 Mass. 298; 37 N. E. Rep. 165; 58 Am. & Eng. R. Cas. 1), 552.
Webster *v.* Hudson River R. Co. (38 N. Y. 260), 1041.
Webster *v.* Norwegian, etc., Co. (137 Cal. 399; 70 Pac. Rep. 276), 69.
Webster *v.* Rome, etc., R. Co. (115 N. Y. 112; 21 N. E. Rep. 725), 803.
Weed *v.* Chicago, etc., R. Co. (Neb., 99 N. W. Rep. 827), 249.
Weed *v.* Railroad Co. (17 N. Y. 362), 663.
Week *v.* Fremont, etc., Co. (3 Wash. 629; 29 Pac. Rep. 215), 344.
Weeks *v.* New Orleans, etc., R. Co. (32 La. Ann. 615), 405.
Weeks *v.* New Orleans, etc., R. Co. (40 La. Ann. 800; 5 So. Rep. 72; 8 Am. St. Rep. 560), 795.
Weeks *v.* New York, etc., R. Co. (72 N. Y. 50; 9 Hun 669; 28 Am. Rep. 104), 767.
Weeks *v.* Scharer (111 Fed. Rep. 330; 49 C. C. A. 372), 354.
Weger *v.* Pennsylvania R. R. Co. (55 Pa. [5 P. F. Sm.] 460), 3.
Weideman *v.* Tacoma, etc., R. Co. (7 Wash 517; 35 Pac. Rep. 414), 92.
Weightman *v.* Washington (66 U. S. 39), 133.
Weiler *v.* Manhattan R. Co. (6 N. Y. Supp. 320), 183.
Weisser *v.* Southern Pac. R. Co. (82 Pac. Rep. 439), 500.
Weist *v.* Coal Cr. R. Co. (Wash., 84 Pac. Rep. 725), 78.
Welch *v.* New York, etc., R. Co. (43 N. Y. S. R. 958; 63 Hun 625), 348.
Weldon *v.* Third Ave. R. Co. (3 App. Div. 370; 38 N. Y. Supp. 206), 1057.
Weller *v.* Chicago, etc., Ry. Co. (120 Mo. 635; 23 S. W. Rep. 1061; 25 S. W. Rep. 532), 1011.
Weller *v.* Chicago, etc., R. Co. (164 Mo. 180; 64 S. W. Rep. 141; 86 Am. St. Rep. 592), 996.
Wellman *v.* Oregon, etc., R. Co. (21 Ore. 530; 28 Pac. Rep. 625), 498.
Wellmeyer *v.* St. Louis Transit Co. (95 S. W. Rep. 925), 801.
Wells *v.* Burlington, etc., R. Co. (56 Iowa 520), 381.
Wells *v.* Denver, etc., R. Co. (7 Utah 482; 27 Pac. Rep. 688), 191.
Wells *v.* New York, etc., R. Co. (24 N. Y. 181), 848.
Welsch *v.* Hannibal, etc., R. Co. (72 Mo. 451; 37 Am. Rep. 440; 6 Am. & Eng. R. Cas. 75), 931.
Welsh *v.* Alabama, etc., R. Co. (70 Miss. 20; 11 So. Rep. 723), 404.
Welsh *v.* Butts (202 Pa. 59; 51 Atl. Rep. 591), 309.
Welsh *v.* New York, etc., R. Co. (176 Mass. 393; 57 N. E. Rep. 668), 511.
Welsh *v.* West Jersey R. Co. (62 N. J. L. 655; 42 Atl. Rep. 736; 15 Am. & Eng. Cas. [N. S.] 674), 736.
Wendall *v.* Chicago & Alton R. Co. (100 Mo. App. 556; 75 S. W. Rep. 689), 156.
Wendell *v.* New York, etc., R. Co. (91 N. Y. 420), 1005.
Wengler *v.* Missouri Pacific Ry. Co. (16 Mo. App. 493), 1009.
Wennecker *v.* Missouri, etc., R. Co. (169 Mo. 592; 70 S. W. Rep. 145), 566.
Wentworth *v.* Duffy (68 Mo. App. 513), 1105.
Wentworth *v.* Eastern, etc., R. Co. (143 Mass. 248; 9 N. E. Rep. 563), 99.

[*References are to sections.*]

Werle *v.* Long Island R. Co. (98 N. Y. 650; 21 Am. & Eng. R. Cas. 429), 801.
Wertheimer *v.* Saunders (95 Wis. 573; 70 N. W. Rep. 824; 37 L. R. A. 146), 284.
Wesley *v.* Chicago, etc., R. Co. (84 Iowa 441; 51 N. W. Rep. 163), 1022.
West Chester, etc., R. Co. *v.* McElwee (67 Pa. St. 311), 94.
West Chicago, etc., R. Co. *v.* Anderson (200 Ill. 329; 65 N. E. Rep. 717), 229.
West Chicago R. Co. *v.* Binder (52 Ill. App. 420), 784.
West Chicago R. Co. *v.* Dougherty (110 Ill. App. 204; 209 Ill. 241; 70 N. E. Rep. 586), 1050.
West Chicago, etc., R. Co. *v.* Dedloff (92 Ill. App. 547), 1039.
West Chicago R. Co. *v.* Martin (47 Ill. App. 610), 675.
West Chicago, etc., R. Co. *v.* Peters (196 Ill. 298; 63 N. E. Rep. 662), 1055.
West Chicago, etc., R. Co. *v.* Piper (165 Ill. 325; 64 Ill. App. 605; 46 N. E. Rep. 186), 1044.
West *v.* St. Louis, etc. Co. (63 Ill. 545), 235.
West Hamshire Co. *v.* Great Eastern R. Co. (64 L. J. Q. B. [N. S.] 340), 623.
Westbrook *v.* Mobile, etc., R. Co. (66 Miss. 560; 6 So. Rep. 321), 1058.
Westcott *v.* New York, etc., R. Co. (153 Mass. 460; 27 N. E. Rep. 10), 340.
Westerkamp *v.* Chicago, B. & Q. Ry. Co. (92 Pac. Rep. 687), 1011.
Western Anthracite Co. *v.* Beaver (95 Ill. App. 95; 61 N. E. Rep. 335), 6.
Western A. R. Co. *v.* Strong (52 Ga. 461; 8 Am. Ry. Rep. 13), 58.
Western Maryland R. Co. *v.* Herold (74 Md. 519; 22 Atl. Rep. 323), 788.
Western Steel Car & Foundry Co. *v.* Nowalaniak (135 Ill. App. 137), 948.
Western Union R. Co. *v.* Fulton (64 Ill. 271), 960.
Western Union Tel. Co. *v.* McGill (57 Fed. Rep. 699), 68.
Western, etc., R. Co. *v.* Atlanta (74 Ga. 774; 19 Am. & Eng. R. Cas. 233), 961.
Western, etc., R. Co. *v.* Bishop (50 Ga. 465), 850.
Western, etc., R. Co. *v.* Drysdale (51 Ga. 644; 7 Am. Ry. Rep. 343), 177.
Western, etc., R. Co. *v.* Jones (65 Ga. 631; 8 Am. & Eng. R. Cas. 267), 968.
Western, etc., R. Co. *v.* Moran (116 Ga. 441; 42 S. E. Rep. 737), 338.
Western, etc., Ry. Co. *v.* Russell (Ala., 39 So. Rep. 311), 258.
Western, etc., R. Co. *v.* Sistrunk (85 Ala. 352; 5 So. Rep. 79), 975.
Western, etc., R. Co. *v.* Turner (72 Ga. 292; 53 Am. Rep. 842; 28 Am. & Eng. R. Cas. 455), 178.
Western, etc., R. Co. *v.* Voils (98 Ga. 446; 26 S. E. Rep. 483; 35 L. R. A. 655), 696.
Western R. Co. *v.* Young (51 Ga. 489; 7 Am. Ry. Rep. 352), 789.
Western, etc., R. Co. *v.* Young (81 Ga. 397; 7 S. E. Rep. 912; 37 Am. & Eng. R. Cas. 489), 60.
Waston *v.* Lackawana Co. (105 Mo. App. 702), 404.
Whalen *v.* Arcata, etc. R. Co. (92 Cal. 669; 28 Pac. Rep. 833), 998.
Whalen *v.* Chicago, etc., R. Co. (75 Iowa 563; 39 N. W. Rep. 894; 38 Am. & Eng. R. Cas. 141), 522.
Whalen *v.* Illinois, etc., R. Co. (16 Ill. App. 320), 374.
Whalen *v.* Mad River R. Co. (8 Ohio St. 249), 468.
Whalen *v.* Michigan, etc., R. Co. (114 Mich. 512; 72 N. W. Rep. 323), 500.
Whalen *v.* New York, etc., R. Co. (58 Hun 431; 35 N. Y. S. R. 556; 12 N. Y. Supp. 527), 1001.
Whalen *v.* St. Louis, etc., R. Co. (60 Mo. 323; 9 Am. Ry. Rep. 224), 771.
Wheaton *v.* North Beach R. Co. (36 Cal. 590), 582.
Wheelan *v.* Chicago, etc., R. Co. (85 Iowa 167; 52 N. W. Rep. 119; 49 Am. & Eng. R. Cas. 693), 191.
Whelan *v.* Georgia, etc., R. Co. (84 Ga. 506; 10 S. E. Rep. 1091; 44 Am. & Eng. R. Cas. 335), 788.
Whelan *v.* Rio Grande, etc., R. Co. (111 Fed. Rep. 326), 64.
Whelen *v.* Chicago, etc., R. Co. (75 Wis. 654; 44 N. W. Rep. 849; 41 Am. & Eng. R. Cas. 558), 875.
Whelen *v.* New York, etc., R. Co. (38 Fed. Rep. 15), 922.
Wheeler *v.* San Francisco R. Co. (31 Cal. 46), 810.
Wheeling & L. E. Ry. Co. *v.* Parker (29 Ohio Civ. St. R. 1), 959.
Wheeling, etc., R. Co. *v.* Suhrwiar (67 Ohio St. 497; 67 N. E. Rep. 1100), 1055.
Wheelock *v.* Boston, etc., R. Co. (105 Mass. 203), 632.
Whelton *v.* West End R. Co. (172 Mass. 555; 52 N. E. Rep. 1072), 509.
White *v.* Boston, etc., R. Co. (136 Mass. 321), 596.
White *v.* Boston, etc., R. Co. (144 Mass. 404; 11 N. E. Rep. 552; 30 Am. & Eng. R. Cas. 615), 650.
White *v.* Central R. Co. (83 Ga. 595; 10 S. E. Rep. 273), 875.
White *v.* Fitchburg, etc., R. Co. (136 Mass. 321; 18 Am. & Eng. R. Cas. 140), 578.
White *v.* Green (Tex., 82 S. W. Rep. 329), 286.
White *v.* Milwaukee, etc., R. Co. (61 Wis. 536; 21 N. W. Rep. 524; 50 Am. Rep. 154; 18 Am. & Eng. R. Cas.), 93.
White *v.* Rio Grande, etc., R. Co. (Utah, 71 Pac. Rep. 593), 40.
White *v.* Southern R. Co. (123 Ga. 353; 51 S. E. Rep. 411), 91.
White *v.* Wabash R. Co. (34 Mo. App. 57), 878.
White *v.* Whitman Co. (58 Hun 381; 12 N. Y. Supp. 188; 131 N. Y. 631; 30 N. E. Rep. 236), 275.

[*References are to sections.*]

White *v.* Wilmington City R. Co. (Del., 63 Atl. Rep. 931), 33.
Whitehead *v.* St. Louis, etc., R. Co. (22 Mo. App. 60), 824.
Whitehead *v.* St. Louis, etc., R. Co. (99 Mo. 263; 11 S. W. Rep. 751; 6 L. R. A. 409), 670.
Whitelaw *v.* Memphis, etc., R. Co. (16 Lea [Tenn.] 391; 1 S. W. Rep. 37), 308.
Whitford *v.* Panama R. Co. (23 N. Y. 467), 48.
Whitley *v.* Chicago, B. & Q. Ry. Co. (83 S. W. Rep. 68; 109 Mo. App. 123), 408.
Whitlow *v.* Nashville, etc., R. Co. (Tenn., 84 S. W. Rep. 618), 47.
Whitman *v.* Fisher (98 Me. 577; 57 Atl. Rep. 895), 1056.
Whitman *v.* Wisconsin, etc., R. Co. (58 Wis. 408; 17 N. W. Rep. 124; 12 Am. & Eng. R. Cas. 214), 468.
Whitmore *v.* Boston, etc., R. Co. (150 Mass. 477; 23 N. E. Rep. 220), 412.
Whitney *v.* Maine, etc., R. Co. (69 Me. 208), 995.
Whitney *v.* Texas Cent. R. Co. (110 S. W. Rep. 70), 1069.
Whitaker *v.* Eighth Ave., etc., R. Co. (51 N. Y. 295), 92.
Whittaker *v.* Delaware, etc., R. Co. (49 Hun 400; 22 N. Y. S. R. 405), 471.
Whittaker *v.* Delaware, etc., R. Co. (126 N. Y. 544; 27 N. E. Rep. 1042), 263.
Whittaker *v.* Helena (14 Mont. 124; 35 Pac. Rep. 904; 43 Am. St. Rep. 621), 1053.
Whittelsey *v.* Burlington, etc., R. Co. (121 Iowa 597; 90 N. W. Rep. 516), 97.
Whitton *v.* Chicago, etc., R. Co. (2 Biss. [U. S.] 282), 205.
Wichita, etc., R. Co. *v.* Davis (37 Kan. 743; 16 Pac. Rep. 78; 32 Am. & Eng. R. Cas. 65), 1036.
Wiggin *v.* St. Louis (135 Mo. 558; 37 S. W. Rep. 528), 285.
Wightman *v.* Chicago, etc., R. Co. (73 Wis. 169; 40 N. W. Rep. 689; 2 L. R. A. 185), 658.
Wilburn *v.* St. Louis, etc., R. Co. (48 Mo. App. 224), 657.
Wilburn *v.* St. Louis, etc., R. Co. (36 Mo. App. 203), 714.
Wild *v.* Oregon, etc., R. Co. (21 Oregon 159; 27 Pac. Rep. 954), 321.
Wilds *v.* Brunswick, etc., R. Co. (82 Ga. 667; 9 S. E. Rep. 595), 1097.
Wilds *v.* Hudson River R. Co. (24 N. Y. 432), 451.
Wilds *v.* Hudson River R. Co. (29 N. Y. 315, 326), 661.
Wilkes *v.* Buffalo Ry. Co. (65 Atl. Rep. 787), 568.
Wilkins *v.* St. Louis, etc., R. Co. (101 Mo. 93; 13 S. W. Rep. 893), 1028.
Wilkinson, etc., Co. *v.* Dickinson (35 Ind. App. 230; 73 N. E. Rep. 957), 85.
Wilburn *v.* St. Louis, etc., R. Co. (36 Mo. App. 203), 832.
Willetts *v.* Buffalo, etc., R. Co. (14 Barb. [N. Y.] 585), 389.
Willfong *v.* Omaha, etc., R. Co. (116 Iowa 548; 90 N. W. Rep. 358), 1056.
Williams *v.* Alaska, etc., Co. (2 Alaska 43), 204.
Williams *v.* Belmont, etc., Co. (55 W. Va. 84; 46 S. E. Rep. 802), 317.
Williams *v.* Car Co. (40 La. Ann. 417), 595.
Williams *v.* Chicago, etc., R. Co. (106 Mo. App. 61; 79 S. W. Rep. 1167), 43.
Williams *v.* Chicago, etc., R. Co. (64 Wis. 1; 24 N. W. Rep. 423), 401.
Williams *v.* Chicago, etc., R. Co. (135 Ill. 491; 26 N. E. Rep. 661; 32 Ill. App. 339), 964.
Williams *v.* Chicago, etc., R. Co. (111 N. W. Rep. 596), 878.
Williams *v.* Choctaw & R. Co. (149 Fed. Rep. 104), 413.
Williams *v.* Delaware, etc., R. Co. (116 N. Y. 628; 22 N. E. Rep. 1117; 41 Am. & Eng. R. Cas. 254), 341.
Williams *v.* Delaware, etc., R. Co. (2 N. Y. Supp. 435; 18 N. Y. S. R. 857; 50 Hun 600), 347.
Williams *v.* Fresno, etc., Co. (96 Cal. 14; 30 Pac. Rep. 961; 31 Am. St. Rep. 172), 284.
Williams *v.* Great Northern R. Co. (68 Minn. 55), 101.
Williams *v.* Iowa Central R. Co. (96 N. W. Rep. 774), 522.
Williams *v.* Kansas City, etc. R. Co. (96 Mo. 275; 9 S. W. Rep. 573; 37 Am. & Eng. R. Cas. 329), 843.
Williams *v.* Louisville, etc., R. Co. (23 Ky. L. R. 1124; 64 S. W. Rep. 738), 342.
Williams *v.* Louisville & N. R. Co. (43 So. Rep. 576), 586.
Williams *v.* Missouri Pacific R. Co. (109 Mo. 475; 18 S. W. Rep. 1098), 482.
Williams *v.* Mobile, etc., R. Co. (Miss., 19 So. Rep. 90), 1070.
Williams *v.* Nally (20 Ky. L. R. 244; 45 S. W. Rep. 874), 92.
Williams *v.* Nashville (Tenn., 63 S. W. Rep. 231), 872.
Williams *v.* Northern, etc., Co. (Minn., 113 Fed. Rep. 882), 332.
Williams *v.* Quebec S. S. Co. (126 Fed. Rep. 591), 55.
Williams *v.* St. Louis, etc., Ry. Co. (96 S. W. Rep. 307), 739.
Williams *v.* Southern Pacific R. Co. (9 Pac. Rep. 152; 11 Pac. Rep. 849), 1084.
Williams *v.* Southern R. Co. (68 S. C. 369; 47 S. E. Rep. 706), 91.
Williams *v.* South, etc., R. Co. (91 Ala. 635; 9 So. Rep. 77), 62.
Williams *v.* Texas, etc., R. Co. (60 Tex. 205), 1058.
Williams *v.* Vanderbilt (28 N. Y. 217), 663.
Williamson *v.* Central (56 S. E. Rep. 119), 561.
Williamson *v.* Grand Trunk Ry. (17 Up. Can. [C. P.] 615), 39.
Williamson *v.* Sheldon, etc., Co. (66 Vt. 427), 308.
Williard *v.* Spartanburg, etc., R. Co. (124 Fed. Rep. 796), 235.

[*References are to sections.*]

Willis *v.* Long Island R. Co. (32 Barb. 398), 774.
Willis *v.* Long Island R. Co. (34 N. Y. 670), 801.
Willis *v.* Missouri Pac. R. Co. (61 Tex. 432; 23 Am. & Eng. R. Cas. 379), 44.
Willmott *v.* Consolidated, etc., Ry. Co. (106 Mo. 535; 17 S. W. Rep. 490), 851.
Willoughby *v.* Chicago, etc., R. Co. (37 Iowa 432), 995.
Wills *v.* Cape Girardeau, etc., R. Co. (44 Mo. App. 51), 407.
Wilmington Star Mining Co. *v.* Fulton (27 U. S. Sup. Ct. Rep. 412), 388.
Wilmuth's Admr. *v.* Illinois Cent. R. Co. (76 S. W. Rep. 198), 269.
Wilsey *v.* Chicago, etc., R. Co. (83 Ky. 511), 729.
Wilsie *v.* Louisville, etc., R. Co. (83 Ky. 511), 557.
Wilson *v.* Bamer L., etc., Co. (108 La. Ann. 590; 32 So. Rep. 460), 64.
Wilson *v.* Brett (11 M. & W. 115), 15.
Wilson *v.* Louisville & N. R. Co. (85 Ala. 269; 4 So. Rep. 701), 152.
Wilson *v.* Madison, etc., R. Co. (18 Ind. 226), 491.
Wilson *v.* Middlesex R. Co. (107 Mass. 108; 125 Mass. 130), 561.
Wilson *v.* New Orleans, etc., R. Co. (68 Miss. 9; 8 So. Rep. 330), 785.
Wilson *v.* New York, etc., R. Co. (18 R. I. 598; 29 Atl. Rep. 300), 1053.
Wilson *v.* Northern Pac. R. Co. (26 Minn. 278; 3 N. W. Rep. 333), 39.
Wilson *v.* Rochester, etc., R. Co. (16 Barb. [N. Y.] 167), 886.
Wilson *v.* Virginia-Carolina Chemical Co. (58 S. E. Rep. 1019), 541.
Wilton *v.* Northern R. Co. (5 Ont. 490), 957.
Winchell *v.* Abbott (77 Wis. 371), 945.
Winchell *v.* New York Cent. & H. R. Co. (105 N. Y. S. 425), 664.
Winkler *v.* Philadelphia, etc., R. Co. (Del., 53 Atl. Rep. 90), 254.
Winkler *v.* St. Louis, etc., R. Co. (21 Mo. App. 99), 172.
Winnegar *v.* Central Pass. R. Co. (85 Ky. 547; 4 S. W. Rep. 237; 34 Am. & Eng. R. Cas. 462), 745.
Winnt *v.* International, etc., R. Co. (74 Tex. 32; 11 S. W. Rep. 907), 56.
Winona, etc., Co. *v.* Hohlquist (51 Ill. App. 507), 500.
Winship *v.* Boston, etc., R. Co. (170 Mass. 464; 49 N. E. Rep. 647), 677.
Winslow *v.* Boston, etc., R. Co. (11 N. Y. S. R. 831), 1075.
Winstanley *v.* Chicago, etc., R. Co. (72 Wis. 375; 39 N. W. Rep. 857; 35 Am. & Eng. R. Cas. 370), 946.
Winterbottom *v.* Wright (10 M. & W. 109), 18.
Winters *v.* Hannibal, etc., R. Co. (39 Mo. 468), 802.
Wisconsin, etc., R. Co. *v.* Ross (142 Ill. 9; 31 N. E. Rep. 412; 43 Ill. App. 454; 53 Am. & Eng. R. Cas. 73), 598.
Wise *v.* Louisville, etc., R. Co. (91 Ky. 537), 737.
Wise Terminal Co. *v.* McCormick (Va., 51 S. E. Rep. 731), 27.
Withers *v.* North Kent R. Co. (27 L. J. [Exch.] 417), 585.
Withers *v.* Railway (3 H. & N. 969), 32.
Wiwirowski *v.* Lake Shore, etc., R. Co. (124 N. Y. 420; 26 N. E. Rep. 1023; 36 N. Y. S. R. 405), 1003.
Woas *v.* Transit Co. (198 Mo. 664; 96 S. W. Rep. 1017; 7 L. R. A. [N. S.] 231), 758.
Wolf *v.* Chicago, etc., R. Co. (111 N. W. 514), 787.
Wolf *v.* Chicago Union Tr. Co. (119 Ill. App. 481), 116.
Wolsey *v.* Railroad Co. (33 Ohio St. 234), 143.
Womack *v.* Central R. Co. (80 Ga. 132; 5 S. E. Rep. 63), 61.
Womble *v.* Merchants Co. (135 N. C. 474; 47 S. E. Rep. 493), 119.
Wonder *v.* Baltimore, etc., R. Co. (32 Md. 411), 500.
Wood *v.* Central, etc., R. Co. (84 Ga. 363; 10 S. E. Rep. 967), 647.
Wood *v.* Georgia, etc., R. Co. (84 Ga. 363; 10 S. E. Rep. 967), 150.
Wood *v.* Lake Shore, etc., R. Co. (49 Mich. 370; 13 N. W. Rep. 779; 8 Am. & Eng. R. Cas. 478), 664.
Wood *v.* Luscomb (23 Wis. 287), 228.
Wood *v.* Metropolitan, etc., R. Co. (181 Mo. 433; 81 S. W. Rep. 152), 100.
Wood *v.* Rio Grande R. Co. (Utah, 79 Pac. Rep. 182), 246.
Wood *v.* Wilmington City Ry. Co. (64 Atl. Rep. 246), 110.
Wooden *v.* Western, etc., R. Co. (46 N. Y. S. R. 77; 43 N. Y. S. R. 218), 374.
Wooden *v.* Western, etc., R. Co. (25 N. Y. Supp. 977; 5 Misc. 537), 379.
Wooden *v.* Western, etc., R. Co. (126 N. Y. 10; 26 N. E. Rep. 1050), 48.
Wooden *v.* Western, etc., R. Co. (147 N. Y. 508; 70 N. Y. S. R. 83; 42 N. E. Rep. 199), 491.
Woodman *v.* Metropolitan R. Co. (149 Mass. 335; 21 N. E. Rep. 482; 38 Am. & Eng. R. Cas. 484), 285.
Woods' Admr. *v.* Southern Ry. Co. (Va., 52 S. E. Rep. 371), 252.
Woods *v.* Missouri, etc., R. Co. (51 Mo. App. 500), 94.
Woods *v.* Northern Pacific Ry. Co. (36 Wash. 658; 79 Pac. Rep. 309), 348.
Woods *v.* Southern Pacific R. Co. (9 Utah 146; 33 Pac. Rep. 628), 801.
Woodstock Iron Works *v.* Cline (43 So. Rep. 362), 188.
Woodward Iron, etc., Co. *v.* Cook (124 Ala. 343), 312.
Woodward *v.* Kentucky C. R. Co. (Ky., 15 S. W. Rep. 178), 1080.
Woodward *v.* Michigan So., etc., R. Co. (10 Ohio St. 121), 49.
Woodward *v.* New York, etc., R. Co. (106 N. Y. 369; 13 N. E. Rep. 424; 32 Am. & Eng. R. Cas. 137), 1006.
Woodworth *v.* St. Paul, etc., R. Co. (5 McCrary [U. S.] 574; 18 Fed. Rep. 282), 335.

[*References are to sections.*]

Woolery *v.* Louisville, etc., R. Co. (107 Ind. 381; 8 N. E. Rep. 226; 57 Am. Rep. 114; 27 Am. & Eng. R. Cas. 210), 789.
Woodley *v.* Baltimore, etc., R. Co. (8 Mackey [D. C.] 542), 943.
Wooley *v.* Grand St., etc., R. Co. (83 N. Y. 121; 3 Am. & Eng. R. Cas. 398), 97.
Woolsey *v.* Brooklyn Heights R. Co. (108 N. Y. S. 16), 651.
Woolwine *v.* Chesapeake, etc., R. Co. (36 W. Va. 329; 15 S. E. Rep. 81; 50 Am. & Eng. R. Cas. 37), 859.
Wooster *v.* Chicago, etc., R. Co. (74 Iowa 593; 35 Am. & Eng. R. Cas. 152), 398.
Worcester *v.* Galveston, etc., R. Co. (Tex., 91 S. W. Rep. 339), 886.
Worden *v.* Hinnesboy & S. Ry. Co. (72 Iowa 201; 33 N. W. Rep. 629), 3.
Worden *v.* Humeston, etc., R. Co. (76 Iowa 310; 41 N. W. Rep. 26), 83.
Worheide *v.* Missouri, etc., Co. (32 Mo. App. 367), 337.
Wormell *v.* Maine C. R. Co. (79 Me. 397; 10 Atl. Rep. 49; 31 Am. & Eng. R. Cas. 272), 399.
Wormington *v.* Atchison, etc., R. Co. (46 Mo. App. 159), 483.
Worthington *v.* Central Vermont R. Co. (64 Vt. 107; 23 Atl. Rep. 590; 15 L. R. A. 326; 52 Am. & Eng. R. Cas. 384), 801.
Worthington *v.* Coforth (Ala., 26 So. Rep. 531), 308.
Wright *v.* Boston, etc., R. Co. (142 Mass. 296; 7 N. E. Rep. 866; 28 Am. & Eng. R. Cas. 652), 861.
Wright *v.* Boston & M. R. R. (65 Atl. Rep. 687), 1032.
Wright *v.* Boston, etc., R. Co. (129 Mass. 440; 2 Am. & Eng. R. Cas. 121), 1062.
Wright *v.* Chicago, etc., R. Co. (27 Ill. App. 212), 25.
Wright *v.* Chicago, etc., R. Co. (Ind., 66 N. E. Rep. 454), 369.
Wright *v.* Great Northern R. Co. (L. R., 8 Ir. 257), 775.
Wright *v.* Illinois Cent. R. Co. (119 Ill. App. 132), 464.
Wright *v.* London, etc., R. Co. (33 L. T. 830; L. R., 1 Q. B. D. 252; 45 L. J. Q. B. 570), 864.
Wright *v.* Malden, etc., R. Co. (4 Allen 283), 1058.
Wright *v.* Midland R. Co. (42 L. J. Ex. 89; L. R., 8 Ex. 137; 21 W. R. 460; 29 L. A. 436), 674.
Wright *v.* Pennsylvania R. Co. (3 Pittsb. [Pa.] 116), 679.
Wright *v.* Southern Ry. Co. (127 N. C. 227; 37 S. E. Rep. 221), 119.
Wright *v.* Southern R. Co. (123 N. Car. 280; 31 S. E. Rep. 652; 12 Am. & Eng. R. Cas. [N. S.] 717), 498.
Wrightsville, etc., R. Co. *v.* Lattimore (118 Ga. 581; 45 S. E. Rep. 453), 341.
Wurtenberger *v.* Metropolitan St. Ry. Co. (Kan., 75 Pac. Rep. 1049), 879.
Wutilla *v.* Duluth Lumber Co. (37 Minn. 153; 33 N. W. Rep. 551; 5 Am. St. Rep. 832), 307.
Wyatt *v.* Citizens Ry. Co. (55 Mo. 485), 784.
Wyatt *v.* Great Western R. Co. (6 B. & S. 709; 34 L. J. Q. B. 204), 1002.
Wyman *v.* New York, etc., R. Co. (46 Me. 162), 683.
Wymore *v.* Wahaska County (78 Iowa 396; 43 N. W. Rep. 264; 16 Am. St. Rep. 449; 6 L. R. A. 545), 1058.
Wynne *v.* Conklin (86 Ga. 40; 12 S. E. Rep. 183), 269.
Wysocki *v.* Wisconsin, etc., Co. (121 Wis. 96; 98 N. W. Rep. 950), 87.

Y

Yahn *v.* Ottumwa (60 Iowa 429; 15 N. W. Rep. 257), 1056.
Yager *v.* Receivers (4 Hughes [U. S.] 192), 467.
Yancey *v.* Wabash R. Co. (93 Mo. 437, 438; 6 S. W. Rep. 272), 1024.
Yarnell *v.* Kansas City, etc., Ry. Co. (113 Mo. 570; 21 S. W. Rep. 1; 18 L. R. A. 599), 570.
Yarnell *v.* St. Louis, etc., R. Co. (75 Mo. 575), 838.
Yarnold *v.* Bowers (186 Mass. 396; 71 N. E. Rep. 799), 1049.
Yates *v.* Covington (83 S. W. Rep. 592), 97.
Yazoo & M. V. R. Co. *v.* Byrd (42 So. Rep. 286), 801.
Yeaton *v.* Boston, etc., R. Co. (135 Mass. 418; 15 Am. & Eng. R. Cas. 253), 321.
Yeaton *v.* Railroad Corp. (145 Mass. 418), 348.
Yeomans *v.* Contra Costa Nav. Co. (44 Cal. 71), 566.
Yerkes *v.* Keokuk, etc., Co. (7 Mo. App. 265), 634.
Yerkes *v.* Northern Pac. Ry. Co. (112 Wis. 184; 88 N. W. Rep. 33), 377.
Yess *v.* Chicago, etc., Co. (124 Wis. 406; 102 N. W. Rep. 942), 20.
Yeull *v.* Sioux City & Pac. R. Co. (66 Iowa 346; 23 N. W. Rep. 736), 275.
York *v.* Chicago, M. & St. P. Ry. Co. (98 Iowa 544; 67 N. W. Rep. 574), 217.
York *v.* Kansas City, etc., R. Co. (117 Mo. 405; 22 S. W. Rep. 1081), 158.
York *v.* Maine, etc., R. Co. (84 Me. 117; 24 Atl. Rep. 790), 1028.
Youll *v.* Sioux City, etc., R. Co. (66 Iowa 346; 23 N. W. Rep. 736; 21 Am. & Eng. R. Cas. 589), 330.
Young *v.* Burlington, etc., Co. (79 Iowa 415; 44 N. W. Rep. 693), 255.
Young *v.* Chicago, etc., R. Co. (100 Iowa 357), 715.
Young *v.* Detroit, etc., R. Co. (56 Mich. 430; 23 N. W. Rep. 67; 19 Am. & Eng. R. Cas. 417), 1030.
Young *v.* Metropolitan R. Co. (103 S. W. Rep. 135), 185.
Young *v.* Missouri Pacific Ry. Co. (93 Mo. App. 273), 695.
Young *v.* New Jersey R. Co. (46 Fed. Rep. 160), 471.

[*References are to sections.*]

Young *v.* New York, etc., R. Co. (30 Barb. 229), 298.
Young *v.* New York, etc., R. Co. (171 Mass. 33; 50 N. E. Rep. 455; 41 L. R. A. 193), 556.
Young *v.* New York, etc., R. Co. (107 N. Y. 500; 14 N. E. Rep. 434; 32 Am. & Eng. R. Cas. 130), 1005.
Young *v.* Old Colony R. Co. (156 Mass. 178; 30 N. E. Rep. 560), 1062.
Young *v.* Railroad Co. (69 N. H. 356), 368.
Youngblood *v.* South Car. R. Co. (60 S. C. 9; 38 S. E. Rep. 232), 382.
Yownley *v.* Chicago, etc., R. Co. (53 Wis. 626), 4.

Z

Zahn *v.* Milwaukee, etc., Ry. Co. (Wis., 89 N. W. Rep. 889), 335.
Zeccardi *v.* Yonkers R. Co. (83 N. E. Rep. 31), 557.
Zeigler *v.* Danbury, etc., R. Co. (52 Conn. 543; 23 Am. & Eng. R. Cas. 400), 482.
Zeigler *v.* Northeastern R. Co. (5 So. Car. 221), 884.
Zimmerman *v.* Hannibal, etc., R. Co. (71 Mo. 476; 2 Am. & Eng. R. Cas. 191), 1003.
Zimmerman *v.* Union R. Co. (3 App. Div. 219; 38 N. Y. Supp. 362), 1039.
Zipperlen *v.* Southern Pac. Co. (93 Pac. Rep. 1049), 969.
Zirkle *v.* Missouri Pacific Ry. Co. (14 Am. Neg. Rep. 51), 408.
Zoebisch *v.* Tarbell (10 Allen 385), 794.
Zongker *v.* People's R. Co. (110 Mo. App. 382; 86 S. W. Rep. 436), 184.
Zuccarello *v.* Nashville, etc., R. Co. (3 Baxt. [Tenn.] 364), 906.
Zumalt *v.* Kansas City, etc., Ry. Co. (175 Mo. 288; 74 S. W. Rep. 1015), 388.
Zumwalt *v.* Chicago, etc., R. Co. (35 Mo. App. 661), 844.

THE LAW
OF
PERSONAL INJURIES ON RAILROADS.

VOLUME I.
INJURIES TO EMPLOYEES.

CHAPTER I.

GENERAL CONSIDERATIONS IN ACTIONS FOR PERSONAL INJURIES.

§ 1. Actions founded on negligence.
2. Duty owing plaintiff must be violated.
3. Rule the same, whether action by employee or third party.
4. Essentials of actionable negligence, further considered.
5. May arise from omission of duty, or commission of wrongful act.
6. When duty is imposed by statute.
7. Liability not affected by public character of business.
8. Legal status of railroad company.
9. Company must be sued in proper name.
10. Care required in general.
11. How affected by character of business.
12. Ordinary care alone required of railroad companies.
13. Due care, reasonable care, and ordinary care, explained.
14. Willfulness, wantonness and recklessness.
15. Degrees of negligence.
16. Action may be based upon contract.
17. Remedies in contract and tort concurrent.
18. Authorities announcing a contrary doctrine.
19. Violated right and injury both essential.

§ 1. **Actions founded on negligence.**— Personal injury actions, in whatever vocation of life arising, in order to be successfully maintained in the courts, must be grounded upon

the negligence of the one causing the injury. The law of negligence is a branch of the general law of torts and the meaning of these terms is definitely or indefinitely explained by lexicographers and law writers.

A tort, in the strictest legal sense, is a wrongful act, causing an injury, which gives a right of action, otherwise than by contract.[1] In the sense that a negligent act is the breach of a duty imposed by law, such negligent act is a tort;[2] but where the negligent act is not one resulting from a violation of a duty imposed by law, but rather consists in the breach of a duty imposed by contract, the negligence could not be said to belong to the law of torts.[3] In a suit to redress a wrong made such by the law itself the action would be called one *ex delicto,* while an action for negligence based upon the violation of a duty imposed by contract, would be an action *ex contractu.* Torts are, therefore, confined or denominated actions *ex delicto,* and, in this sense the term is or may be narrower than the term negligence, as the latter may include or be based upon acts that come within the other division of civil actions,[4] as well as those strictly known as actions *ex delicto.*

§ 2. **Duty owing plaintiff must be violated.**— The neglect, or negligent act, resulting in an injury to the person of the plaintiff, or to the one for whose injury or death he sues, in order to furnish the basis of an action, must be what is known as actionable negligence, as distinguished from a mere abstract negligent act, which might, or might not, be the basis of a cause of action, according to the relation of the parties and the circumstances under which the injury was

[1] Moak's Underhill on Torts 23; Addison Torts 2; 2 Bouv. Law Dict. 600; Cooley Torts 3; Hillard Torts 1.

[2] *Ante idem.*

[3] Black's Law & Pr. Acc. Cas., § 2, p. 2.

[4] Shearm & Redf. on Neg., § 4; *idem* (5 ed.) § 22; Cooley on Torts 90.

received. A wrongful act, causing an injury to an employee, or one occupying some other relation, from which a duty of protection in that relation would flow, might furnish the basis of a cause of action for such resulting injury, but as to a trespasser, who occupied no relation from which such duty would spring, the same act would not afford a right to sue. Hence, it is that the negligence which must exist to furnish a cause of action, is the violation of some right on the part of the plaintiff, or the breach of some duty owing to him by the defendant. However great the injury received, if there was no breach of duty on the part of defendant owing to the injured party, there would be no civil liability therefor, but, in such case, the rule *damnum absque injuria* would be applicable.[5]

In all personal injury actions, therefore, where a recovery can be sustained, there must be combined, both the breach of duty owing to the plaintiff and the injury resulting from such breach. This result follows, necessarily, from the very nature of the action, for whether the plaintiff declares in tort, or upon a contract, a breach of duty must be shown and the resulting injury, as the measure of the defendant's liability. Without establishing both these elements, the plaintiff in a personal injury action, would show no more right to a recovery, than could a perfect stranger to a violated contract who was not damaged by reason of the breach of such contract.[6]

[5] Shearm. & Redf. on Neg., § 3 (5 ed.); Wharton on Neg., § 24; Buswell, Per. Inj., § 3; Watson, Dam. Per Inj., § 3, p. 2.

[6] Thompson on Neg. (2 ed.) § 3, p. 5; Baltimore City Pass R. Co. v. Nugent, 86 Md., 349; 38 Atl. Rep. 779; 39 L. R. A. 161; Cleveland, etc., R. Co. v. Ballentine, 56 U. S. App. 266; 84 Fed. Rep. 935; 28 C. C. A. 572. Can be no actionable negligence, without breach of legal duty to injured person. Rush v. Missouri Pac. R. Co. (Kan.), 28 Amer. & Eng. R. Cas. 484.

In Cotton v. Wood (8 C. B. N. S. 568; 98 E. C. L.), Erle, C. J., laid it down as a fundamental rule that, "unless it be shown

§ 3. **Rule the same, whether action by employee or third party.**— While in some courts it is held that an employee is not entitled to the same remedies for a personal injury as a passenger is entitled to,[7] where the personal negligence of the employer has caused an injury to his employee, the employer's liability to his employee is generally held to be the same as if the employee were a third party.[8]

An employee could not recover from his employer for injuries received in his service unless the employer is chargeable with negligence in respect to the act causing the injury,[9] any more than a third person could recover, in the absence of some act of negligence, as a basis for the action,[10] and in an action by an employee for the negligence of the employer, as in an action for a personal injury to a passenger, the test of liability is the negligence of the employer, not the danger of the employment, though the danger may help to determine the degree of care required from the employer.[11]

§ 4. **Essentials of actionable negligence further considered.**— Actionable negligence may be said to be the failure to use such care, in the discharge of a given duty, as the

that there existed some duty owing from the defendant to the plaintiff, and that there has been a breach of that duty," there is no proof of negligence.

[7] Weger v. Pennsylvania R. R. Co., 55 Pa. (5 P. F. Sm.) 460.

[8] McMahon v. Walsh, 43 N. Y. Sup. Ct. (11 J. & S.) 36; Lorentz v. Robinson, 61 Md. 64; Killien v. Hyde, 63 Fed. Rep. 172.

[9] Hand v. Mississippi Central R. R. Co., 50 Miss. 178; Connor v. Burlington, C. R. & N. Ry. Co., 71 Iowa 490; 32 N. W. Rep. 465; 60 Amer. St. Rep. 814.

[10] Killien v. Hyde, *supra;* Worden v. Hinnesboy & S. Ry. Co., 72 Iowa 201; 33 N. W. Rep. 629.

[11] Knight v. Cooper, 36 W. Va. 232; 14 S. E. Rep. 999. The danger does not affect the degree of care required, but it does the quantum of diligence. Galveston H. & L. A. Co. v. Gormley, 91 Texas 393; 43 S. W. Rep. 877.

law imposed, as a result of which an injury is directly sustained by the one toward whom the duty existed.[12]

It is only a consideration and recognition of the full import of the word *duty* that one of the essential elements of the definition will be observed. Whenever the absence of care, such as duty requires, under the circumstances, to be exercised, exists, then negligence can be said to be present, if there is also an injury, traceable directly to such want of care.[13]

The obligation may either attach to a wrongful act, or an omission, but whether the negligence arises from the doing or omission to do that which the law requires, it is the absence of care that denominates the act a negligent act, or otherwise, when there is a resulting injury, directly connected therewith.[14]

If it should be objected that this definition does not specifically define the degree of care, the absence of which may amount to negligence, in a given case,[15] it may be properly replied, that the application of the term to a person sought to be charged, who may occupy a given relation in life, by the further definition of the different ingredients of the term, is, in no respect, an essential of the definition of the general term. The degree of care which the law imposes as a duty, is that care which a reasonable and prudent man would

[12] For various definitions, see Wharton on Neg., § 3; Shearm. & Redf. on Neg. (5 ed.) § 3; Deering on Neg., § 1; Cooley on Torts 630; Ray on Neg., § 183; Rapalje, Law Dict. (vol. 2) p. 860; Webster's Dict.; Pennsylvania R. Co. v. Peters, 116 Pa. St. 206; 9 Atl. Rep. 317; Henry v. Cleveland, etc., R. Co., 67 Fed. Rep. 426; Rosen v. Chicago, etc., R. Co., 83 Fed. Rep. 300; 49 U. S. App. 647; 27 C. C. A. 534; 7 Amer. & Eng. Enc. Law (2 ed.) 370; Salmon v. Delaware, etc., R. Co., 9 Vt. 5; Texas, etc., R. Co. v. Curlin, 13 Tex. Civ. App. 505.

[13] 1 Thompson on Neg., § 1, p. 3, and cases cited.

[14] In this sense, as Judge Thompson observes, it is "a sin of omission merely," in either case. See Bucki v. Cone, 25 Fla. 1; 6 So. Rep. 160.

[15] Judge Thompson urges this objection against such definitions as the above. 1 Thompson on Neg., § 2, p. 4.

ordinarily bestow, under the circumstances of each case;[16] this is the measure of care, or the standard by which the duty imposed by law is determined, by the triers of the facts,[17] but regardless of how this standard may be applied, it is the absence of this care which constitutes negligence and the method by which its existence is determined is no essential of the definition of the term.

[16] Pennsylvania R. Co. v. Coon, 111 Pa. St. 430; Ellis v. Lake Shore, etc., R. Co., 138 Pa. St. 506; 21 Atl. Rep. 140; Patton v. Southern R. Co., 82 Fed. Rep. 979; 42 U. S. App. 576; 27 C. C. A. 287; Hearn v. Pender, L. R. 11 Q. B. D. 503; Yownley v. Chicago, etc., R. Co., 53 Wis. 626; Brown v. Congress, etc., R. Co., 49 Mich. 153; Nicholson v. Erie, etc., R. Co., 41 N. Y. 525; Nolan v. N. Y., etc., R. Co., 53 Conn. 461; 1 N. E. Rep. 826.

[17] 1 Thompson on Neg., § 2, p. 4.

In Pennsylvania W. & B. R. Co. v. Stinger (78 Pa. St. 225), Paxson, J., defines negligence as follows: "The absence of care, according to the circumstances."

Willes, J., defines it as follows: "The absence of such care as it was the duty of defendant to use." Grill v. Iron, etc., Co. L. C. R. 1 C. P. 160. Mr. Patterson, in his analytical work on Railroad Accident Law, defines actionable negligence as "a nonperformance of *duty*, causing injury to the person to whom the duty is owing." Patterson on Railroad Acc. Law, p. 7.

Brett, M. R., in Heaven v. Pender (11 Q. B. D. 507), gives the following definition, that is very hard to improve upon, *viz.*, "The neglect of the use of ordinary care or skill, toward a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect, the plaintiff, without contributory negligence on his part, has suffered injury."

For varying definitions, substantially like the above, see, Washington v. Baltimore & O. R. Co., 17 W. Va. 190; 10 Am. & Eng. R. Cas., 749; Jamison v. San Jose etc., R. Co., 55 Cal. 593; 3 Am. & Eng. R. Cas. 350; Johnson v. W. C. & P. R. Co., 70 Pa. St. 366; Baltimore & Pot. R. Co. v. Jones, 95 U. S. 439; 24 L. Ed. 506, giving a concise definition, by Mr. Justice Swayne; Texas & Pac. R. Co. v. Behymer, 189 U. S. 468; 47 L. Ed. 905; Texas & Pac. R. Co. v. Barrett, 166 U. S. 617; 41 L. Ed. 1136. For additional definitions of negligence, in actions for injuries on railroads, see the following cases: Nolan v. N. Y., etc., R. Co. (Conn.), 25 Amer. & Eng. R. Cas. 342; Carter v. Columbia & C. R. Co. (S. C.), 15 Amer. & Eng. R. Cas. 414; Brown v. Congress, etc., R. Co. (Mich.), 8 Amer. & Eng. R. Cas. 383.

§ 5. **May arise from omission of duty or commission of wrongful act.**— It is elementary that the failure to use such care as the law imposes for the protection of those members of the human family likely to be injured by a failure thereof, which can be legally denominated as negligence or neglect, may either consist in the commission of a wrongful act, when the doing of the act is prohibited by the law, or the failure to act, when action is the mandate of the law, under the circumstances of the given case.[18]

An omission of duty which would render one liable for an injury resulting therefrom, would arise in any case where activity would be essential for the proper protection of the injured person, such as an inspection, or inquiry, or warning of the impending danger, if the law, under the circumstances and situation of the parties, required such an act to be done, as the proper test of due care.[19] On the other hand, the violation of duty is equally as apparent, when with knowledge of the danger brought home to the wrongdoer the duty imposed by the law for the protection of the injured person through recklessness, wantonness or actual intent to do wrong, is knowingly violated, by some overt act.[20]

§ 6. **When duty is imposed by statute.**— Whether the given act, resulting in an injury, is one denominated negligent, by express legislative act, or is one violative simply of the measure of care erected by the law, in the absence of such express legislation, the principle is the same, for the act

[18] Thompson Neg., § 1, p. 3; Brotherton v. Manhattan Beach Co., 48 Neb. 563; 67 N. W. Rep. 479; 69 N. W. Rep. 757; 33 L. R. A. 598.

[19] Schmidt v. Chicago, etc., R. Co., 83 Ill. 405.

[20] 1 Thompson Neg., § 8, pp. 9 and 10. "If the negligence of the defendant be the proper cause of the injury to the plaintiff, it is of no consequence whether it be of omission or commission." Harriman v. Pittsburg, etc., R. Co. (Ohio), 32 Amer. & Eng. R. Cas. 37.

is none the less a violation of legal duty imposed and the result of the act is to submit the wrongdoer to a legal charge of negligence.[21]

Some authors, notably the late Judge Thompson, place such emphasis upon this particular kind of negligence, i. e., the violation of statutory duty, as to distinguish it from all other kinds of negligence and defend the rule by which the violations of such express duties are made conclusive acts of negligence.[22] Some State courts also hold that the violation of such express duties is such conclusive evidence of negligence, as to prevent the defense of assumption of the risk or even contributory negligence on the part of the injured person.[23] But such decisions are manifestly at variance with the elementary rules of law underlying the liability for damages based upon negligence, for if the wrongful act of the injured person, rather than the wrongful act or neglect of another, was the approximate cause of the injury, then his contributory negligence ought to prevent a recovery, whether the breach of duty was such as may be denominated common law, statutory or ordinance duty.[24]

When a duty imposed by law is carried out in all the essentials in accordance with the statute or ordinance imposing

[21] Dresser, Emp. Liab., §§ 51, 116; Victor Co. v. Muir, 20 Colo. 320; Matta v. Chicago, etc., Co., 69 Mich. 109; Taylor v. Carew, 142 Mass. 470; Spiva v. Osage Coal, etc., Co., 88 Mo. 68 Senior v. Ward, 28 L. J. Q. B. 139; Corning Steel Co. v. Pohlplotz (Ind.), 64 N. W. Rep. 476; Krause v. Morgen, 52 Ohio St. 325; 40 N. E. Rep. 886.

[22] 1 Thompson Neg., §§ 10, 11, 12, pp. 12, 13.

[23] Contributory negligence is not a defense to the breach of statutory duty, in Illinois. Riverton Coal Co. v. Shepard, 207 Ill. 395; 69 N. E. Rep. 921; Western Anthracite Co. v. Beaver, 95 Ill. App. 95; 61 N. E. Rep. 335; Chicago, etc., Co. v. Des Lauriers, 40 Ill. App. 645; Fulton v. Star Mining Co., 133 Fed. Rep. 193; Chicago-Coulterville, etc., Co. v. Fidelity & Casualty Co., 130 Fed. Rep. 957; White, Per Inj. in Mines, § 254, pp. 260, 261 and cases cited.

[24] Dresser, Emp. Liab., §§ 51, 116; White, Per. Inj. in Mines, § 254, and cases cited.

such duty, no liability will result from a subsequent injury on account of such compliance with the law or ordinance, for it would be manifestly unjust to erect a measure of care, for the noncompliance with which a liability would be imposed and then hold the party complying with such imposed duty, as though no such standard of care had been erected as a gauge for his conduct.[25]

§ 7. **Liability not affected by public character of business.**—The fact that the business of a railroad company is a branch of the public service,[26] and, as such, is subject to such limitations upon its charter power as may be prescribed by the State, and to such regulations, under the police power of the State, as may be necessary to protect the lives, limbs and health of the general public, or the convenience of the traveling public, does not in the least affect its liability for a personal injury resulting from the operation of the road, or the enjoyment of its *quasi*-public franchises.[27]

Companies organized for railroad purposes, in the law, are none the less private corporations,[28] and in actions for personal injuries the liability of such companies is judged by the same rules of law that obtain in actions against private individuals; in both cases, a duty owing the injured person must be established and a breach of that duty, as a direct re-

[25] Taylor v. Baltimore & Ohio R. Co., 33 W. Va. 39; 10 S. E. Rep. 29; 39 Amer. & Eng. R. Cas. 259; Rudard v. Chesapeake & Ohio R. Co., 88 Ky. 280; 11 S. W. Rep. 70; 1 Thompson Neg., § 9, p. 11.

[26] Grand Trunk R. Co. v. Stevens, 95 U. S. 660; 24 L., Ed. 525.

[27] In Chicago, Burlington & Q. R. Co. v. Iowa (94 U. S. 161; 24 L. Ed. 94), Waite, C. J., speaking for the court, said: "This company, in the transaction of its business, has the same rights, and is subject to the same control as private individuals, under the same circumstances."

[28] Pennsylvania & L. E. R. Co. v. Bruce, 102 Pa. St. 23; Timlow v. Pennsylvania R. Co., 99 Pa. St. 284; Patterson, Ry. Acc. Law, p. 4.

sult of which the injury was sustained, or no legal liability is shown.[29]

§ 8. **Legal status of railroad company.**— In personal injury actions, based upon negligence, a railroad company in a court of justice, occupies identically the same relation to the law suit, to which it is made a party defendant, as any individual employer of employees. No greater or less degree of evidence is, or should be required, to establish a case of personal negligence against a railroad company than against an individual, sued upon a similar cause of action and when a cause of action is submitted to a jury upon a less degree of proof, in a railroad case, than a similar cause would be submitted, in the case of an individual employer, or when a verdict is returned, upon evidence that would not establish a liability in the case of an individual defendant, then the officials of the court have somewhere grievously failed in the performance of their sacred duties, and like a private official who varies from the performance of his duty, either from prejudice or favor, to the detriment of his private character, so each variance from its legal duty by a court in any class of litigation, correspondingly affects the high character of the court and the respect of the masses for all courts. In other words, since corporations occupy the same legal status as individuals, theoretically, before the courts, unless they are accorded the same rights, there is a manifest failure of justice, and as courts are organized to see that justice prevails there should be no limit to the beneficent performance of this duty. Nothing but legal precedents and stern duty should prompt the court in railroad litigation, and the defendant railroad company in a personal injury action should be accorded the same rights, and no more, that any individual citizen would enjoy, under the same, or similar circumstances.

[29] Rush v. Missouri Pac. R. Co. (Kan.), 28 Am. & Eng. R. Cas. 484.

§ 9. **Company must be sued in proper name.**— It is elementary, that a railroad company, or other corporation, can only be brought into court, by an action and process in its correct corporate name, for service on such defendants is always of a constructive nature and unless it is sued in its correct name, no jurisdiction over it will be acquired, as it would be in a suit against an individual under an irregular or erroneous name, if it was *idem sonans.*

It may be taken for granted that the company is a different thing from the railroad or railway, for the latter consists of nothing but the ties, rails, roadbed and things that go to make up the property of the company. In a Missouri case [30] suit was filed against the railroad, rather than against the company, of the same name, and on a default judgment being appealed, it was held that no jurisdiction was acquired over the defendant.

§ 10. **Care required in general.**— An employer is bound to use reasonable care and diligence to prevent accident or injury to his employees, in the cause of the service they are engaged to render and if he fails to do so, he will be held responsible in damages.[31] An employer is required to take such precaution for the safety of his employees as a careful and prudent man would take, under similar circumstances.[32] He should use all reasonable care, diligence and caution, in providing for the safety of his employees.[33]

But employers are bound only to use such ordinary and reasonable care and precaution, for the safety of their employees as the nature and dangers of the business admit of and demand,[34] and no liability on the part of an employer,

[30] Vickery v. Omaha, K. C. & E. R. Co., 93 Mo. App. 1.
[31] Hallower v. Henley, 6 Cal. 209.
[32] Harr v. New York & H. R. R. Co., 13 N. Y. St. Rep. 227.
[33] Frank v. Otis, 15 N. Y. St. Rep. 681.
[34] Michigan Central R. Co. v. Dolan, 32 Mich. 510.

for an injury to his employee, in the regular scope of his employment, can be predicated upon an obligation extending beyond the use of ordinary care and diligence.[35]

§ 11. **How affected by character and risk of business.**— The term negligence is a relative term and must necessarily depend upon the particular facts and circumstances of each case. What would not constitute a careless act, in a business attendant with little or no danger, might be considered a very negligent act, where the lives or limbs of individuals were apt to be lost or injured as a result thereof. Hence, it is, that negligence, as between employer and employee, should be measured by the character and risk of the business engaged in and the degree of care, of all parties, is held to be higher, when the lives and limbs of themselves and others are apt to be endangered, by their acts, than in ordinary cases.[36]

§ 12. **Ordinary diligence only required of railroad companies.**— In legal contemplation, a railroad company occupies the same status as any other employer of men and no greater degree of care is required on the part of railroads, to prevent injuries to their employees, than exists in the case of any other employer. The degree of diligence required of railroad companies, in regard to the safety of their employees, is simply ordinary diligence,[37] regard being had, of course, to the nature of the particular branch of the business where the employee was engaged, and the dangers of the service he was rendering.[38]

[35] King v. Boston & W. R. Co., 63 Mass. (9 Cush.) 112.

[36] Galveston, etc., R. Co. v. Gormley (Tex. Civ. App.), 27 S. W. Rep. 1051.

[37] Lane v. Ohio & M. R. Co., 6 Ohio, § 39.

[38] Michigan Cent. R. Co. v. Dolan, 32 Mich. 510.

§ 13. **"Due care," "reasonable care" and "ordinary care," explained.**— The degree of care, due from an employer to his employees does not vary with the diminution or the increase of the danger, but the quantum of diligence does differ, under different conditions.[39] The terms, "due care," "reasonable care" and "ordinary care" are all used interchangeably by the courts and text writers, to indicate that measure of duty required of the employer, under the different and varying terms of his employment, without regard to the danger in the given service,[40] and except as to duties made absolute by the law, in which case no other standard than that required by the law will control,[41] if the defendant has used such care as an ordinarily reasonable and prudent person exercises, with respect to his own affairs, under like circumstances, he has discharged the full measure of his legal accountability and no responsibility in addition to this can result.[42]

§ 14. **Willfulness, wantonness or recklessness.**— Ordinary care being that degree of care or diligence which every reasonably prudent man takes under similar circumstances, it would seem that wantonness or recklessness would be that conduct that a reckless or wanton man would be guilty of, but this is not the standard the law erects to determine such conduct by. Slight negligence not being incompatible with

[39] Galveston H. & S. A. R. Co. v. Gormley, 91 Texas 393; 43 S. W. Rep. 877.

Reasonable care is such care as a person or ordinary prudence would take under similar circumstances to avoid accidents, in view of the risks incurred. Reiss v. Wilmington City Ry. Co. (Del. Super. 1907), 67 Atl. Rep. 153.

[40] Raymond v. Portland R. Co., 100 Me. 529; 62 Atl. Rep. 602.

[41] Cerilles, etc. Co. v. Desserant, 178 U. S. 570; 9 N. M. 49; 49 Pac. Rep. 807.

[42] Raymond v. Portland R. Co., *supra;* Sanders v. Central of Georgia R. Co., 123 Ga. 763; 51 S. E. Rep. 728.

the exercise of mere ordinary care,[43] neither would the absence of ordinary care show willfulness, wantonness or recklessness, but to establish the absence of such care as would show willfulness or wantonness, it would seem to require more than a mere absence of ordinary care.[44] To constitute wanton negligence it is essential that the act done or omitted must have been done or omitted with a present knowledge that injury would result therefrom,[45] for without this consciousness the omission would be absence of care alone. Hence, it is, that a mere inadvertent failure to observe due care indicates mere negligence, but a conscious failure to observe due care constitutes willfulness.[46]

But while willfulness is judicially held to be a conscious act of the mind and not a mere inadvertence,[47] a wrongful intent is not essential to constitute willfulness, and hence the defendant is not permitted to testify to a lack of such intent to overcome the evidence going to establish willfulness on his part.[48]

§ 15. **Degrees of negligence.**— In an early English case,[49]

[43] Mallett v. Schlosser, 119 Ill. App. 259.

"In order to constitute willfulness or wantonness or reckless indifference to probable consequences, the act done or omitted must be done or omitted with a knowledge or a present consciousness that injury will probably result; and this consciousness is not to be implied from mere knowledge of the elements of the dangerous situation a person may be in and negligent and inadvertent acts in respect of the peril." Duncan v. St. Louis & S. F. R. Co. (Ala. 1907), 44 So. Rep. 418.

[44] Leslie v. Rich Hill, etc., Co., 110 Mo. 31; 19 S. W. Rep. 308; State v. Clark, 29 N. J. L. 98; Niantic Coal Co. v. Leonard, 126 Ill. 216; White, Per Inj. in Mines, § 344, and cases cited.

[45] Alabama Great Southern R. Co. v. Guest (Ala.), 39 So. Rep. 654.

[46] Tinsley v. Western Union Co. (S. C.), 51 S. E. Rep. 913; 72 S. C. 350.

[47] Odin Coal Co. v. Denman, 185 Ill. 413; 57 N. E. Rep. 192; 76 Am. St. Rep. 45; Leslie v. Rich Hill Coal Co., 110 Mo. 31; 19 S. W. Rep. 308.

[48] *Ante idem.*

[49] Coggs v. Bernard, 2 Lord Raymond, 909.

Lord Holt, C. J., defined negligence as consisting in three degrees, or kinds, *viz.*, slight, ordinary and gross and it is presumed that this division was based upon the Roman law of negligence, but upon this subject Mr. Wharton expresses himself [50] as of the opinion that this division did not exist, under the Roman law, but owes its origin to the refinements of the Middle Ages, and Judge Thompson, without hesitation, states that he has always been ignorant and indifferent as to the origin or knowledge of any of the degrees of negligence.[51]

In most of the United States the courts do not adhere to the classification of degrees of negligence,[52] further, perhaps, than to divide it into negligence and willfulness or wantonness.[53] The courts of Missouri recognize this latter division, under what is known as the humanitarian doctrine, under which a railroad company is not held liable for an injury for a mere failure to discover a trespasser, by reason of a want of ordinary care, but only for a willful or intentional or wanton injury, after his presence is discovered.[54]

[50] 1 Wharton Neg. (2 ed.) §§ 59, 63.

[51] 1 Thompson Neg., § 18, p. 18.

[52] Milwaukee, etc., R. Co. v. Arms, 91 U. S. 495; Perkins v. N. Y., etc., R. Co., 24 N. Y. 207; Chicago, etc., R. Co. v. Johnston, 103 Ill. 512; 8 Amer. & Eng. R. Cas. 225; McAdoo v. Richmond, etc., R. Co., 105 N. C. 140; 1 Thompson Neg. § 19, p. 20.

[53] State v. Boston, etc., R. Co., 58 N. H. 408; 1 Thompson Neg., p. 22, § 21.

[54] Holwerson v. St. Louis, etc., R. Co., 157 Mo. 216 and cases cited. The term slightest degree of negligence should be avoided, as there are no degrees of negligence in Missouri. Magrane v. St. Louis, etc., R. Co., 183 Mo. 119; 81 S. W. Rep. 1158.

The consensus of judicial opinion is that it is and has always been found impractical to consider negligence as consisting of different degrees. Why divide into degrees the breach of that duty which will render the defendant liable, if the want of care which the circumstances of the case requires, exists?

"In each case, the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and,

§ 16. **Action may be based upon contract.**— An action for personal injuries may be based upon a contract, if there is an agreement imposing a legal duty upon one person for the protection of another. In such case, the duty imposed by contract, is the same as that imposed by the law itself and the breach of that duty would constitute a tort, founded upon a contract.[55]

An illustration of such a liability is found in the case of the contract of the carrier of a person, for hire; for the breach of such a contract an action would lie against the carrier for a negligent injury to the passenger.[56] But ordinarily, the essence of the action for the tort consists in the violation of the duty owed the individual, as a thing different from the obligation assumed under the terms of the contract.[57] The law, in the case above instanced, would create

hence, it is more strictly accurate, perhaps, to call it simply negligence." This was the language of Justice Bradley, in New York Cent., etc., R. Co. v. Lockwood, 84 U. S. 384; 17 Wall. 357, 384; 21 L. Ed. 627. The Supreme Court characterized as impractical, in another case, any distinctions between the degrees of negligence. Milwaukee & St. P. R. Co. v. Arms, 91 U. S. 495; 23 L. Ed. 374; Steamboat New World v. King, 16 How. 469; 14 L. Ed. 1019.

Lord Cranworth "could see no difference between negligence and gross negligence; that it was the same thing, with the addition of a vituperative epithet." Wilson v. Brett, 11 M. & W. 115, and Lord Denman, observed, in Hinton v. Dibbin (2 Ad. & El. N. S. 661), that "It may well be doubted whether between gross negligence and negligence merely, any intelligible distinction exists."

With these observations and such cumulative evidence of the experience of the courts, it is the more surprising that any legislative body would attempt to establish these distinctions, which can only be productive of confusion and no good results.

[55] Addison on Torts 13; Cooley on Torts 90; Rich v. N. Y., etc., R. Co., 87 N. Y. 382.

[56] Philadelphia, etc., R. C. v. Derby, 14 How. (U. S.) 468; Thompson Carr. Pass. 31; 3 Thompson on Neg., § 2720, p. 187; Thompson Carr. Pass. 175.

[57] Rich v. N. Y., etc., R. C., 87 N. Y. 382; 3 Thompson on Neg., § 2720, p. 187.

the duty out of its regard for human life and its recognition would not depend upon the terms of the contract of carriage. Where there is such a contract, it is held that the liability based upon the duty which the law exacts, is equal with that assumed by the contract, but whether the action is founded upon the contract, or the breach of public duty, the evidence to sustain the action, in either form, would be substantially the same.[58]

§ 17. **Remedies in contract and tort concurrent.**— Where there is a contract relation between the parties, such as that which exists between a carrier for hire and a passenger, since the liability may rest either upon the obligation imposed by the contract, or the breach of duty due to the passenger in common with the general public, in case of an injury during the existence of the contractual relation, the injured party could either sue in tort, for the breach of the public duty, or maintain an action upon the contract, for the violation of the obligation assumed thereby.[59] The contract, as in the case of an injured passenger for hire, would

[58] 3 Thompson on Neg., § 2720, p. 188; Thompson Carr. Pass. 197; Carroll v. Staten Island, etc., R. C., 58 N. Y. 126; Rich v. N. Y., etc., R. Co., 87 N. Y. 382.

[59] In McElroy v. Nashua & Lowell R. Co. (4 Cush. 403), Shaw, C. J. observed: "It is at the election of the plaintiff to declare in assumpsit and rely on the promise, or to declare in tort and rest on the breach of duty." See, also, Eaton v. Boston & Lowell R. Co., 11 Allen 500; Ames v. Union, etc., R. Co., 117 Mass. 541; Buswell on Per Inj., § 5, p. 4. In Bretherton v. Wood (6 Moore, 141; 3 Brod. & B. 54), the plaintiff was a passenger for hire in a stage coach and was injured by the overturning of the coach, through the defendants' negligence. It was maintained, by the defendants, that the contract prevented the action, but the court held not, because the action was founded upon a breach of duty imposed by the "custom of the realm," which was, in fact, a breach of the law. The same doctrine was recognized in Marshall v. York, etc., R. Co., 21 L. J. (N. S.) C. P. 34. Where two parties are jointly interested in a tort, one of them alone cannot waive the tort and sue in assumpsit. Seay v. Sanders, 88 Mo. App. 478.

furnish evidence of the relation that the passenger occupied, from which the law would create the duty, for the violation of which the action could be maintained; but as the duty is one which the law creates, upon grounds of public policy, the contract would not affect the character or extent of this duty, but would be competent only to establish the relation from which the duty would arise.[60] This is the generally prevailing rule, in the United States, but there will be references made thereto in subsequent pages.

§ 18. **Authorities announcing a contrary doctrine.**— Upon this well settled principle of the law of negligence, as upon many other doctrines, the cases have not always been harmonious, but both in England and in the United States it has been announced by the courts that where a contract established the relation of the parties, their rights were limited by the specific provisions of the agreement and in case of a personal injury, received during the existence of the contractual relation, no right of action would result, upon mere grounds of public policy, but the right to recover for such injury would be determined by the special provisions of the contract.

For instance, it was held in an English case, that an employer could not maintain an action against a carrier of passengers for hire, for an injury to his employee, as a result of which he sustained a loss of service, as the employer was not a party to the contract of carriage and the employee's rights would be governed thereby and not by a public duty owing to

[60] Ames v. Union, etc., R. Co., 117 Mass. 541; 3 Bl. Com. 142; Abbott v. Johnstown, etc., R. C., 80 N. Y. 27; Files v. Boston, etc., R. C., 149 Mass. 204; Price v. Pennsylvania R. Co., 113 U. S. 218; Head v. Georgia, etc., R. C., 79 Ga. 358; Pennsylvania R. Co. v. Butler, 57 Pa. St. 335; Ross v. Des Moines Valley, etc., R. Co., 39 Iowa 246; New York Central R. Co. v. Lockwood, 17 Wall. 357; Pennsylvania R. Co. v. Woodworth, 26 Ohio St. 585; Philadelphia & Reading R. Co. v. Derby, 14 How. 468.

him by the carrier.[61] Other English cases have been decided upon similar principles and a recovery for personal injuries denied, where a contract existed, unless a right of recovery could be based thereon, independently of the public duty owing to the injured person.[62] Some of the cases in the United States have followed this doctrine [63] and in some adjudications the doubtful reasoning is even advanced that while a given act might be regarded as a tort, or breach of legal duty sufficient to support an action, in the absence of a contract, the same act would lose the character of a tort, if there was a contract between the parties, and the contract alone, in such case, would govern the right to recover for an injury received.[64]

§ 19. **Violated right and injury both essential.**— The mere proof of negligence, without a violation of some duty owing to the plaintiff by the defendant, together with an injury as a result thereof, will not justify a recovery against an em-

[61] Alton v. Midland Ry. Co., 19 C. B. (N. S.) 213. This case is apparently opposed to the case of Bretherton v. Wood, 6 Moore, 141; 3 Brod. & B. 54.

[62] Winterbottom v. Wright, 10 M. & W. 109; Collis v. Selden, 3 C. P. 495; Tollit v. Sherstone, 5 M. & W. 283.

[63] Fairmount & Arch St. Ry. Co. v. Stutler, 54 Pa. St. 375. The approval of this doctrine in this case is said to be mere *obiter dictum.* Buswell on Per. Inj., § 11, p. 15.

[64] See Martinez v. Gerber, 3 Scott, N. R. 306; Alton v. Midland Ry. Co., 19 C. B. (N. S.) 213; Gallin v. London & N. W. Ry. Co., 44 L. J. Q. B. 89.

The Supreme Court of Massachusetts in the case of Fitzmaurice v. New York, New Haven & Hartford R. Co., (78 Northeastern Reporter, 418), makes a decision upon the interesting question of whether a person is being carried as a passenger. In this case the person injured as the result of a collision had obtained a ticket by presenting to the agent a forged certificate to the effect that she was under eighteen, and a pupil in a certain school, the railroad having contracted to convey pupils at reduced rates. The holding is to the effect that the carriage of the person was brought about by fraud and that she was not a passenger.

ployer in an action for personal injuries. In all cases, it is essential that there should be combined both a breach of duty to the plaintiff and an injury resulting proximately from such violated duty. "This result follows, necessarily, from the very nature of the action for personal injuries, for whether the plaintiff declares in tort, or upon a contract, a breach of duty must be shown and the resulting injury, as the measure of the defendants' liability."[65] Unless the plaintiff in such an action establishes both of these essentials to the action, he would show no more right of recovery than would a mere stranger to a violated contract, who, of course, would not be able to show any damages from the breach thereof, to himself.[66] It is generally required that the breach of duty must be alleged, not merely by the statement of the conclusion, but from an averment of facts from which the duty follows, as a matter of law[67] and the pleading and proof must both show that the omission of the particular duty owing to the plaintiff caused the injury sued for, or no liability will be made to appear.[68] This suggests the necessity of showing the legal connection between the breach of duty alleged and the injury to the plaintiff, which will be discussed in the next chapter.

[65] White, Per. Inj. in Mines, § 8, and cases cited; Black's Law & Pr. Acc. Cas., § 17.

[66] Black's Law & Pr. Acc. Cas., § 17; Watson, Dam. Per. Inj., § 2; Buswell, Law Per. Inj., § 3.

[67] Chicago, etc., R. Co. v. Gardner, 116 Ill. App. 619.

[68] Pittsburg, etc., R. Co. v. Simons (Ind.), 76 N. E. Rep. 883.

CHAPTER II.

PROXIMATE CAUSE OF INJURY.

§ 20. Defendant's negligence must be proximate cause of injury.
21. Immediate cause alone considered.
22. Wrongful act must be the "efficient cause" of injury.
23. Tests for determining proximate cause.
24. Nearness of causation, not time, the controlling factor.
25. Efficient intervening cause.
26. Negligent act concurring to produce injury.
27. Wrong need not directly cause injury.
28. Where injury or cause ought to be anticipated.
29. Aggravation of injury, without fault of defendant.
30. Injury in trying to avoid perilous position.
31. Instructions on proximate cause of injury.
32. No liability for injury from act of God.
33. No responsibility for injury due to inevitable accident.
34. Injuries from natural agencies.
35. No liability, if public enemy cause injury.
36. When question of law for court.
37. When a question of fact for the jury.
38. Injuries, where negligence was proximate cause.
39. Cases, where negligence held remote cause.

§ 20. **Defendant's negligence must be proximate cause of injury.**— It being a condition of the plaintiff's right of recovery, for a personal injury, that the defendant has failed to discharge a specific duty owing to him, in order to legally prove a breach of such duty, sufficient to sustain a recovery, by the plaintiff, it is incumbent upon him to establish that the negligence of the defendant, alleged by him as the cause of the injury, was in fact directly responsible therefor. This essential element of every personal injury action is what the courts and law writers generally term the doctrine of proximate cause. The proximate cause of the injury is generally

held to be that particular cause that occasioned the injury, or which could be naturally expected to produce it.[1] Under this doctrine, if the negligence of the defendant, alleged as the cause of the injury, is found to be the direct cause that produced it, the defendant would be liable therefor;[2] but if it appears that two or more causes concurred to produce the injury, and the defendant would be responsible for but one of such causes, and it cannot be determined which produced the injury, there would be no liability shown, for the reason that the damage would not be legally connected with the act for which the defendant would be responsible.[3]

1 "The proximate cause is to be defined, generally, as the cause which led to, or might naturally be expected to produce the result." Buswell, Per. Inj., § 97, p. 134; 1 Thompson, Neg., § 47; Henry v. Southern Pac. R. Co., 50 Cal. 183; Doggett v. Richmond, etc., R. Co., 78 N. C. 305.

2 State v. Manchester, etc., R. Co., 52 N. H. 528, 552; Jackson v. Chicago, etc., R. Co., 52 Wis. 150.

3 Marble v. Worcester, 4 Gray 395; Larson v. St. Paul, etc., R. Co., 43 Minn. 488; 45 N. W. Rep. 1096; Cox v. Chicago, etc., R. Co., 102 Iowa 711; 72 N. W. Rep. 301; 9 Am. & Eng. R. Cas. (N. S.), 604; Glenn v. Columbia, etc., R. Co., 21 S. C. 466.

A proximate cause of an injury is the cause which sets in motion the chain of circumstances leading up to the injury. Cleveland, etc., R. Co. v. Carey (Ind.), 71 N. E. Rep. 244.

An efficient and adequate cause of an injury is to be taken as the proximate cause thereof, unless another independent and intervening cause has produced the injury. Davis v. Mercer, etc., Co., 164 Ind. 413; 73 N. E. Rep. 899.

The proximate cause of an injury is that event, which, as a natural and continuous sequence, unbroken by any new and independent cause, produces that event, and without which that event would not have happened. Cleveland, etc., R. Co. v. Lindsay, 109 Ill. App. 533; Claypool v. Wigmore (Ind.), 71 N. E. Rep. 509.

That the injury resulted, in continuous sequence; that it would not have occurred without the negligent act and that it might have been foreseen as a result from such negligent act, are all necessary, to constitute proximate cause. Ramsbottom v. Atlantic Coast, etc., R. Co., 138 N. C. 38; 50 S. E. Rep. 448; St. Louis, Southwestern R. Co. v. Rowe (Tex.), 86 S. W. Rep. 1059.

To constitute actionable negligence, there must be not only a casual connection between the action complained of and the injury suffered, but

§ 21. **Immediate cause alone considered.**— Since it would be extremely impractical, in the administration of the law, for the court, with the accuracy of a metaphysician, to trace back to its primal cause, or origin, the sequence of events that culminated in the injury to the plaintiff, the last or efficient cause, for the purpose of judicial investigation, is alone regarded as the proximate or controlling cause of the injury.[4] "It were infinite for the law to consider the causes of causes, and their impulsion of each other; therefore it contenteth itself with the immediate cause, and judgeth of acts

such connection must be by unbroken sequence, so that the negligence must be not only a cause, but the proximate cause of the injury. Decatur Car, etc., Co. v. Mehaffey (Ala.), 29 So. Rep. 646.

Proximate cause is held to be the nearest cause; the immediate cause; that cause in which there is nothing intervening between it and the injury and the negligence of the defendant; to give a cause of action must be such a cause. Anderson v. Southern Ry. Co., 70 S. C. 490; 50 S. E. Rep. 202. But see Siegel, Cooper & Co. v. Trecka, 115 Ill. App. 56; 75 N. E. Rep. 1053.

The proximate cause need not be the immediate cause of the injury. Yess v. Chicago, etc., Co., 124 Wis. 406; 102 N. W. Rep. 942.

The question of proximate or remote cause often arises under a variety of circumstances. In a recent Indiana case, an engineer was injured by the bursting of a water gauge. The gauge was not defective, but broken window panes, replaced with boards, compelled him to hold his face nearer the water gauge then he would have had to do if the window had been paned with glass, and the negligence of the company in permitting the panes to remain out was held the approximate cause of the injury. Cleveland, etc., Ry. Co. v. Patterson, 75 N. E. Rep. 875. It would seem that the breaking of a perfect gauge could not have been anticipated.

[4] "Perhaps no event can occur which may be considered as insulated and independent; every event is itself the effect of some cause, or combination of causes, and, in its turn, becomes the cause of many ensuing consequences more or less immediate or remote. The law, however, looks to a practical rule, * * * and on account of the difficulty of unraveling a combination of causes, and of tracing each result, * * * the law has adopted the rule of regarding the proximate and not the remote cause of the occurrence which is the subject of inquiry." Shaw, C. J., in Marble v. Worcester, 4 Gray 305.

by that, without looking to any further degree." [5] This terse statement of the reason for the rule, by Lord Bacon, finds many amplifications in the adjudicated cases and precedents, by which the rule has been crystallized that in the eye of the law that cause is alone essential which is the true, real and efficient cause; [6] the particular wrongful or negligent act, in the chain of events, that directly contributed to produce the given injury.[7] If the negligent act charged is too remote from the injury for it to be directly connected therewith, in the natural sequence of events, as the controlling cause, then such negligence could not be said to be the immediate, or proximate cause of the injury.[8]

§ 22. **Wrongful act must be the "efficient" cause of injury.**— The proximate cause of an injury is sometimes said to be that cause which, as a natural and continuous sequence, unbroken by any controlling intervening cause, produces the injury and without which it would not have occurred.[9] Or, as expressed judicially "the proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental, or instruments of the superior or controlling agency are not proximate causes, are not the responsible ones, though they may be nearer in time to the result." [10] The efficient cause is not always the cause nearest in time to the injury, for quite frequently the nearest cause is not the efficient cause at all; the

[5] Maxims of Law, 1.

[6] Marble v. Worcester, *supra.*

[7] Northern Central R. Co. v. State, 29 Md. 420; Baltimore & O. R. Co. v. State, 33 Md. 542; Green v. Erie R. Co., 11 Hun 333; Peterson v. Chicago & M. R. Co., 64 Mich. 621.

[8] Pike v. Grand Trunk Ry. Co., 39 Fed. Rep. 255.

[9] Smith v. Los Angeles, etc., R. Co., 98 Cal. 210; Goodlander, etc., Co. v. Standard Oil Co., 63 Fed. Rep. 400; 11 C. C. A. 253; 27 L. R. A. 538.

[10] Goodlander, etc., Co. v. Standard Oil Co., *supra.*

act causing the injury must be the nearest in causation to the injury, without reference to the time of the injury. The active, procuring cause, of which the injury is a natural or probable consequence, is the efficient cause.[11]

§ 23. **Tests for determining proximate cause.**— The United States Supreme Court has held that no cause can be legally considered the proximate cause of an injury, unless there is a direct connection between the negligent act and the injury. The reasoning of Mr. Justice Strong, speaking for the court, in a leading case, may well be regarded as a classic in the law of probable and remote cause, and because of the clear exposition of the subject, is quoted in the note.[12] If the injury could not have been foreseen as a natural or probable result of the alleged negligent act, it is not, generally, held to be the proximate result of such act.[13] In order to warrant

[11] Union Pac. R. Co. v. Callaghan, 56 Fed. Rep. 988; C. C. A. 205.

An instruction that "proximate cause means the nearest cause, the immediate cause, in which there is nothing intervening between it and the effect, or the injury complained of, and that the negligence of the defendant relied on would not give the plaintiff the right to recover, unless it was such proximate cause, is held to be proper, in South Carolina." Anderson v. Southern Ry. Co., 70 S. C. 490; 50 S. E. Rep. 202.

Mere proof of negligence is not sufficient to support a verdict in an action for personal injuries. Such negligence must be the proximate cause of the injury. Deschner v. St. Louis & M. R. R. Co. (Mo. 1906), 98 S. W. Rep. 737.

[12] "We do not say that even the natural and probable consequences of a wrongful act or omission are, in all cases, to be chargeable to the misfeasance or nonfeasance. They are not, when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect and proximate to it. The inquiry must, therefore, always be, whether there was any intermediate cause disconnected from the primary fault and self-operating, which produced the injury." Minneapolis & St. Paul R. Co. v. Kellogg, 94 U. S. 469.

[13] Hoag v. Lake Shore, etc., R. Co., 85 Pa. St. 293; United States

a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, therefore, it must appear that the injury is the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen, in the light of attendant circumstances.[14] If the alleged act of negligence would not have produced the injury but for the interposition of an independent cause, which could not have been reasonably anticipated, but which turned aside the natural sequence of events, and produced the result, such negligent act is not the proximate cause of the injury and is not actionable. The intervening cause, in such case, is the only proximate cause.[15]

§ 24. **Nearness of causation, not time, the controlling factor.**— It is not essential that the event which contributed to produce the injury should be the nearest thereto in point of time, but that it should have been the most directly connected in point of causation to the injury, in order for the event to be considered the proximate cause of the injury.[16] The condition nearest in time or space to the injury is not always the controlling cause thereof, but the agency producing it may be comparatively remote in time or space, yet if sufficiently near, in the order of causation, to the resulting in-

Fidelity & Guaranty Co. v. Des Moines Nat. Bank, 145 Fed. Rep. 273. But see *contra*, Smith v. L. & S. W. R. Co., L. R. 6 C. P. 14.

[14] McGill v. Michigan S. S. Co., 144 Fed. Rep. 788.

[15] American Bridge Co. v. Seeds, 144 Fed. Rep. 605.

[16] In point of time, the negligent act need not be the nearest to the injury, but such negligent act as actively aided to produce the injury; and the fact that another cause contributed to produce the injury also, will not prevent a recovery, if the negligence of the defendant was the efficient cause of the injury. Ray v. Pecos, etc., R. Co. (Tex.), 88 S. W. Rep. 466.

Union Pacific R. Co. v. Callaghan, 56 Fed. Rep. 988; 6 C. C. A. 205; 1 Thompson on Neg., § 48.

jury, the negligent act will be held the proximate cause.[17] But while the authorities hold that in the inquiry for the controlling cause, the conditions at the time of the injury, will not be looked to alone, it is not to be concluded that the cases authorize the statement that the search will be extended for an indefinite period, either in time or space, for it is generally held that there must be such proximity in the order of events, as to enable the court or jury to plainly individualize the alleged injurious act from other causes or events that may have conduced to produce the result.[18]

§ 25. **Efficient intervening cause.**— When a new, independent cause, not under the control of the alleged wrongdoer, intervenes between the alleged wrongful act and the injury, if such intervening cause is not a consequence of the original wrongful act and could not have been foreseen by the exercise of ordinary care and but for such intervening cause, the injury to the plaintiff would not have resulted, then the intervening cause will be taken to be the proximate cause of the injury and no recovery can be had from the party who is not responsible for such independent cause.[19]

But if the intervening events could, by the exercise of reasonable care, have been foreseen by the wrongdoer, then

[17] Eckert v. Long Island, etc., R. Co., 43 N. Y. 502; Henry v. Cleveland, etc., R. Co., 67 Fed. Rep. 426.

[18] Vicars v. Wilcox, 8 East. 1; 2 Greenl. Evid. 210.

The negligence of defendant need not be the sole cause or the nearest, in point of time, if the injury would not have happened but for the negligence and it is closely connected in the order of events. Siegel, Cooper & Co. v. Trecka, 115 Ill. App. 56; 75 N. E. Rep. 1053.

[19] This is practically the language and conclusion reached by the Supreme Court of Kansas, in Atchison, Topeka & Santa Fe R. Co. v. Stanford, 12 Kansas 354; American Bridge Co. v. Seeds, 144 Fed. Rep. 788; Harriman v. Railroad Company, 45 Ohio St. 11; 12 N. E. Rep. 451; Kincaid v. Kansas City, etc., R. Co., 62 Mo. App. 365; South Side, etc., R. Co. v. Trich, 117 Pa. 390; 11 Atl. Rep. 627; Jackson v. Galveston, etc., R. Co., 90 Texas, 372; 37 S. W. Rep. 786.

any number of independent causes may have arisen between the original wrongful act and the injury and it will not affect the resulting liability of the author of the original wrongful act, for every intermediate result, in the sequence of causation, will be regarded as the proximate effect of the first wrongful act.[20]

Some of the cases go so far as to hold that even if the intervening cause could not have been foreseen, yet if it is the direct result of the original negligent act of the defendant, or the result of agencies put in operation by such wrongful act, it will be regarded as a proximate cause of such consequences and the defendant will be liable for the ultimate result, produced by the intervening causes set in motion by the original wrongful act.[21]

§ 26. **Negligent act concurring to produce injury.**— If the injury is the direct result of the wrongful act of the defendant and could have been anticipated as the probable and natural result of such negligent act, the defendant would be liable therefor, even if such act was not the sole cause of the injury. A recovery may be had for negligence which contributed to the injury complained of and it is not necessary that the negligence alleged should have been the sole cause of

[20] Wright v. Chicago, etc., R. Co., 27 Ill. App. 212; Atchison, etc., R. Co. v. Stanford, *supra.*

[21] Billman v. Indianapolis, etc., R. Co., 76 Ind. 166; 40 Amer. Rep. 230; Alabama, etc., R. Co. v. Arnold, 80 Ala. 600; Union, etc., R. Co. v. Evans, 52 Neb. 50; 71 N. W. Rep. 1062; East Tenn. R. Co. v. Lockhart, 79 Ala. 315; Gilliland v. Chicago, etc., R. Co., 19 Mo. App. 411.

If an intervening act is such a one that its probable or actual consequence ought to have been foreseen by the original wrongdoer, the casual connection is not broken and the original wrongdoer is responsible for all the consequences resulting from the intervening act. Southern Ry Co. v. Webb, 116 Ga. 152; 42 S. E. 395; 59 L. R. A. 109.

A prior and remote cause cannot be the basis of an action, though the remote cause gave rise to the event which occasioned the injury, if there was, between such cause and the injury, an independent, unrelated,

the injury.[22] In such case the negligence would be held a concurrent proximate cause of the injury.[23]

So, where two causes combined to produce an injury and both are proximate in their character, the one being the result of negligence of the defendant and the other an occurrence as to which neither the plaintiff nor the defendant was at fault, the defendant would be liable, if the injury would not have happened but for his negligence.[24] And if the injury is the result of two or more causes, all of which can be traceable to the negligence of the defendant, he would be liable therefor and the question of probable or remote cause would not enter into the question.[25] Nor would it defeat the plaintiff's action that the injury resulted from the concurrent negligence of the defendant and another, for neither of the wrongdoers could relieve himself by setting up the negligence of the other.[26]

§ 27. **Wrong need not directly cause injury.**— If the wrongful act of the defendant is one but for which the injury would not have occurred to the plaintiff, the defendant will be liable for the resulting damage therefrom even though such wrongful act was not the direct cause of the injury, but other causes concurred to bring it about, in the

efficient cause therefor. Missouri Pac. R. C. v. Columbia (Kan.), 69 Pac. Rep. 338.

Where a boy was injured as a result of the negligence of the railroad company in leaving its snow fence in a defective condition whereby it fell upon him, his act in raising it up, at a time before the injury, is not such an independent cause as will prevent a recovery. Fishburn v. Burlington & N. W. R. Co., 127 Iowa 483; 103 N. W. Rep. 481.

[22] Gulf, Colorado & Santa Fe R. Co. v. Josey (Tex.), 95 S. W. Rep. 688.

[23] Strange v. Bodcaw, etc., Co. (Ark.), 96 S. W. Rep. 152.

[24] This is the reasoning of the court, in Grimes v. Louisville, etc., R. Co., 3 Ind. App. 573; 30 N. E. Rep. 200.

[25] Kraut v. Frankford, etc., R. Co., 160 Pa. 327; 28 Atl. Rep. 783.

[26] Chicago, etc., R. Co. v. Sutton, 63 Fed. Rep. 394; 11 C. C. A. 251;

sequence of events. The Supreme Court of Indiana has noted this distinction by the use of the following language: "There must be some connection between the effect and the cause — between the injury and the wrong. *It is not*

City, etc., R. Co. v. Conery, 61 Ark. 381; 33 S. W. Rep. 426; 31 L. R. A. 365; Meade v. Chicago, etc., R. Co., 68 Mo. App. 92; Colgrove v. New Haven, etc., R. Co., 20 N. Y. 492; Galveston, etc., R. Co. v. Croskell (Tex.), 25 S. W. Rep. 486.

In an action for an injury received in a collision between the train of a defendant railroad company and a street car, where it is alleged that the injury resulted from the concurrent negligence of both companies, there is no presumption of negligence, as against either company. Harrison v. Sutter, etc., R. Co., 134 Cal. 549; 66 Pac. Rep. 787; 55 L. R. A. 608.

A railroad company is liable for an injury resulting from the concurrent negligence of such company's agent and another cause, the same as if such injury resulted entirely from its negligence. Choctaw, etc., R. Co. v. Holloway, 114 Fed. Rep. 458; 52 C. C. A. 260.

Where a railroad company had customarily whistled in approaching a yard and the deceased was thrown from a platform over the tracks by the smokestack striking the cable holding it in place, the negligence in failing to whistle, was held to be a concurring cause of the accident and the company held liable. Merchants, etc., Co. v. Burns (Tex.), 74 S. W. Rep. 758; 72 S. W. Rep. 626.

Negligence in permitting a pile of stones to remain close to a railroad track, as a result of which a conductor, mounting a car, is struck and thrown under the car, is such act of concurrent negligence as to render the company liable, in Illinois. North Chicago, etc., R. Co. v. Dudgeon, 184 Ill. 477; 56 N. E. Rep. 796.

Where one is injured by the concurring negligence of two different parties, they may be sued separately or jointly. Ray v. Pecos, etc., R. Co., 88 S. W. Rep. 466; Siegel, Cooper & Co. v. Trecka, 115 Ill. App. 56; 75 N. E. Rep. 1053.

Where the injury results from the negligence of two parties, it is enough to justify a recovery, that the act of the party charged was an efficient cause of the injury, without which it would not have happened. Chicago, etc., R. Co. v. O'Donnell, 109 Ill. App. 616; 69 N. E. Rep. 882.

Where the negligent conduct of several, at the same time and place, combined in causing the injury, they acting in concert, it is not essential that they must have acted by a preconcerted arrangement, but all are liable for the injury. Chicago, etc., R. Co. v. Marshall (Ind.), 75 N. E. Rep. 973.

necessary, however, that there should be a direct connection between the wrong and the injury. It is enough if it appears that, but for the wrong, no injury would have occurred, and that the injury was one which might have been anticipated." [27]

But it must not be concluded, from the foregoing statement, that the defendant could be held liable, unless he was the author of an act which, had it not happened, the injury would not have followed. Although there may be different causes for an injury and the defendant may not be the author of all such causes, if he is the party through whose agency one of the efficient causes thereof resulted, and, without this cause, the injury would not have occurred, he will be held liable; [28] but if several causes combine to produce the injury and each may be regarded as an efficient cause, without which it would have been prevented, the accident may be regarded as having proceeded from all such causes combined, but it could not be traced to a cause which did not contribute to produce it.[29]

§ 28. **Where injury or cause ought to be anticipated.**— Where the injury to the plaintiff is not only the result of the

The absence of lights on rear of an engine tender will not be held to be the proximate cause of an injury to an employee in getting on the engine, where he admits that he both saw and heard the engine before attempting to get on. Wise Terminal Co. v. McCormick (Va.), 51 S. E. Rep. 731.

[27] Ohio, etc., R. Co. v. Trowbridge, 126 Ind. 391; 26 N. E. Rep. 64; 45 Am. & Eng. R. Cas. 200.

[28] Schermerhorn v. New York, etc., R. Co., 53 N. Y. S. 279; 33 App. Div. 17.

[29] Murtaugh v. New York, etc., Co., 49 Hun 456; Ergott v. New York, 96 N. Y. 264; Ring v. Cohoes, 77 N. Y. 83; 1 Thompson on Neg., § 56; Louisville & C. B. Co. v. Wilson, 21 Fla. 700.

In an action for damages for injury to a child in a fire, caused by the defendant, it is no defense that after the child was safely rescued, it returned to the burning building, and thus received its injuries. Birmingham, etc., R. Co. v. Hinton (Ala.), 37 So. Rep. 635.

defendant's negligent or wrongful act, in the natural or probable sequence of events, but the injury ought to have been anticipated as a result of such wrongful conduct, on defendant's part, then the defendant is liable for all damages to him resulting from such injury.[30] Nor will the defendant be excused for an injury resulting from his own and an intervening act of another, if such intervening act ought to have been reasonably anticipated to result as an intermediate cause of the injury, in the natural or probable order of events.[31]

But before the defendant, in any case, can be held responsible for an act occasioning an injury to another, either as a direct result of his own act, or when it is considered with reference to the act of another, either the injury or the act causing it must have been one which could reasonably have been anticipated to follow. An employer would not be liable for a rape, committed by a convict employee, as a result of such employee not having been confined at the time or guarded;[32] a railroad company would not be liable for a rape committed on a female, who had been wrongfully removed or ejected from its train, by its employees, as such an act could not have been foreseen to follow as a result of its negligent act;[33] it could not be anticipated that children would run in front of a train which had been negligently separated,[34] or that a lamp would explode in a hotel where a passenger had been negligently left, instead of at her des-

[30] Texas, etc., R. Co. v. Reed, 88 Tex. 439; 31 S. W. Rep. 1058; Huber v. La Crosse, etc., R. Co., 92 Wis. 636; 66 N. W. Rep. 708; 31 L. R. A. 583.

[31] Brown v. Wabash R. Co., 20 Mo. App. 222; Mexican Central R. Co. v. Mussetts, 86 Tex. 708; Seale v. Railroad Co., 65 Tex. 274.

[32] Henderson v. Dade, etc., Co., 100 Ga. 568; 28 S. E. Rep. 251; 40 L. R. A. 95.

[33] Henderson v. Dade, etc., Co., 100 Ga. 568; Graney v. St. Louis, etc., R. Co., 140 Mo. 89; 41 S. W. Rep. 246.

[34] Galveston, etc., R. Co. v. Chambers, 73 Tex. 296; 11 S. W. Rep. 279.

tination by a railroad company,[35] for in all of these cases the injury could not have been reasonably expected to follow the negligence counted upon.

It is held, in Minnesota,[36] that even if the specific injury could not have been anticipated, the defendant will nevertheless be liable, if any injury ought to have been foreseen, but this rule is doubted by good authority.[37]

§ 29. **Aggravation of injury without fault of defendant.**— Since the party causing an injury is only liable for the direct consequences of his own wrongful act, although such an act may directly cause an injury, if, after such injury was sustained, it was aggravated or increased by the acts of the plaintiff himself, or others, for whose acts the defendant was not responsible, he would not be liable for this condition, which did not result from any act of his.[38] This statement applies as well to an act for which the defendant was not responsible, occurring at the time of the infliction of an injury by another person, as it does to an aggravation of the injury subse-

[35] Central, etc., R. Co. v. Price, 106 Ga. 176; 32 S. E. Rep. 77; 43 L. R. A. 402.

[36] Schumaker v. St. Paul, etc., R. Co., 46 Minn. 39.

[37] 1 Thompson on Neg., §§ 59, 60.

To be the proximate cause of an injury, the negligence must have been such that a person of ordinary prudence would have foreseen that some injury would likely result, if not the specific injury sustained. Atchison, etc., R. Co. v. Parry (Kan.), 73 Pac. Rep. 105.

It is held, in Illinois, that negligence may be the proximate cause of an injury even though the injury could not have been anticipated. Chicago, etc., R. Co. v. Willard, 111 Ill. App. 225.

Where an act is negligent, the person committing it is liable for any injury proximately resulting therefrom if he should have anticipated that some injury would be liable to happen from the negligence, though the particular manner in which the injury occurred was not reasonably to have been anticipated. Hudson v. Atlantic Coast Line R. Co. (N. C. 1906), 55 S. E. Rep. 103.

[38] Mack v. Lombard, etc., R. Co., 18 Wash. 84; Georgia, etc., R. Co. v. George, 92 Ga. 760; 19 S. E. Rep. 813.

quently, by some act of the plaintiff, and for such increased injury the original wrongdoer could not be held.

The wrongful ejection of a passenger, by the defendant's employees, whereby he was injured, would not be connected with a subsequent striking of the injured person by another train some time later;[39] a person causing an injury is never liable for an aggravation of such injury by the negligence of the injured person himself;[40] nor would the author of a slight injury be liable for the death of the injured person, caused by the mistake of his physician in giving him poison, instead of medicine.[41]

But if the injured person has used ordinary care in the employment of a physician, he or his representatives could recover, although his injuries were increased or his death resulted, because of the negligence or mistake of such physician, since the law makes allowance for the inexact science of medicine and on grounds of public policy, the author of an injury is not permitted to escape liability therefor by establishing that an injury occasioned by his negligence was aggravated by reason of the mistake or lack of skill of another, whom the plaintiff or injured person employed in the exercise of ordinary care, in an effort to be cured.[42]

[39] Georgia, etc., R. Co. v. George, *supra;* 1 Thompson on Neg., § 65.

[40] Henry v. Southern, etc., R. Co., 50 Cal. 183. But if instead of being negligent himself, the injured person simply acted under the stress of excitement, or innocent of any danger, his act will not be held to preclude a recovery by him. Liming v. Illinois, etc., R. Co., 81 Iowa 246; Berg v. Great Northern R. Co., 70 Minn. 272; 73 N. W. Rep. 648.

[41] Thompson v. Louisville & Nashville R. Co., 91 Ala. 496; 8 So. Rep. 406; 11 L. R. A. 146.

[42] Pullman Car Co. v. Blume, 109 Ill. 20; Lyons v. Erie R. Co., 57 N. Y. 489; St. Louis, etc., R. Co. v. Doyle (Tex.), 25 S. W. Rep. 461; Sauter v. New York Central & Hudson River R. Co., 66 N. Y. 50.

Although a railway company is negligent and the plaintiff is free from negligence, if his injury is the direct result of an innocent act, on his part, there is no liability. Georgia Southern, etc., R. Co. v. Cartledge, 116 Ga. 164; 42 S. E. Rep. 405; 59 L. R. A. 118.

§ 30. **Injury in trying to avoid perilous position.**— Where one, by negligence, puts another under a reasonable apprehension of personal physical injury, and, in a reasonable effort to escape from the impending peril, the latter sustains a physical injury, a right of action arises to recover for the physical injury and mental disorder naturally incident to its occurrence. Under this rule, it is held in New Jersey, that where a woman, crossing the street, saw a car approaching at a rapid speed, after it had been negligently derailed, and she ran for safety and in her flight fell and was injured as a result of the fall, that she could recover damages received by the fall.[43]

If the negligence of the railroad company has placed a person in a position where he will be obliged to adopt the alternative of a precipitous course, or remain in a position of cer-

One is liable for the death of another if the injury caused blood poison, from which the deceased died. Armstrong v. Montgomery St. R. Co. (Ala.), 26 So. Rep. 349.

A party who has the least opportunity of avoiding an accident is not excused by the negligence of another. His negligence, in such case, and not the other's act, is the proximate cause. Klockenbrink v. St. Louis, etc., R. Co., 81 Mo. App. 351, 409.

The mangling of a passenger's foot, through the negligence of a railroad company, is not the proximate cause of an injury from a rectal injection of coffee, by its physician. Galveston, etc., R. Co. v. Scott, 18 Tex. Civ. App. 321; 44 S. W. Rep. 589. See, also, Allan v. State, etc., R. Co., 132 N. Y. 99; 15 L. R. A. 166; Secord v. St. Paul, etc., R. Co., 18 Fed. Rep. 221; O'Brien v. Cunard S. S. Co., 154 Mass. 372; 28 N. E. 266; 13 L. R. A. 329.

In Hooper v. Bacon (64 Atl. Rep. 950), the Supreme Judicial Court of Maine holds that, in a suit to recover damages for personal injuries, if the plaintiff employed a surgeon of ordinary professional knowledge and skill, and followed his directions, he is entitled to recover compensation for all the damages sustained, though the surgeon may not have used the requisite skill, or may have erred in judgment, and by unskillful treatment have prevented the plaintiff from recovery from the injury as soon or as perfectly as he would have recovered under skillful treatment.

[43] Tuttle v. Atlantic City R. Co., 49 Atl. Rep. 450.

tain peril, it will be liable, if, in a vain attempt to avoid injury, the plaintiff sustains a greater injury than he would otherwise have done; but if the injured person's act resulted from a rash apprehension of danger, when none in fact existed, and the resulting injury is to be traced directly to such rash act on his part, this will be held to be the proximate cause of his injury, instead of the negligence of the defendant, and he will be denied a recovery therefor.[44]

§ 31. **Instructions on proximate cause of injury.**— It has been held, in South Carolina, that an instruction defining proximate cause, as the immediate cause; that cause in which there is nothing intervening between it and the effect, or the injury, to the plaintiff, and unless the cause alleged as the basis of the injury was such a cause there could be no recovery, was properly given.[45] And an instruction that if the jury believe, from the evidence, that the whole occurrence was a mere accident, without negligence on the part of defendant, the verdict should be for defendant, is proper,[46] for a purely accidental occurrence, causing injury, without the fault of the person to whom it is attributable, is not actionable.

But in Wisconsin, it is held to be error to define proximate cause as the direct and natural or direct and producing cause, without the existence of which the injury would not have occurred, since it is sufficient to constitute proximate cause that the effect follows naturally and probably, though

[44] Caswell v. Baltimore, etc., R. Co., 98 Mass. 194; Georgia, etc., R. Co. v. Rhodes, 56 Ga. 645; Smith v. St. Paul, etc., R. Co., 30 Minn. 169; 9 Am. & Eng. R. Cas. 262; Iron, etc., R. Co. v. Mowery, 36 Ohio St. 418; 3 Am. & Eng. R. Cas. 361; Buel v. New York Central, etc., R. Co., 31 N. Y. 314; Wilson v. Northern Pac. R. Co., 26 Minn. 278; Jones v. Boyce, 1 Starkie 493; Patterson, Ry. Acc. Law, pp. 14, 15.

[45] Anderson v. Southern Ry. Co., 70 S. C. 490; 50 S. E. Rep. 202. It was held error to refuse substantially a similar charge, in Texas. Texas & Pac. R. Co. v. McKenzie, 70 S. W. Rep. 237.

[46] Illinois Central R. Co. v. Smiesni, 104 Ill. App. 194.

not directly and immediately.[47] And it is also held to be erroneous to tell the jury that the cause, to be a proximate cause, ought to be one that an ordinarily prudent person, "would" have reasonably foreseen, as necessary foresight was held to be too high a standard to use in the measuring of those events which will give a cause of action, in the regular or probable sequence of events.[48] And where the defense is that the injury resulted from an act of God, it is error to tell the jury that "if the defendant used ordinary care to prevent the injury and such injury was caused by an act of God, and not by want of care," the jury should find for the defendant, for the defendant was entitled to a verdict if the injury was caused by an act of God, regardless of whether or not it used ordinary care.[49]

§ 32. **No liability for injury from act of God.**— Where the injury to the plaintiff, instead of being traceable to some wrongful act or neglect on the part of the defendant, is the result of natural causes, directly and entirely, "without human intervention," which could not have been avoided by any amount of care or foresight, there is no liability for such an injury.[50]

This is the general rule established by an almost unbroken line of decisions in the United States and England.[51] If

[47] Meyer v. Milwaukee, etc., R. Co., 93 N. W. Rep. 6; Baxter v. Chicago & N. W. Ry. Co., 104 Wis. 307; 80 N. W. Rep. 644.

[48] Meyer v. Milwaukee, etc., R. Co., *supra*.

[49] Texas, etc., R. Co. v. Anderson, 61 S. W. Rep. 424.

[50] Withers v. Railway Company, 3 H. & N. 969; Nugent v. Smith, 1 C. P. D. 444; Patterson, Ry. Acc. Law, p. 29.

[51] Baltimore & Ohio R. R. Co. v. School District, 96 Pa. St. 65; 2 Am. & Eng. R. Cas. 166; Pennsylvania, etc., Co. v. Anderson, 94 Pa. St. 351; Pennsylvania, etc., Co. v. Brigham, 29 Ohio St. 374; International & Great Northern R. Co. v. Halloren, 53 Texas 46; 3 Am. & Eng. R. Cas. 343; Denny v. New York Central R. Co., 13 Gray 481; Gates v. St. Paul, etc., R. Co., 28 Minn. 110; 2 Am. & Eng. R. Cas. 237, but see

the company's negligence has not superinduced the injury, one suffering damage from the effects of an unprecedented flood, whereby a railroad grade,[52] or bridge,[53] is carried away; or if a station [54] or a train [55] is wrecked as the result of a cyclone, no recovery can be had from the company. And if the phenomena causing the injury is of such unprecedented character as to come within the definition of an act of God, it is immaterial that it may recur in a short time after the first injury resulted. It is not essential that it should be unique, if it could not reasonably have been anticipated, for, as said, in a Pennsylvania case, "If all were extraordinary, * * * the surprise at the second and third could not be less than at the first, and it was still more surprising that they should come in this rapid succession." [56]

But if the negligence on the part of the railway company concurs with the act of God to bring about the injury, a liability could be predicated thereon, for it is only where the injury results solely from an act of God that there is no liability. This exception to the rule is illustrated by a Missouri case, where a liability was held to exist from a wreck caused by the washing away of an embankment, admitted to have been caused by an unprecedented flood, but the company had failed to have its roadbed or bridge examined or inspected before the rain; [57] the same result would follow, if the defendant's negligence weakened the structure,[58] or if

contra, Kansas & Pac. R. Co. v. Miller, 2 Colo, 442, not a well-considered case.

[52] Withers v. Railway Co., 3 H. & N. 969; Ely v. St. Louis, etc., R. Co. 77 Mo. 34; 16 Am. & Eng. R. Cas. 342.

[53] Lambkin v. Southeastern R. Co., 5 App. Cas. 552.

[54] Pennsylvania, etc., R. Co. v. Brigham, 29 Ohio St. 374.

[55] McCrary v. Illinois Central R. Co., 3 Neb. 44.

[56] Pennsylvania, etc., R. Co. v. Gilliland, 56 Pa. St. 445.

[57] Ellet v. St. Louis, etc., R. Co., 76 Mo. 518; 12 Am. & Eng. R. Cas. 183; Truitt v. Hannibal & St. Joe R. Co., 62 Mo. 527; Strauss v. Railroad, 17 Fed. Rep. 209.

[58] Davis v. Railroad Co., 55 Vt. 84; 11 Am. & Eng. R. Cas. 173.

the injury could have been avoided, after the natural phenomena causing the damage, if due care had been exercised on the defendant's part.[59]

§ 33. **No responsibility for injury due to inevitable accident.**— An accident is generally defined to be "an unforeseen occurrence."[60] Since it is essential in order to establish negligence, that the defendant, by the exercise of ordinary care, could have prevented the injury, if the cause of the injury could not have been anticipated, it is usually held to be an accident, for which no responsibility exists.[61]

A child, whose presence was not known to the train crew, who is thrown from the train while it is rounding a curve, is held to have met his injury as the result of an accident;[62] this would also be true as to a boy, hid by the side of the roadbed, whose presence was not discovered by the engineer in time to stop the train.[63] In these and similar cases, where no amount of human foresight or care could prevent the injury, there is held to be no liability.[64]

But where the injury is not caused solely by an unforeseen occurrence, but is, in part due to the negligence of the de-

[59] Lambkin v. S. E. Ry. Co., 5 App. Cas. 352.

An act of God means inevitable accident, without the intervention of man, or the public enemy. Sonneborn, etc., Co. v. Southern R. Co., 65 S. C. 502; 44 S. E. Rep. 77.

That an unusual rain had overflowed an embankment and washed the dirt out from under the cross ties cannot be regarded as an act of God, to the extent of relieving the company for its negligence in failing to provide a drain to carry off the water. Gulf, etc., R. Co. v. Boyce, 87 S. W. Rep. 395.

One is not relieved from the effects of an injury to which his negligence contributed, although an act of God concurred to produce the damage. Greeley v. State, 88 N. Y. S. 468; 94 App. Div. 605.

[60] Black's Law & Pr. Acc. Cas., p. 17; Patterson, Ry. Acc. Law, p. 35.

[61] *Ante Idem.*

[62] State v. Baltimore & Ohio R. Co., 24 Md. 84.

[63] Meyers v. Missouri Pac. R. Co., 2 Neb. 320.

[64] White v. Wilmington City R. Co. (Del.), 63 Atl. Rep. 931.

fendant, unless the injury would have happened in the absence of such negligence, the defendant will be liable therefor, since his negligence would be held an approximate, concurring cause of the injury.[65] This doctrine, however, is denied in some States and in England.[66]

§ 34. **Injuries from natural causes.**— If the injury to the plaintiff is shown to have resulted from a natural cause, beyond the power of any man to control, there is no responsibility therefore, on the defendant's part, for no man is chargeable for the effects of an injury from natural agencies alone, but every one is held to the effects of an injury received by coming in contact with natural laws and charged with a knowledge thereof, as a matter of law. Even if the defendant's act conduced to produce the injury, if the conduct

[65] Titcomb v. Fitchburg, etc., R. Co., 12 Allen 254; Washington, etc., R. Co. v. Hickey, 166 U. S. 521; 41 L. Ed. 1101; Grimes v. R. R., 3 Ind. App. 573; 30 N. E. Rep. 200.

[66] Bigelow v. Reed, 51 Me. 325; Bridges v. R. R. Co., 6 Q. B. 377.

Where the injury was due purely to an accident, a verdict based thereon ought to be set aside. Seaboard, etc., R. Co. v. Spencer, 111 Ga. 868; 36 S. E. Rep. 921.

Negligence is not imputable to an accident not the reasonable, natural or probable result, which ought to have been foreseen. Hartman v. Clark, 93 N. Y. S. 314; 104 App. Div. 62.

Where injuries are the result of an accident and there is no negligence on the part of the plaintiff, or the defendant, there can be no recovery. Rea v. St. Louis, etc., R. Co. (Tex.), 73 S. W. Rep. 555.

An inanimate thing or an inevitable accident contributing to produce an injury, will not prevent a recovery, if defendant's negligence was the efficient cause thereof. Commonwealth Electric Co. v. Rose, 214 Ill. 545; 73 N. E. Rep. 780; 114 Ill. App. 181.

It is no defense to an action for injuries occurring by reason of the negligence of the defendant that the negligent or tortious act of a third person or an inevitable accident or an inanimate thing contributed to cause the injury to the plaintiff, if the negligence of the defendant was an efficient cause without which the injury would not have happened. Elgin, A. & S. Traction Co. v. Wilson, 120 Ill. App. 371, judgment affirmed 75 N. E. Rep. 436, 217 Ill. 47.

could not be characterized as negligent, as where an embankment or cut in a railroad was not properly shored up, but the fall of the earth or rock resulted from some other force, subjecting it to the natural law of gravitation, there would be no responsibility for an injury to an employee from such falling earth or rock.[67] But to exempt the defendant from liability for an injury from natural agencies, the direct cause of the injury must have been such natural force, instead of the negligence of the defendant, and if he had been guilty of some act or omission, but for which the injury would not have resulted, then his negligence would be sufficient upon which to predicate a liability, notwithstanding the presence of natural forces contributing thereto. If a knowledge of the unsupported cut or embankment could be brought home to the defendant and the necessity of proper support therefor, in order to render it reasonably safe, then his negligence in failing to properly sustain the same, would furnish a cause of action to the one injured as result thereof, and the mere concurrence of a natural force would not prevent a recovery.[68]

§ 35. **No liability, if public enemy cause injury.**— Analogous to the doctrine that no one is responsible for an injury resulting from an act of God, is the rule of law that no person is liable for an injury to another, if, instead of being due to the negligent act of the person charged, the injury was really caused by an act of the public enemy.

This principle is well illustrated by the Missouri case,[69] where a railway bridge was burned by an armed force of

[67] Rassmussen v. Chicago, etc., R. Co., 65 Iowa 236; Bradley v. Chicago, etc., R. Co., 138 Mo. 293; Olson v. McMullen, 34 Minn. 94; 24 N. W. Rep. 318.

[68] Bradley v. Chicago, etc., R. Co., *supra;* Himrod, etc., Co. v. Clark, 99 Ill. App. 332; 197 Ill. 514.

[69] Sawyer v. Hannibal & St. Joe R. Co., 37 Mo. 240.

men, who were in open rebellion against the Government, and a train, without notice of the burned bridge being brought home to the agents in charge thereof, was wrecked and the injury to the plaintiff resulted. There was held to be no liability. The rule would be different, however, if the agents of the road in charge of the train, had received knowledge that the enemy expected or were liable to attack a train, for in such a case, the injury would not result solely from the act of the enemy, but from the concurrent negligence of the defendant and the act of the enemy and in this instance, the defendant would be liable, the same as he would be where the injury resulted from two concurrent causes and his negligence was one of those causes.[70]

§ 36. **When question of law for court.**— Where the evidence as to the cause of the injury is practically all one way, or the cause is so apparent that no two reasonable men would differ as to the event or chain of events which led up to and culminated in the injury, then the court, as a matter of law, ought to say whether the cause alleged was or was not the proximate cause of the injury.[71] The question of proximate cause is not essentially different from other issues to be decided and where the facts are not conflicting, or are admitted, then the court should say whether or not the cause alleged was the proximate cause.[72] It would be also within the province of the court to determine, in the first instance, whether or not the testimony offered by the plaintiff was sufficient to establish that the negligence of the defendant

[70] Clark v. Pacific R. Co., 39 Mo. 184; Pruitt v. Hannibal & St. Joe R. Co., 62 Mo. 527; Reed v. St. Louis, etc., R. Co., 60 Mo. 199; Bostick v. Baltimore & Ohio R. Co., 45 N. Y. 712.

[71] Dunn v. Cass Avenue, etc., R. Co., 21 Mo. App. 188; South Side, etc., R. Co. v. Trick, 117 Pa. 390; Hoag v. Lake Shore, etc., R. Co., 85 Pa. 293.

[72] South Side, etc., R. Co. v. Trick, 117 Pa. 390; 11 Atl. Rep. 627.

was the proximate cause of the injury, or whether or not it tended to prove this fact.[73] This is always the province of the court, in the determination of the basic fact, whether or not the plaintiff has a cause of action sufficient to justify its submission to the jury. And if the undisputed evidence clearly establishes that the injury was due to another unrelated, independent cause, than the negligence of the defendant alleged,[74] or if the cause of the injury is established to be one wholly different from that alleged, in either event, there would be such a failure to establish the negligence alleged, as to constitute a failure of the cause, and the court should take the case from the jury. The trained judicial mind usually is better qualified to judge of the connection of causes, under the legal rules of evidence than a jury, composed often of men without experience in such matters, and for this reason the rule is held to be that where the testimony is clear that the cause of the injury was different from that alleged as the ground of recovery, it is the duty of the court to pass upon the question, not to submit the issue to the jury.[75]

§ 37. **When a question of fact for the jury.**— As in every other issue submitted in an orderly way, to a court, it may be said that where the facts are so conflicting that reasonable men might differ as to the cause of an injury, then the court ought to submit the determination of the question of what was the proximate cause of such injury to the jury.[76] Some

[73] Cincinnati, etc., R. Co. v. Murray, 53 Ohio St. 570; 42 N. E. Rep. 596; 30 L. R. A. 508; 1 Thompson, Neg., § 162.

[74] South Side, etc., R. Co. v. Trick, 117 Pa. 390; 11 Atl. Rep. 627.

[75] Louisville & N. R. Co. v. Johnston, 81 Fed. Rep. 679; 53 U. S. App. 381.

[76] Patten v. Chicago, etc., R. Co., 32 Wis. 524, where the court held that whether a failure to keep a station lighted was proximate cause of injury should be submitted to jury. See, also, Bischoff v. Peoples, etc., R. Co., 121 Mo. 216; 25 S. W. Rep. 908; Lake Erie, etc., R. Co. v.

courts have held that the determination of such a question is peculiarly a question for the jury, in the consideration of a cause to look at the acts as they occur as shown by the evidence and trace the injury to its source or primal cause.[77] Judge Thompson contends that the question should be determined by the average experience of mankind, as possessed by a jury;[78] some courts hold that it is not a matter of science or one requiring a trained judicial mind,[79] and others say, in every instance the question is for the jury to determine whether or not the evidence shows a connection between the cause alleged and the injury.[80] It may be admitted that this question is not one requiring peculiar science or legal acumen or training to solve, yet, since the knowledge of what causes may legally enter into a consideration of the question, when legally considered, and what evidence is essential to legally establish a given fact and what proof is required to establish a case, are all elements bearing upon the proper determination of this question, it would not seem that the court, possessing these qualifications and selected by the people or the chief executive to try such issues, because of these very qualifications, would, because possessing them, be less competent than the average jury, to consider such issues. This is not the true rule. The issue is not essentially different from other issues; if there is a dispute in the evidence, or if there is

Craig, 73 Fed. Rep. 642; 19 C. C. A. 631; Baltimore, etc., R. Co. v. Anderson, 85 Fed. Rep. 413; 29 C. C. A. 235.

[77] Milwaukee, etc., R. Co. v. Kellogg, 94 U. S. 469; Brown v. Chicago, etc., R. Co., 54 Wis. 342; Schumaker v. St. Paul, etc., R. Co., 46 Minn. 39; 48 N. W. Rep. 559; Louisville & Nashville R. Co. v. Nitsche, 126 Ind. 229; 26 N. E. Rep. 51.

[78] 1 Thompson on Neg., § 161, p. 158.

[79] Clemens v. Hannibal, etc., R. Co., 53 Mo. 366; Gram v. Northern Pac. R. Co., 1 N. D. 252.

[80] Baltimore, etc., R. Co. v. Kemp, 61 Md. 619. This is not the law. It is always for the court to say whether there is a *prima facie* case made. For illustrations of numerous jury cases, where it was held that issue was properly submitted, see 1 Thompson on Neg., §§ 163, 164,

doubt as to the cause, the question should be submitted to the jury. If there is not, the court should decide it, as a matter of law.

§ 38. **Injuries where negligence was proximate cause.**— Where the railroad permits its track to get in a defective condition, as a result of which a train is derailed or wrecked, this is generally held to be such a proximate cause of an injury to the engineer or train crew, as to support an action therefor.[81] The absence of hand-holds,[82] a defective brake beam [83] or any other defect in a car, directly contributing to produce an injury, will be held the proximate cause thereof, both as to employees of the initial and connecting carrier, if an inspection by the latter has not resulted prior to the injury.[84] Failing to maintain the statutory stock fence, as a result of which stock derailed a train, was held, in Missouri, to be the proximate cause of an injury to the engineer, of the wrecked engine.[85] And, generally, whenever the act of the company, or any of its employees, contributes to produce an injury to another employee, such act will be held to render the company liable, if the statutory fellow-servant rule obtains, the same as if the company had been negligent

[81] Knapp v. Sioux City, etc., R. Co., 65 Iowa, 91; 18 Am. & Eng. R. Cas. 60; Aldrich v. Concord, etc., R. Co., 67 N. H. 380; 36 Atl. Rep. 252; Patterson, Ry. Acc. Law, p. 26.

[82] International & Gr. N. R. Co. v. Sipole, 29 S. W. Rep. 686.

[83] Cone v. Delaware, etc., R. Co., 81 N. Y. 206; Booth v. Boston, etc., R. Co., 73 N. Y. 38; Ransier v. Minneapolis, etc., R. Co., 32 Minn. 331.

[84] Pennsylvania R. Co. v. Snyder, 55 Ohio St. 342; 45 N. E. Rep. 559.

[85] Dickson v. Omaha, etc., R. Co., 124 Mo. 140; 27 S. W. Rep. 476; 25 L. R. A. 320.

The United States Supreme Court even upheld a verdict caused by the running into a boy, who strayed on its track, by reason of its failure to construct a fence around a public park, as required by statute, to keep out stock. Hayes v. M. C. R. Co., 111 U. S. 228; 15 Am. & Eng. R. Cas. 394.

in the failure to maintain or repair a tool or appliance necessary in the service.[86]

And for direct injuries to third parties from the negligence of its employees, such as injuries from a runaway, caused by the negligent blowing of the locomotive whistle;[87] injuries resulting to female passengers, from being carried past their stations and ejected,[88] or injuries to male passengers, after being ejected, where the injuries are not the result of another intervening, independent cause,[89] or injuries sustained in putting out fires set by the locomotive,[90] in all such cases, there is held to be a liability.

[86] Christianson v. Chicago, etc., R. Co., 67 Minn. 94; 69 N. W. Rep. 640; 1 Thompson on Neg., § 108.

[87] Pennsylvania, etc., R. Co. v. Brannen, 17 W. N. C. (Penn.) 227; Patterson Ry. Acc. Law, p. 26; Lowery v. Ry. Co., 99 N. Y. 158.

[88] Brown v. Chicago, etc., R. Co., 54 Wis. 342; 3 Am. & Eng. R. Cas. 444.

[89] Southern, etc., R. Co. v. Nix, 68 Ga. 572.

[90] Glanz v. Chicago, etc., R. Co. (Iowa), 93 N. W. Rep. 575.

It is held, in Iowa, that the fact that a child is injured on a turntable, as a result of the turning of the table by its playmates, will not relieve the railroad company, since it is negligent in maintaining such a dangerous machine, attractive to children. Edginton v. Burlington, etc., R. Co., 116 Iowa 410; 90 N. W. Rep. 95; 57 L. R. A. 561.

Negligence of a railroad in starting a fire on plaintiff's premises, was held the proximate cause of an injury received while putting it out. Glanz v. Chicago & C. R. Co. (Iowa), 93 N. W. Rep. 575.

Negligence in leaving machinery unguarded, was held the proximate cause of an injury to an employee, who fell and in trying to sustain himself caught hold of an unguarded cog. Gee v. Northern Pac. R. Co., 30 Wash. 654; 71 Pac. Rep. 182.

Where the defendant's negligence caused plaintiff's team to run away and in trying to hold it, the line broke, which was really the cause of his falling from his wagon, the company was none the less liable, in Texas, as if it could have foreseen such a result. Texas & Pac. R. Co. v. Moseley, 58 S. W. Rep. 48.

Where the negligence of employees in carrying a passenger past his station, results in exposure to the elements, from which sickness results, it is held to result proximately from the wrongful expulsion. Missouri K. & T. R. Co. v. Hennessy, 20 Tex. Civ. App. 316; 49 S. W. Rep. 917.

Allowing cars to remain on a double track road, so as to necessitate

§ 39. **Cases where negligence held remote cause.**— The rule is quite general that if two distinct causes contribute to produce an injury, wholly unrelated each to the other, one of such causes must be held the proximate cause and the other the remote cause of the injury.[91] The proximate cause, to render the defendant liable, must be the wrongful act of the defendant, or its employees, or no cause of action for such an injury can be maintained. A defective coupling pin, which causes the parting of a train, will not be held the proximate cause of an injury to a brakeman, received while going between the broken train to couple it, in violation of a known rule of his employer;[92] a failure to have the customary number of brakemen on a train when an employee was injured, making a coupling, will give no right of action, as the absence of the required force was not connected with the injury;[93] a brakeman's death from being struck by a gate, negligently left open, but while he was riding a brake beam, instead of riding in the cab, where he ought to have been, was held to be due to his own and not the company's negligence,[94] and a hole in a car could not be termed the proximate cause of an injury to a brakeman who was hurt by the conductor letting a heavy piece of freight fall against him, while assisting to unload a car.[95] The negligence of the company will not, generally, be held to be the proximate cause of an injury to an employee, caused by the intervening negligence of a coemployee, in the absence of a statute imposing such a liability,[96] nor will the

a short turn with a wagon, may be deemed the cause of an injury received from being thrown from the wagon, while turning it. Southern R. Co. v. Prather, 119 Ala. 588; 24 So. Rep. 836; 14 Am. & Eng. R. Cas. (N. S.) 832.

[91] Missouri Pac. R. Co. v. Columbia (Kan), 69 Pac. Rep. 338.

[92] Richmond, etc., R. Co. v. Tribble, 24 S. E. Rep. 278; 3 Am. & Eng. R. Cas. (N. S.) 632.

[93] Connor v. Elmira, etc., R. Co., 92 Hun 339; 36 N. Y. S. 926.

[94] Benage v. Lake Shore, etc., R. Co., 102 Mich. 72; 60 N. W. Rep. 286.

[95] Louisville & N. R. Co. v. Southwick (Ind.), 44 N. E. Rep. 263.

[96] East Tenn., etc., R. Co. v. Reynolds, 93 Ga. 570; 20 S. E. Rep. 70;

company be liable for injuries to third parties, unless the injury can be traced directly to the negligence of its employees.

Accordingly, injuries to the public, in attempts to avoid a blocked street by climbing, or driving around standing cars;[97] injuries to passengers, after being ejected from the train, which could not have been foreseen, or anticipated;[98] injuries received by drunken passengers, as a result of their intoxication,[99] or injuries to passengers by third persons, or other passengers, are not, generally, injuries for which damages can be recovered from the railroad company.[1]

Terre Haute, etc., R. Co. v. Mansberger, 65 Fed. Rep. 196; 12 C. C. A. 574; 1 Thompson on Neg., § 109.

[97] Pennsylvania, etc., R. Co. v. Taylor, 104 Penn. 306; Pennsylvania, etc., R. Co. v. Staley, 41 Ohio St. 188; 19 Am. & Eng. R. Cas. 381; Jackson v. North Carolina, etc., R. Co., 13 Lea (Tenn.), 491; 19 Am. & Eng. R. Cas. 433; Patterson Ry. Acc. Law, p. 24.

[98] Hobbs v. L. & S. W. Ry. Co., L. R. 10 Q. B. 111; St. Louis, etc., R. Co. v. Marshall, 78 Mo. 610; St. Louis, etc., R. Co. v. Trigg, 74 Mo. 174; Cincinnati, etc., R. Co. v. Eaton, 94 Ind. 474; Brown v. Chicago & C. R. Co., 54 Wis. 342; Louisville, etc., R. Co. v. Fleming, 14 Lea (Tenn.), 128.

[99] McClelland v. Louisville, etc., R. Co., 94 Ind. 276; 18 Am. & Eng. R. Cas. 260; Haley v. Chicago & Northwestern Ry. Co., 21 Iowa, 15.

[1] Cornman v. E. C. Ry. Co., 4 H. & N. 78; Hunter v. Stewart, 47 Me. 419; Williamson v. Grand Trunk Ry. Co., 17 Up. Can. (C. P.) 615; Patterson, Ry. Acc. Law, p. 25.

Where two distinct causes, wholly unrelated, contribute to produce an injury, one must be the proximate cause and the other the remote cause. Missouri Pac. R. Co. v. Columbia, 69 Pac. Rep. 338.

Where an employee places his hand on a railroad track and gets it crushed by a car, this act of his and not the speed of the car, is the cause of his injury. Nolan v. Metropolitan, etc., R. Co., 72 N. Y. S. 501; 65 App. Div. 184.

A brakeman who was kicked by a horse, which run from a stock car, while he was attempting to fasten the door, cannot recover from the company, as the kick of the horse was the proximate cause of his injury, although the door was defective. Smith v. Texas & Pac. R. Co., 58 S. W. Rep. 151.

In an action for injury from a defective car, delivered by a connecting carrier, such carrier will not be liable after an inspection by the receiving carrier, as its negligence will be held too remote. Missouri

K. & T. R. Co. v. Merrill, 65 Kan. 436; 70 Pac. Rep. 358; 59 L. R. A. 711.

A railway train may be operated at an improper rate of speed, but this will not be held to be the proximate cause of crushing the plaintiff's hand, if he laid it in front of the train. His own act occasioned the injury. Nolan v. Metropolitan, etc., R. Co., 173 N. Y. 604; 66 N. E. Rep. 1112.

One injured in a railroad collision, as a result of which dizziness was a consequence, cannot recover for an injury received from a fall, while laboring under such dizziness, as it is too remote. Snow v. New York, etc., R. Co., 185 Mass. 321; 70 N. E. Rep. 205.

A railway company will not be liable for an object left in the highway, which was rolled against plaintiff's carriage, as a result of which the injury was sustained. Glassey v. Worcester Con., etc., R. Co., 185 Mass. 315; 70 N. E. Rep. 199.

Injuries from jumping from a moving train can never be traced to the negligence of the company. Central Texas, etc., R. Co. v. Hoard, 49 S. W. Rep. 142; St. Louis & S. F. R. Co. v. Murray, 55 Ark. 248; 18 S. W. Rep. 50; 16 L. R. A. 787; St. Louis I. M. & S. Ry. Co. v. Madry, 57 Ark. 306; 21 S. W. Rep. 472; Mitchell v. Southern Pac. R. Co., 87 Cal. 62; 25 Pac. Rep. 245; 11 L. R. A. 130; Southwestern R. Co. v. Paulk, 24 Ga. 356; Wilson v. Northern Pac. R. Co., 26 Minn. 278; 3 N. W. Rep. 333; Dimmitt v. Hannibal & St. Joe R. Co., 40 Mo. App. 654; Buel v. New York Cent. R. Co., 31 N. Y. 314; 88 Am. Dec. 271.

The negligence of a boy in jumping from a train, not the company's failure to discover him, is the cause of his injury. Chicago & C. R. Co. v. Hoffman, 82 Ill. App. 453; Brightman v. Union, etc., R. Co., 167 Mass. 113; Schiffer v. Chicago & C. R. Co., 96 Wis. 141.

The act of one alighting from a train is the cause of his injury, not the fact that employees left the train gate open. Aguline v. New York, etc., R. Co., 21 R. I. 263; 43 Atl. Rep. 63; 14 Am. & Eng. R. Cas. (N. S.) 199.

The postponement of his marriage is not the proximate result of plaintiff's ejection from defendant's train. Louisville & N. R. Co. v. Hine, 121 Ala. 234; 14 Am. & Eng. R. Cas. (N. S.) 382.

Mere failure to give statutory signals of the movements of a switch engine, crossing a street, will not enable an injured traveler to recover, who crosses without stopping, as his negligence is the proximate cause of his injury. Killian v. Chicago, etc., R. Co., 86 Mo. App. 473.

CHAPTER III.

JURISDICTION OF ACTION.

LAW OF PLACE.

§ 40. Actions both local and transitory.
41. When action existed at common law.
42. Statutory actions for death strictly construed.
43. Law of place of accident controls damages.
44. Death of foreigner — Administrator may sue for.
45. For injury or death in foreign State.
46. Negligence and injury in different States.
47. When remedy exists in either of two States.
48. Same — Statutes need not be identical.
49. Death statutes given no extraterritorial effect.
50. When statute given extraterritorial effect.
51. Subsequent repeal of statute does not effect.
52. Penal and compensatory statutes distinguished.
53. Pleading law of foreign State.
54. Proving statute of foreign State.
55. Special limitations applicable to such actions.

§ 40. **Action both local and transitory.**— An action for the death of a person, caused by the wrongful act of a railroad company is said, in a Kentucky case, to be both local and transitory. It is transitory in the sense that it may be instituted in another county than that in which the tort was committed and its chief officer and agent, if the officer is named by the statute upon whom service must be made, may be found, and it is local at the option of the plaintiff.[1]

The action need not be filed in the county where the death or injury occurred, and regardless of the place where

[1] Chesapeake & O. R. Co. v. Heath, 87 Ky. 651; 9 S. W. Rep. 832; White v. Rio Grande, etc., R. Co. (Utah), 71 Pac. Rep. 593.

the principal office or place of business of the defendant is located, or the place where the contract of employment was made, the action is generally permitted to be brought in any county where a valid service of process upon the defendant can be had.[2]

§ 41. **When action existed at common law.**— Where the right of action for a personal injury on a railroad exists by virtue of the common law, an action for such injury may be brought in a State where the common law obtains, although the injury was received in another State. Accordingly, it is held, in Texas, in an action in that State, by an employee, for injuries received in another State, that the case will be determined according to the common law of Texas, although both plaintiff and defendant are residents of the other State where the injuries occurred.[3] And it is also held, in Tennessee, that an action may be brought in that State, for injuries received by an employee in another State, without alleging the decisions and laws of the State where the injury occurred, if the right of action existed at common law.[4]

[2] Georgia, etc., R. Co. v. Oaks, 52 Ga. 410; 7 Am. Ry. Rep. 143; East Tenn. & C. R. Co. v. Atlanta, etc., R. Co., 49 Fed. Rep. 608; Christian v. Columbus, etc., R. Co., 79 Ga. 460; 38 Am. & Eng. R. Cas. 261; 7 S. E. Rep. 216.

In Louisiana, under the Practice Code, an action for death against a railroad for wrongful death, may be brought in the parish where the injury was inflicted. Houston v. Vicksburg, etc., R. Co., 39 La. Ann. 796; 34 Am. & Eng. R. Cas. 76; 2 So. Rep. 562.

An action for death under the Arkansas statute was held to be a transitory action. Kansas City, etc., R. Co. v. McGinty, 88 S. W. Rep. 1001. See, also, Smith v. Empire State M. & D. Co., 127 Fed. Rep. 462.

[3] Missouri, K. & T. Ry. Co. v. Thompson, 11 Texas Civ. App. 658; 33 S. W. Rep. 718.

[4] Louisville & N. R. R. Co. v. Reagan, 96 Tenn. (12 Pickle) 128; 33 S. W. Rep. 1050.

§ 42. **Statutory actions for death strictly construed.**— As a general rule, all statutes creating a cause of action for injuries causing the death of the injured party are strictly construed, for the reason that all such acts are in contravention of the common-law rule that actions for personal injuries resulting in death did not survive the death of the injured person.[5]

The right to sue, for injuries resulting in death, is limited to those expressly named in the statute creating the cause of action and no one can sue for damages resulting from the death of a person injured through the negligence of a railroad company, or its agents, unless specially named in the statute as empowered to sue for the death of such person.[6]

§ 43. **Law of place of accident controls damages.**— The damages recoverable from an employer for the death of his employee, caused by his negligence, are controlled by the law of the place where the contract of employment was made, and where the accident occurred, regardless of the fact that the death occurred and the action is brought in another State.[7]

Where the action is brought in one State, for death in another, the parties entitled to sue depend upon the law of the State where the death occurred and not where the suit is in-

[5] Baker v. Balken, 1 Camp. 493; James v. Christie, 18 Mo. 162; Parsons v. Missouri Pacific Ry. Co., 94 Mo. 286; Buswell, Per. Inj., §§ 15 to 18.

[6] Personal representatives are not entitled to sue, unless specially named. McIntosh v. Missouri K. & T. R. Co., 103 Mo. 340; Boyd v. Brazil, etc., Co., 22 Ind. App. 329; 50 N. E. Rep. 368.

[7] Northern Pacific R. R. Co. v. Babcock, 154 U. S. 190; 14 Sup. Ct. Rep. 978; 38 L. Ed. 958; The City of Alexandria, 17 Fed. Rep. 390.

An action for personal injuries received in Iowa, where the suit is filed in Missouri, is governed by the law of Iowa. Benedict v. Chicago Great Western Ry. Co., 104 Mo. App. 218; 78 S. W. Rep. 60; Williams v. Chicago, etc., R. Co., 106 Mo. App. 61; 79 S. W. Rep. 1167.

stituted.[8] And the defendants, in actions for death by wrongful act, also depend entirely upon the statute creating the liability, and whether the liability is imposed under a domestic or foreign statute, its provisions as to parties plaintiff and defendant must be followed.[9]

§ 44. **Death of foreigner — Administrator may sue for.**— Where a nonresident of a State, where an injury resulting in death, under the statute of the State where the death occurs, is within the protection of the statute of the State where the death occurred and there would be no one competent to sue for such death, but such statute permits an administrator to sue therefor, the Probate Court of the county where the death occurred would have jurisdiction to appoint an administrator for the purpose of suing for the wrongful death of the deceased, although he was not an inhabitant of the State, or left no property therein.[10]

But of course, his representative could not recover in one State, for the wrongful killing of a person by a railroad, where the act was done in another State and the laws of the State where the killing occurred would give the plaintiff no remedy therefor.[11]

§ 45. **For injury or death in foreign State.**— In an action for death, where the injury or death occurred in a different

[8] Usher v. West Jersey Co., 126 Pa. St. 206; Lomer v. Segal, 30 Vt. 66; Johnson v. Union Pac. Co. (Utah 1904), 76 Pac. Rep. 1089. A right of action, in Missouri, for a negligent injury inflicted in Iowa, is governed by the law of Iowa. Williams v. Chicago, R. I. & P. R. Co. (Mo. App. 1904), 106 Mo. App. 61; 79 S. W. Rep. 1167.

[9] Williams v. Chicago, R. I. & P. R. Co., *supra;* Black's Law and Prac. Acc. Cas., §§ 146, 147.

[10] Hutchins v. St. Paul, etc., R. Co., 44 Minn. 5; 46 N. W. Rep. 79.

[11] Selma, etc., R. Co. v. Lacey, 49 Ga. 106; Willis v. Missouri Pac. R. Co., 61 Texas, 432; 23 Am. & Eng. R. Cas. 379; St. Louis, I. M. & S. Ry. Co. v. McCormick, 71 Texas 660; DeHam v. Mexican Nat. R. Co. (Texas), 22 S. W. Rep. 249.

State than that wherein the action is brought, the wrong causing the death must generally be actionable under the law of the State where it occurs and also in the State where the suit is brought, or otherwise there is no cause of action.[12]

A person cannot recover, in the courts of one State, for a wrongful killing, by a railroad, where the act was done in another State, under whose laws the plaintiff could not have recovered.[13] Such a right of action may be prosecuted in another State, only when the two States have substantially similar statutes[14] and it must generally be both alleged and proved that an action would lie under the law of the State where the injury occurred.[15]

§ 46. **Same — Negligence and injury in different States.—** The rule that the law of the place of the injury governs the damages recoverable therefor, is not affected by the fact that the negligent act which occasioned the injury may have been committed in a different State than that where the injury was received. Where a railroad engineer, running through the States of Mississippi and Tennessee, was killed by a collision in Tennessee, the omission of a duty in Mississippi,

[12] Burns v. Grand Rapids, etc., R. Co., 113 Ind. 169; 15 N. E. Rep. 230; Richardson v. New York, etc., R. Co., 98 Mass. 85; Anderson v. Milwaukee, etc., R. Co., 37 Wis. 321; O'Reilly v. New York, etc., R. Co., 42 Am. & Eng. R. Cas. 50; 16 R. I. 388; 17 Atl. Rep. 906; 6 L. R. A. 719; Gardner v. New York, etc., R. Co., 17 R. I. 790; Needham v. Grand Trunk R. Co., 38 Vt. 294; Davis v. New York, etc., R. Co., 143 Mass. 301; 58 Am. Rep. 138; 28 Am. & Eng. R. Cas. 223; 9 N. E. Rep. 815.

[13] St. Louis, I. M. & S. Ry. Co. v. McCormick, 71 Texas, 660; Willis v. Missouri Pac. R. Co., 61 Texas 432; 23 Am. & Eng. R. Cas. 379.

[14] O'Reilly v. New York, etc., R. Co., 16 R. I. 388; 17 Atl. Rep. 906; 42 Am. & Eng. R. Cas. 50; 6 L. R. A. 719.

[15] Vandeventer v. New York, etc., R. Co., 27 Barb. 244; Hyde v. Wabash, etc., R. Co., 61 Iowa 441; 16 N. W. Rep. 351; 47 Am. Rep. 820; 15 Am. & Eng. R. Cas. 503; Hamilton v. Hannibal, etc., R. Co., 39 Kansas, 56; 18 Pac. Rep. 57.

which really occasioned the injury, was held not to have the effect of transferring the cause of action, because the consequence of the wrongful act was manifested physically in the State of Tennessee, and that was where the cause of action accrued and the right of recovery was held to be determined by the laws of Tennessee.[16]

§ 47. **When remedy exists in either of two States.**— Where a person is killed by the wrongful act of a railroad in one State and the courts of another State are endowed with jurisdiction in a similar action, and the statutes of both States are alike on the subject, the action may be brought in the courts of the other State as well as in the courts of the State where the death occurs.[17] The existence of a similar statute in the latter State is sufficient evidence of the legislative policy of the State, inimical to that of the State where the accident occurred and hence the action cannot be held to be opposed to the public policy of the State where the right is attempted to be enforced.[18]

If the right of action is given an administrator of the State where the death occurred and such action is not op-

[16] Chicago, St. L. & N. O. R. Co. v. Doyle, 60 Miss. 977.

[17] Cincinnati, etc., R. Co. v. McMullen, 117 Ind. 439; 38 Am. & Eng. R. Cas. 165; 20 N. E. Rep. 287; Hecht v. Ohio, etc., R. Co., 132 Ind. 507; Dennick v. Central R. Co., 103 U. S. 11; Bruce v. Cincinnati, etc., R. Co., 83 Ky. 174; Chicago, etc., R. Co. v. Doyle, 60 Miss. 977; 8 Am. & Eng. R. Cas. 171; Burns v. Grand Rapids, etc., R. Co., 113 Ind. 169; 15 N. E. Rep. 230; Missouri Pac. R. Co. v. Lewis, 24 Neb. 848; 40 N. W. Rep. 401; 2 L. R. A. 67; Stoeckman v. Terre Haute, etc., R. Co., 15 Mo. App. 503; Ash v. Baltimore, etc. R. Co., 72 Md. 144; 44 Am. & Eng. R. Cas. 676; Vawter v. Missouri Pac. R. Co., 84 Mo. 679; 54 Am. Rep. 105; Illinois C. R. Co. v. Crudup, 63 Miss. 291; McLeod v. Connecticut, etc., R. Co., 58 Vt. 727; 28 Am. & Eng. R. Cas. 644; Laird v. Connecticut, etc., R. Co., 62 N. H. 254; 43 Am. & Eng. R. Cas. 63; Nelson v. Chesapeake, etc., R. Co., 88 Va. 971.

[18] Chicago, etc., R. Co. v. Doyle, 60 Miss. 977; 8 Am. & Eng. R. Cas. 171.

posed to the public policy of the State where the action is filed, the administrator of the latter State can sue,[19] regardless of the administration in the State of the homicide.[20]

[19] Illinois C. R. Co. v. Crudup, 63 Miss. 291; Dennick v. Central R. Co., 103 U. S. 11.

[20] Gurney v. Grand Trunk R. Co., 37 N. Y. S. R. 557; 138 N. Y. 638; Leonard v. Columbia, etc., Co., 84 N. Y. 48.

It is held, in the following cases, that an action may be prosecuted in one State, for death in another, where the statutes of the two States were similar. Central R. Co. v. Swint, 73 Ga. 651; 26 Am. & Eng. R. Cas. 482; South Carolina R. Co. v. Nix, 68 Ga. 572; Knight v. West Jersey R. Co., 108 Pa. St. 250; 26 Am. & Eng. R. Cas. 485; Leonard v. Columbia St. Nav. Co., 84 N. Y. 48; Nelson v. Chesapeake & Ohio Co., 88 Va. 971; Dennick v. Central R. Co., 103 U. S. 11; Morris v. Chicago, etc., R. Co., 65 Iowa 727; 19 Am. & Eng. R. Cas. 180; 54 Am. Rep. 39; Stoeckman v. Terre Haute, etc., R. Co., 15 Mo. App. 503; Jones v. Kansas City, etc., R. Co., 178 Mo. 528; 77 S. W. Rep. 890; Lee v. Missouri Pac. R. Co., 195 Mo. 418; 92 S. W. Rep. 614; Burns v. Grand Rapids, etc., R. Co., 113 Ind. 169; Boyce v. Wabash, etc., Co., 63 Iowa 70; 23 Am. & Eng. R. Cas. 172; 50 Am. Rep. 730; Higgins v. Central R. Co., 155 Mass. 176; Illinois Central R. Co. v. Crudup, 63 Miss. 291; Chandler v. New York, etc., R. Co., 159 Mass. 589; 35 N. E. Rep. 89; Hover v. Pennsylvania R. Co., 25 Ohio St. 667; Missouri Pac. R. Co. v. Lewis, 24 Neb. 848; Nashville, etc., R. Co. v. Sprayberry, 9 Heisk. (Tenn.) 852; 20 Am. Ry. Rep. 55.

The statutes of Ohio and Kentucky are so similar that a Kentucky administrator is held competent to sue for the death of his intestate in Ohio. Camden Interstate Ry. Co. v. Williams, 140 Fed. Rep. 985; 72 C. C. A. 680.

A suit may also be maintained in Ohio, for a death in a foreign State, although the next of kin are also all aliens. Baltimore & Ohio R. Co. v. Baldwin, 144 Fed. Rep. 53.

And in the following cases, it was held that action could be maintained in one State, for death occurring in another. Denver, etc., R. Co. v. Warring (Colo.), 86 Pac. Rep. 305; *In re* Lowham's Estate, 85 Pac. Rep. 445; Strauss v. New York, etc., R. Co., 87 N. Y. S. 67; 91 App. Div. 583; Nebauer v. Great Northern R. Co. (Minn.), 99 N. W. Rep. 620; Whitlow v. Nashville, etc., R. Co. (Tenn.), 84 S. W. Rep. 618; Florida Cent. R. Co. v. Sullivan, 120 Fed. Rep. 799; 57 C. C. A. 167; 61 L. R. A. 410; Harrill v. South Carolina Ry. Co., 132 N. Car. 655; 44 S. E. Rep. 109; Boston, etc., R. Co. v. Hurd, 108 Fed. Rep. 116; 47 C. C. A. 615; Nicholas v. Burlington, etc., R. Co. (Minn.), 80 N. W. Rep. 776.

§ 48. **Same — Statutes need not be identical.**— The statutes of the State where the death occurred and where the action is instituted need not be alike in all their details, in order to permit the action in the latter State, but it is usually held to be sufficient if they are of similar import and character and are founded upon the same principles and possess the same general objects and attributes.[21]

Accordingly, it is held that an administrator of a resident of Massachusetts, may sue in that State for the death of his intestate in Connecticut, although the details of the statutes as to the procedure incidental to the recovery, differ in the two States.[22] And in an action in Illinois, for a death occurring in Canada, it is held not to affect the question of jurisdiction in the former State that the statutes of the two countries differ as to the distribution of the sum recovered or the amount of the recovery.[23]

§ 49. **Death statutes given no extraterritorial effect.**— The weight of authority leans toward the proposition that statutes giving a right of action for death caused by the wrongful act, neglect or omission of another, can only be enforced in the jurisdiction where the right of action accrues and such right, being purely statutory, the statutes can have no extraterritorial effect and if attempted to be administered outside

[21] Wooden v. Western, etc., R. Co., 126 N. Y. 10; 26 N. E. Rep. 1050; Hanna v. Grand Trunk R. Co., 41 Ill. App. 116; Herrick v. Minneapolis, etc., R. Co., 31 Minn. 11; Morris v. Chicago, etc., R. Co., 65 Iowa 727; 23 N. W. Rep. 143; 19 Am. & Eng. R. Cas. 180; 54 Am. Rep. 39; Whitford v. Panama R. Co., 23 N. Y. 467; Lee v. Missouri Pac. R. Co., 195 Mo. 418; 92 S. W. Rep. 614; Jones v. Kansas City, etc., R. Co., 178 Mo. 528; 77 S. W. Rep. 890.

[22] Lee v. Missouri Pac. R. Co., 195 Mo. 418; 92 S. W. Rep. 614; Higgins v. Central, etc., R. Co., 155 Mass. 176; 29 N. E. Rep. 534; 48 Am. & Eng. R. Cas. 512.

[23] Hanna v. Grand Trunk R. Co., 41 Ill. App. 116; Jones v. Kansas City, etc., R. Co., 178 Mo. 528; 77 S. W. Rep. 890.

the jurisdiction where enacted, this can only be done on principles of comity.[24]

Unless the statutes of the State where the action is brought recognize a right of action by the personal representatives of the deceased, an administrator appointed in that State cannot maintain an action in the courts there, under the statutes of another State, authorizing personal representatives to maintain actions for death by wrongful act, for the benefit of the widow or next of kin.[25] Nor would the right of action be affected although the injured party was a citizen of and died in the State where the action was instituted, for the effects of the injury received in another State.[26]

§ 50. **When statute given extraterritorial effect.**— Apparently at variance with the rule that the law of the State

[24] Vawter v. Missouri Pac. R. Co., 84 Mo. 679; 19 Am. & Eng. R. Cas. 176; 54 Am. Rep. 105; Oates v. Union Pac. R. Co., 104 Mo. 514; 16 S. W. Rep. 487; McGinnis v. Missouri Car, etc., Co., 174 Mo. 225; 73 S. W. Rep. 586; 97 Am. St. Rep. 553; Casey v. Transit Co., 116 Mo. App. 248; Ash v. Baltimore & Ohio R. Co., 72 Md. 144; 44 Am. & Eng. R. Cas. 676; 19 Atl. Rep. 643; McCarthy v. Chicago, etc., R. Co., 18 Kansas 46; Boyce v. Wabash, etc., R. Co., 63 Iowa 70; 23 Am. & Eng. R. Cas. 172; 50 Am. Rep. 730; Vandeventer v. New York, etc., R. Co., 27 Barb. 244; Mahler v. Norwich, etc., R. Co., 35 N. Y. 352; Hover v. Pennsylvania R. Co., 25 Ohio St. 667; Usher v. West Jersey R. Co., 126 Pa. St. 206; 41 Am. & Eng. R. Cas. 508; 17 Atl. Rep. 597.

[25] Woodward v. Michigan So., etc., R. Co., 10 Ohio St. 121; Mackay v. Central R. Co., 14 Blatchf. 65; 4 Fed. Rep. 617; Taylor v. Pennsylvania R. Co., 78 Ky. 348; 7 Am. & Eng. R. Cas. 23; Illinois, etc., R. Co. v. Cragin, 71 Ill. 177.

[26] McCarthy v. Chicago, etc., R. Co., 18 Kansas 46; Richardson v. New York, etc., R. Co., 98 Mass. 85.

In the following cases, it is held that no action can be maintained in one State, for death in another, where the statutes giving the right are dissimilar. Kahl v. Memphis, etc., R. Co., 95 Ala. 337; 10 So. Rep. 661; State v. Pittsburg, etc., R. Co., 45 Md. 41; Ash v. Baltimore & Ohio Co., 72 Md. 144; 19 Atl. Rep. 643; 44 Am. & Eng. R. Cas. 676; Richardson v. New York, etc., R. Co., 98 Mass. 85; Davis v. New York, etc., R. Co., 143 Mass. 301; 28 Am. & Eng. R. Cas. 223; 58

where the injury was received, as the law of the place where the cause of action accrued, governs the right of the injured person to recover, is a recent Ohio case, practically giving extraterritorial effect to the statute of that State, regulating the kind of appliances to be used on railroads in that State. The statute [27] making a failure to employ the appliances specified, *prima facie* evidence of negligence, was held not only to apply to railroads wholly within the State, but also as to railroads any part of whose lines extended into the State of Ohio, whether the injury complained of was received within or without the State.[28]

§ 51. **Subsequent repeal of statute does not affect.**— After a right of action, given by a statute of the State where an injury occurred, accrues to one by virtue of an injury in such State, the right of action for the injury so received is not affected by a subsequent repeal of the statute, but is

Am. Rep. 138; Vawter v. Missouri Pac. R. Co., 84 Mo. 679; 19 Am. & Eng. R. Cas. 176; 54 Am. Rep. 105; Oates v. Union Pac. R. Co., 104 Mo. 514; 16 S. W. Rep. 487; McGinnis v. Missouri Car, etc., Co., 174 Mo. 225; 73 S. W. Rep. 586; Woodard v. Michigan Southern R. Co., 10 Ohio St. 121; Vandeventer v. New York, etc., R. Co., 6 Abb. Pr. 239; Beach v. Bay St. Co., 30 Barb. 433; 10 Abb. Pr. 71; 18 How. Pr. 335; Whitford v. Panama R. Co., 23 N. Y. 465; Atchison, etc., R. Co. v. Betts, 10 Colo. 431; 31 Am. & Eng. R. Cas. 563; 15 Pac. Rep. 821; Gurney v. Grand Trunk R. Co., 37 N. Y. S. R. 557; 13 N. Y. Supp. 645; Derr v. Lehigh Valley R. Co., 158 Pa. St. 365; 27 Atl. Rep. 1002; St. Louis, I. M. & S. Ry. Co. v. McCormick, 71 Texas 660; 9 S. W. Rep. 540; Runt v. Illinois Cent. R. Co. (Miss.), 41 So. Rep. 1; Raisor v. Chicago & A. R. Co., 117 Ill. App. 488; 215 Ill. 47; 74 N. E. Rep. 69; Baltimore & Ohio R. Co. v. Chambers (Ohio), 76 N. E. Rep. 91; Stockwell v. Boston, etc., R. Co., 131 Fed. Rep. 153; Slater v. Mexican Nat. R. Co., 115 Fed. Rep. 593; 53 C. C. A. 239; 194 U. S. 120; 48 L. Ed. 900; Wabash R. Co. v. Fox (Ohio), 59 N. E. Rep. 888; 64 Ohio St. 133; Lyon v. Boston, etc., R. Co., 107 Fed. Rep. 386; Ott v. Lake Shore, etc., R. Co., 18 Ohio Cir. Ct. 395; 10 O. C. D. 85.

[27] Act April 2, 1890; 1897 Ohio Laws, p. 149.

[28] Pennsylvania R. Co. v. McCann, 54 Ohio St. 10; 42 N. E. Rep. 768; 56 Am. St. Rep. 695.

left the same as though the statute were still in effect, for as to the right accruing by virtue of the injury and the provisions of the statute, no subsequent repeal of the statute would be operative, but the right would remain the same as though the statute were still in force.[29]

§ 52. **Penal and compensatory statutes distinguished.**— The law of the place of death governing actions for wrongful death, and not that of the forum,[30] the right to sue depends upon the provisions of the law at the place where the death occurred. The right to sue is not merely part of the remedy, but the right is conferred by statute and the right is governed by the law of the State where the death occurred, or the injury was received, resulting in death.[31] If the statute giving a right to sue, at the place where the death or injury occurred, is a penal statute, no action could be maintained under it in any other State,[32] but if the statute giving the right is not penal, but compensatory, since an action in any State, where a recovery was had, would prevent an action in any other State, a suit could be maintained in a State other than that in which the right of action accrued.[33]

[29] This is particularly true if there has been a subsequent amendment or re-enactment of the statute. San Antonio & A. P. Ry. Co. v. Heller, 11 Tex. Civ. App. 569; 32 S. W. Rep. 847.

[30] Chicago, etc., R. Co. v. Doyle, 60 Miss. 977; 8 Am. & Eng. R. Cas. 171; Lung Chung v. Northern Pac. R. Co., 19 Fed. Rep. 254; 10 Saw. (U. S.) 17; 16 Am. & Eng. R. Cas. 548; McMaster v. Illinois C. R. Co., 65 Miss. 264; 4 So. Rep. 59; 41 Am. & Eng. R. Cas. 486; 7 Am. St. Rep. 653.

[31] Usher v. West Jersey R. Co., 126 Pa. St. 206; 17 Atl. Rep. 597; 41 Am. & Eng. R. Cas. 508.

[32] O'Reilly v. New York, etc., R. Co., 16 R. I. 388; 17 Atl. Rep. 906; 42 Am. & Eng. R. Cas. 50; 6 L. R. A. 719; 29 Cent. L. J. 210.

[33] Nelson v. Chesapeake & Ohio R. Co., 88 Va. 971; 54 Am. & Eng. R. Cas. 82; 14 S. E. Rep. 838.

A statute of a sister State, providing for the recovery of $5,000.00 without proof of damages, is held to be penal and opposed to the

§ 53. **Pleading law of foreign State.**— As the presumption is generally indulged in that the common law obtains in a foreign State, unless the plaintiff in an action for wrongful death in another State, alleges the existence of a statute giving the right of action, and shows that it is similar to that of the State where the suit is filed, his petition will not state a cause of action.[34] The existence of the statute in the State where the right of action is alleged to have accrued, is the basis of the right to sue in the other jurisdiction and such statute must be pleaded like any other fact which is essential to the maintenance of the action.[35] The pleading must show that the action is prosecuted in the name of the party to whom the right of action belongs, under the law of the State where the right accrued, and if it does not do so, no cause of action will be held to be stated.[36]

§ 54. **Proving statute of foreign State.**— As the common law is presumed to obtain at the place of the killing, in the absence of evidence to the contrary,[37] no recovery can generally be had for the wrongful killing of a person, outside the State where the action is instituted, without proof that the action was allowed by the law of the place where the killing occurred.[38] And the proof is not alone confined to

public policy of Illinois. Raisor v. Chicago & Alton R. Co., 117 Ill. App. 488; 215 Ill. 47; 74 N. E. Rep. 69.

[34] Selma, etc., R. Co. v. Lacy, 43 Ga. 461; O'Reilly v. New York, etc., R. Co., 16 R. I. 388; 17 Atl. Rep. 906; 6 L. R. A. 719; 42 Am. & Eng. R. Cas. 50; Debevoise v. New York, etc., R. Co., 98 N. Y. 377; 25 Am. & Eng. R. Cas. 335; 50 Am. Rep. 683.

[35] O'Reilly v. New York, etc., R. Co., 16 R. I. 388; 17 Atl. Rep. 906; 6 L. R. A. 719; 42 Am. & Eng. R. Cas. 50.

[36] Wooden v. Western, etc., R. Co., 126 N. Y. 10; 26 N. E. Rep. 1050.

[37] Chicago, etc., R. Co. v. Schroeder, 18 Ill. App. 328; O'Reilly v. New York, etc., R. Co., 16 R. I. 388; 17 Atl. Rep. 906; 6 L. R. A. 719; 42 Am. & Eng. R. Cas. 50; Selma, etc., R. Co. v. Lacy, 43 Ga. 461.

[38] Geoghagan v. Atlas Steamship Co., 51 N. Y. S. R. 868; 22 N. Y. Supp. 749; Debevoise v. New York, etc., R. Co., 98 N. Y. 377; 25

the fact that a right of action for the death is given by the law of the State where the death occurred, but it must go further and show that the person who sues is the person to whom the right of action is given by such State and that the statute of such State is similar to that of the State where the suit is filed.[39]

§ 55. **Special limitations applicable to such actions.**— As a general rule, where the statute giving an action for death by wrongful act provides that the action therefor must be instituted within a certain period after the cause of action accrues, such limitations are not held to be mere limitations upon the remedy, applicable in the forum where the suit is instituted, according to the general statutes of limitation for similar actions, but are held to be express conditions on the right of action itself, which must be given effect in every forum where the right of action under the statute is attempted to be enforced.[40]

Am. & Eng. R. Cas. 335; 50 Am. Rep. 683; Leonard v. Columbia Steam Nav. Co., 84 N. Y. 48; Nashville, etc., R. Co. v. Eakin, 6 Caldw. (Tenn.) 582.

[39] Wooden v. Western, etc., R. Co., 126 N. Y. 10; 26 N. E. Rep. 1050; McDonald v. Mallory, 77 N. Y. 546; Kahl v. Memphis, etc., R. Co., 95 Ala. 337; 10 So. Rep. 661; Central R. Co. v. Swint, 73 Ga. 651; 26 Am. & Eng. R. Cas. 482; South Carolina R. Co. v. Nix, 68 Ga. 572; Ash v. Baltimore & Ohio R. Co., 72 Md. 144; 19 Atl. Rep. 643; 44 Am. & Eng. R. Cas. 676; St. Louis, I. M. & S. Ry. Co. v. McCormick, 71 Texas 660; 9 S. W. Rep. 540; Knight v. West Jersey R. Co., 108 Pa. St. 250; 26 Am. & Eng. R. Cas. 485.

[40] Birmingham v. Chesapeake, etc., R. Co., 98 Va. 548; 37 S. E. Rep. 17; Alston v. Cleveland, etc., R. Co., 1 Ohio C. D. 353; International Nav. Co. v. Lindstrom, 123 Fed. Rep. 475; Staunton, etc., Co. v. Fischer, 119 Ill. App. 284; Stern v. La Campagnie Generale Transatlantique, 110 Fed. Rep. 996; Van Vactor's Admr. v. Louisville & N. R. Co., 23 Ky. L. R. 1743; 66 S. W. Rep. 4; Staeffler v. Menasha, etc., Co., 111 Wis. 483; 87 N. W. Rep. 480; Atlantic, etc., R. Co. v. McDilda, 125 Ga. 468; 54 S. E. Rep. 140; Case v. Cordell L. & Z. Co. 103 Mo. App. 477; 78 S. W. Rep. 62; Louisville & N. R. Co. v. Robinson (Ala.),

But where the period of limitation dates from the time the cause of action accrues and the right of action is given an administrator, the statute would only commence to run from the date of the letters of administration, as no action would accrue until there was a person competent to sue, under the statute.[41] Where the period of limitation, however, dates from the time of the death of the deceased, this is held to be so far a condition essential to the enforcement of the right, that no action based on the statute can be maintained after the period of limitation and the time will not be extended to cover the appointment of an administrator to sue for the wrongful death.[42]

37 So. Rep. 431; Rodman v. Missouri Pac. Ry. Co., 65 Kansas 645; 70 Pac. Rep. 642; 59 L. R. A. 704.

[41] Craps v. Syracuse, 183 N. Y. 395; 76 N. E. Rep. 465, 1092; Stephan v. Lake Shore, etc., R. Co., 106 Ill. App. 13; Andrews v. Railroad Co., 34 Conn. 57; Railroad v. Sanders, 86 Ky. 259; 5 S. W. Rep. 563.

[42] Williams v. Quebec S. S. Co., 126 Fed. Rep. 591; Poff v. New England, etc., Co., 72 N. H. 164; 55 Atl. Rep. 891; Netelle v. Railroad, 56 Fed. Rep. 261; Hanna v. Railroad Co., 32 Ind. 113.

In New Jersey, the action is commenced when process is placed in the officer's hands to be served. County v. Pacific Coast Co., 53 Atl. Rep. 386.

CHAPTER IV.

PARTIES TO ACTIONS FOR DEATH.

§ 56. Only those named by statute can sue.
57. Must have been right of recovery in deceased.
58. Action by or for the widow of the deceased.
59. Same — Compromise or settlement with widow.
60. Same — Marriage, divorce or adultery of the widow.
61. Action by husband of deceased.
62. Action by father of deceased.
63. Recovery of penalty not affected by emancipation of child.
64. Suit by the mother of decedent.
65. Action by children and grandchildren.
66. Right of posthumous child to sue for death of parent.
67. Actions by brothers or sisters of decedent.
68. Action prosecuted by "heirs at law, or next of kin."
69. Actions by personal representatives or administrator.
70. Those dependent for support upon decedent.
71. Actions by nonresidents.

§ 56. **Only those named by statute can sue.**— As the right to recover damages for wrongful death is purely statutory and did not exist at common law, but the cause of action died with the person of the deceased, where there is a statute giving the cause of action for wrongful death and designating the persons competent to sue therefor, those alone named in the statute can sue for the death and must ordinarily do so within the time named in the statute giving the right of action.[1]

Where the cause of action is made, by statute, to survive to the widow, heir or personal representative of the deceased,

[1] Oates v. Union Pacific R. Co., 104 Mo. 514; 16 S. W. Rep. 487; Pittsburg, etc., R. Co. v. Vining, 27 Ind. 513; Campbell v. Houston, etc., R. Co., 2 Tex. Unrep. Cas. 473.

there can be no action maintained by any person other than the widow, heir, or personal representative,[2] and where the cause of action is limited to the "surviving husband, widow, or heirs of his or her body," [3] a parent of the deceased could not maintain the action, because not specially named in the statute.[4] And where the right of action is given, by statute, to the husband or wife of the deceased, for a definite period, after which it is made to vest absolutely in the surviving minor children, or some other class, the right thus conferred is held to be a conditional right and the plaintiffs, in such an action, must bring themselves clearly within the prescribed conditions necessary to confer the right of action, or no cause of action can be maintained.[5]

§ 57. **Must have been right of recovery in deceased.**— As a general rule, to entitle anyone to sue for the wrongful death of another, there must have been a right of action in the deceased, at the time of the death, or the death must have been so effected as to have enabled him to sue therefor, had he survived the injury.

No independent cause of action was given by Lord Campbell's Act,[6] but a mere transmission of the right of action, when there was, at the time of the death, a subsisting cause of action.[7] In order to maintain an action, under this orig-

[2] Cincinnati, etc., R. Co. v. Adam (Ky.), 13 S. W. Rep. 428.

[3] See Constitution Texas, art. 16, § 26.

[4] Winnt v. International, etc., R. Co., 74 Texas 32; 11 S. W. Rep. 907.

[5] Hamilton v. Hannibal, etc., R. Co., 39 Kansas 56; 18 Pac. Rep. 57. Where a right of action is given to particular persons by statute, for the death of another, it cannot be exercised by any other persons, although they may be sole beneficiaries. Harshman v. Northern Pac. R. Co. (N. D.), 103 N. W. Rep. 412; Louisville & N. R. Co. v. Jones (Fla.), 34 So. Rep. 246.

[6] 9 & 10 Vict., ch. 93.

[7] Read v. Great Eastern R. Co., 9 B. & S. 714; 37 L. J. Q. B. 278.

inal statute, therefore, it must appear that the deceased, if he had survived the injury, would have been entitled to recover.[8] This construction is generally followed as to all modern statutes patterned after the statute above referred to, and the right of action conferred by the statute, upon the representatives of a person whose death is caused by the wrongful act of another, arises only in cases where the deceased might have maintained an action for the injury, had he lived.[9]

§ 58. **Action by or for the widow of the deceased.**— As many of the statutes giving a right of action for wrongful death, in the various States, originally stood, the existence of a widow or children, was essential to the maintenance of the cause of action,[10] and the recovery was either given to them direct, or for their benefit.[11] In many States, there

[8] Haigh v. Royal Mail Steam Packet Co., 52 L. J. Q. B. D. 640; 49 L. T. 802; Armsworth v. Southeastern R. Co., 11 Jur. 758; Rowley v. London, etc., R. Co., 29 L. T. 180; L. R. 8 Ex. 221; 21 W. R. 869.

[9] Ohio, etc., R. Co. v. Tyndall, 13 Ind. 366; Evansville, etc., R. Co. v. Lowdermilk, 15 Ind. 120; Texas, etc., R. Co. v. Berry, 67 Texas 238; 5 S. W. Rep. 817; 31 Am. & Eng. R. Cas. 147.

Rev. Laws, ch. 111, § 268, giving a right of action for death of one killed by a train at a grade crossing, will not avail where the person had turned from the side of the highway where it crossed the railroad, and, having passed upon the company's right of way, was walking on the roadbed when struck by a train. Durbin v. New York, N. H. & H. R. Co. (Mass. 1907), 80 N. E. Rep. 219.

A right of action in the deceased is an essential, under the Wisconsin statute. Robertson v. Chicago, etc., R. Co., 99 N. W. Rep. 433; Wallace v. Chicago, etc., R. Co., 99 N. W. Rep. 1135.

[10] Miller v. Southwestern R. Co., 55 Ga. 143; Chicago, etc., R. Co. v. Morris, 26 Ill. 400; Chicago, etc., R. Co. v. Shannon, 43 Ill. 338; Munro v. Pac. Coast R. Co., 84 Cal. 515; 24 Pac. Rep. 303; Henderson v. Kentucky, etc., R. Co., 86 Ky. 389; 5 S. W. Rep. 975; Conley v. Cincinnati, etc., R. Co., 89 Ky. 402; 12 S. W. Rep. 764; 41 Am. & Eng. R. Cas. 537.

[11] Conley v. Cincinnati, etc., R. Co., 89 Ky. 402; 12 S. W. Rep. 764;

can be no recovery by a personal representative, against a railroad company, for wrongful death, where the deceased leaves neither widow nor children,[12] and where the right of action is not given directly to the widow, if the recovery by the personal representative is for her benefit, it is essential to the maintenance of the cause of action that there be a widow and the fact must be set up in the complaint, or no cause of action is alleged.[13]

Where the cause of action is given first to the widow, no action can be maintained by the administrator or other parties, unless she declines to sue.[14] She may forfeit or release the right to sue, however, in favor of the class next entitled to maintain the action, or to the administrator.[15] On the other hand, if the right of action is vested in the administrator, for the benefit of the widow and children, the widow could not alone maintain an action,[16] nor could she sue for the death of her husband occurring in a foreign State, where, by the statute of the State where the action was instituted, the suit could only be prosecuted in the name of the administrator, or personal representatives.[17]

41 Am. & Eng. R. Cas. 537; Henderson v. Kentucky, etc., R. Co., 86 Ky. 389; 5 S. W. Rep. 875.

[12] Kentucky, etc., R. Co. v. Wainwright, 13 S. W. Rep. 438; Cincinnati, etc., R. Co. v. Previtt, 92 Ky. 223; 17 S. W. Rep. 484; Jordan v. Cincinnati, etc., R. Co., 89 Ky. 40; 11 S. W. Rep. 1013.

[13] Serenson v. Northern Pac. R. Co., 45 Fed. Rep. 407.

[14] Belding v. Black Hills, etc., R. Co. (S. Dak.), 52 Am. & Eng. R. Cas. 624; 53 N. W. Rep. 750.

[15] Webb v. East Tenn, R. Co., 88 Tenn. 119; 12 S. W. Rep. 428; 42 Am. & Eng. R. Cas. 44.

[16] Western A. R. Co. v. Strong, 52 Ga. 461; 8 Am. Ry. Rep. 13.

[17] Usher v. West Jersey R. Co., 126 Pa. St. 206; 17 Atl. Rep. 597; 41 Am. & Eng. R. Cas. 508.

Although the deceased leaves widow and children both surviving, in Pennsylvania, the action must be brought by the widow alone. Haughey v. Pittsburg Ry. Co., 210 Pa. 367; 59 Atl. Rep. 1112; Marsh v. Western, etc., Ry. Co., 204 Pa. St. 229; 53 Atl. Rep. 1001.

§ 59. **Same — Compromise or settlement with widow of deceased.**— It is held, in Mississippi, where the cause of action is given to the widow, for the benefit of herself and her children, that although the apportionment of damages enures to the benefit of the children, equally with the wife, that the widow alone has the right of action and she can compromise or accept a less sum than the amount recovered in the trial court, pending the determination of the cause on appeal, and the children will be bound by the settlement so made.[18] And where the widow sues for herself and the children, as in Tennessee, it is held that she can dismiss the action, without the consent of the children or their guardian, and they will be bound by her action in so doing, as she is given the sole right of action, by the statute, although the recovery is for the benefit of herself and others.[19] In case the right of action is given the administrator of the deceased, however, for the benefit of the widow and her children, she is not permitted to settle or compromise without the consent of the administrator, for the cause of action not being vested in her, she is not able to dispose of it, although permitted under the law to participate in the recovery.[20]

§ 60. **Same — Marriage, divorce or adultery of the widow.**— Under the statutes of Georgia[21] and Texas,[22] the

[18] Natchez, etc., Co. v. Mullins, 67 Miss. 672; 7 So. Rep. 542; Stephens v. Nashville, etc., R. Co., 10 Lea (Tenn.), 448.

[19] Greenlee v. East Tenn., etc., R. Co., 5 Lea (Tenn.), 418; 4 Am. & Eng. R. Cas. 351; Stephens v. Nashville, etc., R. Co., 10 Lea (Tenn.), 448; 11 Am. & Eng. R. Cas. 671.

[20] Knoxville & C. R. Co. v. Acuff, 92 Tenn. 26; 20 S. W. Rep. 348; Yelton v. Evansville, etc., R. Co., 33 N. E. Rep. 629; 54 Am. & Eng. R. Cas. 69.

[21] Georgia R. & B. Co. v. Garr, 57 Ga. 277, distinguished in Western, etc., R. Co. v. Young, 81 Ga. 397; 7 S. E. Rep. 912; 37 Am. & Eng. R. Cas. 489.

[22] International, etc., R. Co. v. Kuehn, 70 Texas 582; 8 S. W. Rep. 484; 35 Am. & Eng. R. Cas. 421.

right of the widow to sue for the wrongful death of her husband, is held not to be affected by her subsequent marriage. The fact that the wife has been living separate and apart from her husband will not, of itself, deprive her of her right to recover for his homicide, provided the conjugal relation continued to exist between them at the time of his death, and she had done nothing, by her own wrong, to forfeit her right to recover for his death.[23] But where the wife is living in a state of prostitution, separate and apart from her husband, at the time of his death, having forfeited, by her own wrongful act, the right to support from him, she is held also to have forfeited the right to recover damages from a railroad company, for the negligent killing of her husband.[24]

§ 61. **Action by husband of deceased.**— In Missouri, the husband of a wife who meets her death, because of the wrongful act or neglect of a railroad company is, by statute, entitled to sue therefor,[25] but this is not the rule obtaining generally in the United States.

In some States the action cannot be maintained by the husband for the wrongful death of his wife and the rule is the same whether the suit is to recover for the wrongful death,[26]

[23] Dallas, etc., R. Co. v. Spicker, 61 Texas 427; 21 Am. & Eng. R. Cas. 160; 48 Am. Rep. 297.

[24] Ft. Worth, etc., R. Co. v. Floyd (Texas), 21 S. W. Rep. 544.

Although separated from her husband and he has not supported her for some time before his death, the widow is entitled to sue in Texas if she has not done anything on her part to forfeit the right. DeGarcia v. San Antonio, etc., R. Co., 77 S. W. Rep. 275.

The fact that the widow had subsequently remarried, was held not to effect her right of recovery, in Nebraska. Chicago, etc., R. Co. v. Legekrans, 91 N. W. Rep. 358.

[25] Session Laws, Missouri, 1905, p. 137; Packard v. Hannibal, etc., R. Co., 181 Mo. 421; 80 S. W. Rep. 951.

[26] Georgia, etc., R. Co. v. Wynn, 42 Ga. 331; Womack v. Central R. Co., 80 Ga. 132; 5 S. E. Rep. 63; Gottlieb v. North Jersey Co.,

or for the loss of services of the deceased wife.[27]

The husband is not permitted to sue, for the instant killing of his wife, in Iowa.[28] He is not permitted to sue alone, in Georgia, but must join with him the deceased wife's surviving children, although adults.[29] He was denied a recovery, in Washington,[30] but was permitted to recover, in New York, as administrator of his wife, although his recovery was confined to his loss of service as her "next of kin."[31] The Federal Court, in Kansas, construing the statute of that State, denied him a recovery as "next of kin" of deceased,[32] but the Supreme Court of the State held that he could sue as "next of kin" of his deceased wife.[33] And a husband, living apart from his wife, was denied a recovery of damages for her death, under Lord Campbell's Act.[34]

§ 62. **Action by father of deceased.**— Under Lord Camp-

58 Atl. Rep. 1088; Major v. Burlington, etc., R. Co., 115 Iowa, 309; 88 N. W. Rep. 815.

[27] Dickens v. New York, etc., R. Co., 23 N. Y. 158; Green v. Hudson River R. Co., 2 Abb. App. Dec. (N. Y.) 277.

[28] Seney v. Chicago, etc., R. Co., 125 Iowa 290; 101 N. W. Rep. 76.

[29] Roberts v. Central, etc., R. Co., 124 Fed. Rep. 471.

[30] Under the statute of Washington, a surviving husband is given no cause of action for the death of his wife. Johnson v. Seattle, etc., Elec. Co., 39 Wash. 211; 81 Pac. Rep. 705.

[31] Dickens v. New York, etc., R. Co., 23 N. Y. 158.

[32] Western Union Tel. Co. v. McGill, 57 Fed. Rep. 699.

[33] The surviving husband, within the provisions of the Code of Kansas, is held to be the "next of kin" to his deceased wife, so as to enable him to sue for her death. Atchison, etc., R. Co. v. Townsend, 81 Pac. Rep. 205.

[34] Harrison v. London, etc., R. Co., 1 C. & E. 540.

A husband was held not entitled to recover, for the instant killing of his wife, in Iowa. Seney v. Chicago, etc., R. Co., 125 Iowa 290; 101 N. W. Rep. 76; Major v. Burlington, etc., R. Co., 115 Iowa 309; 88 N. W. Rep. 815. See, also, Womack v. Railroad, 80 Ga. 132; 5 S. E. Rep. 63; Eden v. Railway Co., 14 B. Mon. 165; Green v. Railroad Co., 28 Barb. 9; Gottlieb v. North Jersey Co., 58 Atl. Rep. 1088.

bell's Act,[35] a father was not entitled to sue for the death of his son, unless by his death he sustained a pecuniary loss.[36] Where the right of action is given to the "widow, heir or personal representative" of the deceased, the father is not entitled to sue[37] and there can be no recovery by the father, for the death of his deceased minor son, where the statute gives the right of action, first to his widow and next to his children, unless it is both alleged and proved that those first entitled to the cause of action do not in fact exist.[38]

As the parent is entitled to the services of his child during its minority, and hence has a legal interest in its earnings during minority, the most generally adopted provision, with reference to the father's right to sue for the death of his son, is that giving him a right to sue for the death of his minor children.[39] Under such a statute the recovery is limited to the reasonable earnings of the child, during its minority,[40] for beyond this the father would have no legal claim.[41] Under some statutes, however, the father is entitled to recover whatever damages he could show that he had sus-

[35] 9 & 10 Vict., ch. 93.

[36] Sykes v. Northeastern R. Co., 44 L. J. C. P. 191; 32 L. T. 199; 23 W. R. 473; Franklyn v. Southeastern R. Co., 3 H. & N. 211; 4 Jur. N. S. 565; 29 L. J. Ex. 25.

[37] Kentucky, etc., R. Co. v. McGinty (Ky.), 14 S. W. Rep. 601; Houston, etc., R. Co. v. Baker, 57 Texas 419; 11 Am. & Eng. R. Cas. 667; Williams v. South, etc., R. Co., 91 Ala. 635; 9 So. Rep. 77; Edgar v. Costello, 14 So. Car. 20; Louisville, etc., R. Co. v. Coppage (Ky.), 13 S. W. Rep. 1086.

[38] Sparks v. Kansas City, etc., R. Co., 31 Mo. App. 111.

[39] Session Laws, Mo. 1905, p. 137; Ky. Gen. St., ch. 57; Miss. Code, § 1510; Amos v. Mobile & O. R. Co., 63 Miss. 509.

[40] Parsons v. Missouri Pac. R. Co., 94 Mo. 286; McDowell v. Georgia R. Co., 60 Ga. 320; Chick v. Southwestern R. Co., 57 Ga. 357; State v. Baltimore & O. R. Co., 24 Md. 84; Walters v. Chicago, etc., R. Co., 36 Iowa 458; Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318; Hedrick v. Ilwaco, etc., R. Co., 4 Wash. 400.

[41] Parsons v. Missouri Pac. R. Co., 94 Mo. 286; State v. Baltimore & O. R. Co., 24 Md. 84.

tained, by reason of the death of his child;[42] the action for loss of services is given to him, independently of the cause of action to the administrator of the decedent, in some States,[43] and in still others, the father could sue only as administrator of his deceased son, and then, only after proof of the emancipation of his son.[44]

§ 63. **Recovery of penalty not affected by emancipation of child.**— While the parent of an adult child, who was unmarried, in Missouri, had no cause of action for the wrongful death of such child, prior to the act of 1905,[45] it does not follow that the parent would be deprived of a right of action for the death of his minor child, by the mere act of emancipating the child, if he was killed under such circumstances as to bring the case under the penalty section of the wrongful death act of that State.[46]

Parents suing for the wrongful death of a child do not sue by virtue of a relationship of employer and employee; the

[42] Houston, etc., R. Co. v. Baker, 57 Texas, 419; 11 Am. & Eng, R. Cas. 667; Frank v. New Orleans, etc., R. Co., 20 La. Ann. 25.

[43] Hedrick v. Ilwaco, etc., R. Co., 4 Wash. 400; 30 Pac. Rep. 714; Louisville & C. R. Co. v. Goodykoontz, 119 Ind. 111; Durkee v. Central Pac. R. Co., 56 Cal. 388.

[44] Berry v. Louisville, etc., R. Co., 128 Ind. 484; 28 N. E. Rep. 182.

A father is not permitted to recover for the death of a minor child in Delaware. Kennedy v. Delaware & C. Co., 58 Atl. Rep. 825.

The father is given no cause of action, for the death of his minor son, under the statute of North Dakota. Harshman v. Northern Pac. R. Co., 103 N. W. Rep. 412.

A father is not allowed to maintain suit for the wrongful death of his son in North Carolina. Killian v. Southern, etc., R. Co., 128 N. Car. 261; 38 S. E. Rep. 873.

In the absence of evidence that deceased contributed pecuniary assistance or support to his father, the father is held to have no right of action, in Texas. Missouri, etc., Ry. Co. v. Freeman, 73 S. W. Rep. 542.

A father cannot sue for the negligent killing of his child, in West Virginia. Shaw v. Charleston, 50 S. E. Rep. 527.

[45] Parsons v. Missouri Pacific Ry. Co., 94 Mo. 284.

[46] Matlock v. Williamsville, etc., R. Co. (Mo.), 95 S. W. Rep. 849.

action is based on the tort and the right which the child would have had, if he had survived the injury.[47] In an action by a father, therefore, suing to recover for the death of his minor son, under a statute providing that whenever any person shall die from an injury due to the negligence of a railroad corporation, the corporation shall "forfeit" the sum of $5,000.00, the fact that the parent had emancipated the son, prior to his death, would constitute no defense to the action,[48] in Missouri. But in Pennsylvania, the existence of the family relation is held to be essential to the maintenance of the action and if the child is either of age, or emancipated, and living apart from his parents, this will defeat an action by the parents, for his death.[49]

§ 64. **Suit by the mother of decedent.**— In many of the United States, for the homicide, by the negligence of a railroad company, of her child, provided he was unmarried and childless, a mother may recover, where the child contributed to her support and she was substantially dependent upon the child for support.[50] In some of the States, the dependency for support is not an essential of the right to sue and the cause of action is vested in the mother, if there are no children, or a widow.[51]

[47] Bellamy v. Whitesell (Mo.), 100 S. W. Rep. 514.

It is not essential, in an action for wrongful death, to a recovery of damages, that there should be a pecuniary loss sustained by those for whose benefit the action is brought, though such loss may be proved as an element of damages. Barksdale v. Seaboard Air Line Ry. (S. Car.), 56 S. E. Rep. 906.

[48] Matlock v. Williamsville, etc., R. Co. (Mo.), 95 S. W. Rep. 849.

[49] Lehigh Iron Co. v. Rupp, 100 Pa. St. 95; 7 Am. & Eng. R. Cas. 25; Matlock v. Williamsville, etc., R. Co. (Mo.), 95 S. W. Rep. 849.

[50] Daniels v. Savannah, etc., R. Co., 86 Ga. 236; 12 S. E. Rep. 365; Clay v. Central, etc., R. Co., 84 Ga. 345; Richmond, etc., R. Co. v. Johnston, 89 Ga. 560.

[51] Session Laws, Missouri, 1905, p. 137; Green v. Hudson River R. Co., 16 How. Pr. (N. Y.) 263; 31 Barb. 260; Putnam v. Southern Pac. R.

As in the case of the father, the basis of the mother's right of action is her legal duty to support her minor children, from which the law recognizes the correlative right to their services during minority.[52] Her right of action is generally limited to actions for the death of her minor children, therefore,[53] unless the statute is so broad as to include within its terms, a right on the part of the mother who is dependent for support upon the deceased, regardless of the age of her child.[54]

It is held, in Georgia,[55] that the fact that the mother was living apart from her husband with her minor son, on whom she was dependent for support at the time of his death, would not prevent an action by her, where the suit was brought in her name and that of her husband jointly. But in Mississippi, where a statute first gave a right of action to the widow or children and then to the father or husband and subsequently provided for an action by a parent for the death of a child, it was held to apply to the father only and the mother was held not entitled to sue for the death of her

Co., 21 Oregon 230; 27 Pac. Rep. 1033; Missouri Pac. R. Co. v. Henry, 75 Texas 220; 12 S. W. Rep. 828.

[52] Kennedy v. New York, etc., R. Co., 35 Hun (N. Y.) 186; Green v. Hudson River R. Co., 16 How. Pr. (N. Y.) 263; 31 Barb. 260; Gulf, etc., R. Co. v. Compton, 75 Texas 667; 13 S. W. Rep. 667; 44 Am. & Eng. R. Cas. 637; Parsons v. Missouri Pac. R. Co., 94 Mo. 286; State v. Baltimore & Ohio R. Co., 24 Md. 84; Galveston, etc., R. Co. v. Kutoc, 72 Texas 643; 76 *id.* 473; 11 S. W. Rep. 127; 13 S. W. Rep. 327; 37 Am. & Eng. R. Cas. 470.

[53] Pennsylvania R. Co. v. Keller, 67 Pa. St. 300; Kennedy v. New York, etc., R. Co., *supra;* Parsons v. Missouri Pac. R. Co., 94 Mo. 286; State v. Baltimore & Ohio R. Co., 24 Md. 84.

[54] Pennsylvania R. Co. v. Keller, 67 Pa. St. 300.

[55] East Tennessee, etc., R. Co. v. Maloy, 77 Ga. 237; 2 S. E. Rep. 941; 31 Am. & Eng. R. Cas. 352.

Neither the divorce nor subsequent re-marriage of the mother affects her right to recover for the death of her minor child, in some jurisdictions. Wilson v. Bamer L., etc., Co., 108 La. Ann. 590; 32 So. Rep. 460; Clark v. Northern Pac. R. Co. (Wash.), 69 Pac. Rep. 636.

child.[56] It is also held, construing Lord Campbell's Act, that the mother of an illegitimate child has no right to sue for his wrongful death,[57] and this same construction is followed by some of the States in the United States, under similar statutes,[58] while others hold that an illegitimate child comes within the term "children," giving a parent a right to sue for his death.[59]

§ 65. **Action by children and grandchildren.**— Where a cause of action is given to the husband or wife, for six months, and, if he or she fails to sue, then to the minor children, the action is not vested in the wife and children concurrently, but in the wife absolutely, for the period named

[56] Amos v. Mobile & Ohio R. Co., 63 Miss. 509.

The mother cannot sue, under the Minnesota statute, during the lifetime of the father. Swift, etc., Co. v. Johnson, 138 Fed. Rep. 867.

[57] Gibson v. Midland R. Co., 2 Ont. 658; 15 Am. & Eng. R. Cas. 507; Dickinson v. Northeastern R. Co., 2 H. & C. 735; 33 L. J. Ex. 91; 12 W. R. 52; 9 L. T. 299.

[58] Harkins v. Pennsylvania R. Co., 15 Phila. (Pa.) 286; Marshall v. Wabash R. Co., 46 Fed. Rep. 269.

The mother has no cause of action, for the death of her illegitimate child, in South Carolina, Georgia, or Mississippi. Ferguson v. Ry. Co., 71 S. C. 352; 51 S. E. Rep. 138; Robinson v. Georgia, etc., R. Co., 117 Ga. 168; 43 S. E. Rep. 452; Alabama, etc., R. Co. v. Williams, 78 Miss. 209; 28 So. Rep. 853; 51 L. R. A. 836; 84 Am. St. Rep. 624. But see, *contra*, Marshall v. Wabash R. Co., 120 Mo. 275; 25 S. W. Rep. 179.

[59] Muhl v. Michigan So. R. Co., 10 Ohio St. 272.

The Code of Washington (2 Ball's Ann. Code & St., § 4828), giving the cause of action, to the decedent's "heirs and personal representatives," was held to give no cause of action, to the mother of an adult son, although dependent for support. Manning v. Tacoma Ry., etc., Co., 34 Wash. 406; 75 Pac. Rep. 994; Henderson v. Railroad Co., 86 Ky. 389; 5 S. W. Rep. 875.

It is held, under the Montana statute, that the mother cannot sue alone, where the father is alive but fails to join in the action. Whelan v. Rio Grande, etc., R. Co., 111 Fed. Rep. 326.

A mother can sue in her own name, for the death of her unmarried adult son, in Washington. Peterman v. Northern Pac. R. Co., 105 Fed. Rep. 335.

and the children cannot sue until after the period within which the wife is given the cause of action.[60] And where the widow of the deceased sues within the period to her limited, this is such an election to appropriate the cause of action, as to deprive the children of any subsequent action, although the widow had sued the wrong defendant and had failed to recover in her action.[61]

Minor children are given a cause of action in some States, on the theory that by the death of the parent they are deprived of their legal right to support, during their minority.[62] In others, they are denied a right of action,[63] while in some others, they are permitted to sue jointly with the surviving parent.[64] In Texas, the child must be able to show some pecuniary interest in the parent's life, to enable him to recover.[65] Adult children are given a right of action in Pennsylvania,[66] but they are denied a recovery in Missouri,[67] Indiana[68] and Georgia,[69] while the majority of the child

[60] R. S. Mo. 1899, § 2864; Packard v. Hannibal, etc., R. Co., 181 Mo. 421; 80 S. W. Rep. 951.

[61] Packard v. Hannibal, etc., R. Co., 181 Mo. 421; 80 S. W. Rep. 951. See, also, Belding v. Black Hills, etc., R. Co. (S. Dak.), 53 N. W. Rep. 750; 52 Am. & Eng. R. Cas. 624.

[62] Eichorn v. New Orleans, etc., R. Co., 114 La. Ann. 712; 38 So. Rep. 526; Atlanta, etc., R. Co. v. Venable, 65 Ga. 55; 7 Am. & Eng. R. Cas. 35.

[63] Baltimore & Ohio R. Co. v. Gillard (Ind.), 71 N. E. Rep. 58.

[64] St. Louis, etc., R. Co. v. Needham, 52 Fed. Rep. 371; 10 U. S. App. 339; 3 C. C. A. 129; 54 Am. & Eng. R. Cas. 88.

[65] Where the children cannot show some pecuniary interest in the life of their father, no cause of action accrues on his death, in Texas. Proctor v. San Antonio, etc., R. Co., 62 S. W. Rep. 939. And the same rule applies to an action for death of their mother. Galveston, etc., R. Co. v. Polk, 63 S. W. Rep. 343.

[66] The right of adult children to recover in Pennsylvania, for the death of their parent, is established by the following cases: Stahler v. Philadelphia, etc., R. Co., 199 Pa. St. 383; 49 Atl. Rep. 273; Schnatz v. Railroad Co., 160 Pa. St. 602; 28 Atl. Rep. 958.

[67] Parsons v. Missouri Pac. R. Co., 94 Mo. 286.

[68] Pittsburg, etc., R. Co. v. Vining, 27 Ind. 513.

[69] Mott v. Central R. Co., 70 Ga. 680; 48 Am. Rep. 595.

is held not to affect his right of recovery, in Texas[70] and Wisconsin.[71]

But under a statute giving a right of action to children, no right, by analogy, can be recognized on the part of the grandchildren, for the death of their grandparent.[72]

§ 66. **Right of posthumous child to sue for death of parent.** — A posthumous child is entitled to recover damages for the death of his father, resulting from injuries inflicted through the negligence of a railroad company, under the Texas statute,[73] providing that an action on account of injuries causing death shall be for the "sole and exclusive benefit of the surviving children," as the term "children" used in the statute is held sufficiently broad to include a posthumous child.[74] Nor would the fact that immediately following

[70] Galveston, etc., R. Co. v. Kutac, 72 Texas 643; 11 S. W. Rep. 127; *id.*, 76 Texas 473; 13 S. W. Rep. 327; 37 Am. & Eng. R. Cas. 470.

[71] Teteur v. Chicago, etc., R. Co., 77 Wis. 505; 46 N. W. Rep. 897.

[72] Under a statute giving a right of action to children, the grandchildren of the deceased have no right of action for the death of their grandparent. Walker v. Vicksburg, etc., R. Co. (La.), 34 So. Rep. 749.

An infant son cannot sue in Indiana, under a statute giving the right of action to the personal representative of the deceased. Baltimore & Ohio R. Co. v. Gillard, 71 N. E. Rep. 58, construing Burns' Ann. St. 1901, § 285.

In an action for death of the wife and mother, in Georgia, the husband cannot sue alone, if there are surviving children, but they must be joined with him in the action, although adults. Roberts v. Central, etc., R. Co., 124 Fed. Rep. 471.

A daughter, though married, can sue for the death of her father, in Texas. Texas, etc., R. Co. v. Martin, 60 S. W. Rep. 803.

Where a daughter, although married, was abandoned by her husband and secured nothing from him and was living with her parents at the time of her mother's death and was only 16 years old, she was held competent to sue, in Texas, for her mother's death. International, etc., R. Co. v. Botkin, 85 S. W. Rep. 1163.

[73] Rev. St. Texas, art. 2903.

[74] Nelson v. Galveston, etc., R. Co., 78 Texas 621; 14 S. W. Rep. 1021; 48 Am. & Eng. R. Cas. 8.

the death of the father, the mother of the child was alive and able to maintain an action for the death of her husband, the father of the child, be sufficient to set the statute of limitations in force, so as to deny the right of action to such posthumous child.[75]

§ 67. **Actions by brothers or sisters of decedent.**— The brothers and sisters of the deceased cannot recover damages from the wrongdoer, under the Wisconsin statute,[76] giving a cause of action to the husband or widow of the deceased, if there be one, otherwise to the lineal descendants or ancestors, as the sisters or brothers do not come within the description of persons made competent by the statute to sue for wrongful death.[77]

And where, by statute, an action is expressly given to the brothers or sisters of the decedent, this would not be held, generally, to confer a right of action for the death of an illegitimate brother or sister.[78]

§ 68. **Action prosecuted by "heirs at law," or "next of kin."**— With the growing tendency of modern legislatures to extend the causes of action for damages against corporations, the legislation is not alone confined to the legal basis of recovery, but enlarges the class of persons entitled to recover,

[75] Nelson v. Galveston, etc., R. Co., *supra*.

[76] Wisconsin R. S. 1898, §§ 4255, 4256.

[77] Brown v. Chicago, etc., R. Co., 102 Wis. 137; 77 N. W. Rep. 748; 44 L. R. A. 579; 13 Am. & Eng. R. Cas. (N. S.) 603.

[78] Under the Mississippi statute, giving a right of action to the brothers or sisters of deceased, no right of action is acquired for the death of an illegitimate sister. Illinois Central R. Co. v. Johnson, 77 Miss. 727; 28 So. Rep. 753; 51 L. R. A. 837.

A woman residing with her nephews and a brother, to whom she contributed for their support, without legal obligation resting on her so to do, was held, by her death, to give them a cause of action, in Indiana. Smith v. Michigan Central R. Co., 73 N. E. Rep. 928.

and it is quite common for statutes to provide for a recovery, in actions for wrongful death, not alone by the classes made competent to sue by the early statutes, but, in case of their absence, by the "heirs at law" of the decedent, or his "next of kin." The extreme of this legislation was enacted, in Missouri, in 1905, by an act giving a cause of action for death to all the classes theretofore recognized as competent to sue and, in case none such survived the decedent, then to his administrator. A penal recovery in the maximum of $10,000.00 was provided for and the State so far abdicated its right to fix the penalty to the trial jury, as to authorize them to fix the recovery, without any basis whatever therefor, at any sum between two and ten thousand dollars.[79] This act was amended, however, in this latter particular, by the next legislature, which provided a pecuniary basis of recovery.[80]

In Arkansas, where there is no personal representative of a decedent, killed by wrongful act, under the statute of that State,[81] appropriating the recovery for the benefit of the widow and "heirs at law," the widow and heirs must sue jointly for the wrongful death [82] and a similar construction was placed upon the statute of Ohio,[83] and in the absence of a wife and children, or the class first given the cause of action, if there are both parents and brothers and sisters surviving, the action must be brought for their joint benefit and the parents cannot be excluded, although the decedent's personal estate would have passed, by descent, to his brothers and sisters alone.[84] The reason for this construction is that there can be but one action for wrongful death and after an

[79] Session Laws Missouri, 1905, p. 137.
[80] Session Laws, Missouri, 1907, p. 124.
[81] Kirby's Digest, §§ 6289, 6290.
[82] McBride v. Berman (Ark.), 94 S. W. Rep. 913.
[83] Ohio Rev. St. 1906, §§ 4153, 4159.
[84] Toledo, etc., R. Co. v. Connolly, 149 Fed. Rep. 398.

appropriation of the cause of action, by those competent to sue, no others could maintain a suit.[85]

[85] Case v. Cordell etc. Co., 103 Mo. App. 477.

"Where there is no personal representative of a decedent killed by wrongful act, an action for his death, under Kirby's Dig., §§ 6289, 6290, giving a right of action for death by wrongful act, and providing that the same shall be brought by the "heirs at law" of decedent where there is no personal representative, and the amount recovered shall be for the benefit of the widow and next of kin, must be brought by the widow and the heirs at law of decedent; the words "heirs at law" in the statute including those receiving a distributive part of the estate and the beneficiary of the action, and the statute intending the bringing only of one action for a person's death." McBride v. Berman (Ark. 1906), 94 S. W. Rep. 913; Berman v. McBride, *id.*

"Under the Ohio wrongful death act, providing that the recovery shall be for the exclusive benefit of the wife or husband, and children, or if there be neither of them, then of the parents and next of kin of the person whose death shall be so caused, the recovery to be apportioned among the beneficiaries with reference to their age and condition and the laws of descent and distribution of personal estates left by persons dying intestate, where decedent died leaving a father and mother and brothers and sisters, the action was properly brought for their joint benefit, and not for the benefit of decedent's next of kin, excluding his parents, though on decedent's death his personal estate would have passed to his brothers and sisters, and not to his father and mother, as provided by Ohio Rev. St. 1906, §§ 4153, 4159." Toledo, St. L. & W. R. Co. v. Connolly (U. S. C. C. A., Ohio, 1907), 149 Fed. Rep. 398.

Under the Massachusetts statute, there can be no recovery, by the "next of kin," unless there is living a widow or children. Commonwealth v. Boston, etc., R. Co., 121 Mass. 36.

But dependency of support need not be legal dependency, under this statute. Daly v. New Jersey, etc., R. Co., 155 Mass. 1; 29 N. E. Rep. 507.

The mother is within the "next of kin" statute in West Virginia. Baltimore & O. R. Co. v. Gettle, 3 W. Va. 376.

In Kansas, it is only where there are no children or widow, that the "next of kin" can sue. Western Union Tel. Co. v. McGill, 57 Fed. Rep. 699.

The term "next of kin" is not confined to any particular degree of consanguinity, in Illinois. Chicago, etc., R. Co. v. Shannon, 43 Ill. 338.

§ 69. Actions by personal representative or administrator. — In the absence of the classes first qualified to sue for wrongful death, such as "next of kin" or "heirs at law," it is provided, in many States, that the personal representative or administrator of the decedent may maintain the action for his death.[86]

An administrator of a deceased minor can, under the statutes of Florida, recover for the death of his intestate, caused by the wrongful act of a corporation or its agents, where such minor leaves neither widow, nor minor child nor children, nor any person dependent upon him for support.[87] A right of action is conferred by the laws of New Mexico, upon the personal representative of a railway employee, who met his death by reason of the negligent failure of the employer to maintain a sufficient number of men to guard the track against falling rock from the hillside adjoining the right of way[88] and the administrator of an employee is authorized, by the laws of Kansas, to recover for the death of his intestate.[89]

The phrase "next of kin," is held, in Kansas, to mean those relations who inherit according to the statute of descent and distribution. Atchison, etc., R. C. v. Ryan, 62 Kansas 682; 64 Pac. Rep. 603.

[86] Sess. Laws, Missouri, 1905, p. 137; Comp Laws, N. M. §§ 3216; Rev. St. Fla. 1892, §§ 2342, 2343; Code, Civil Proc. Kansas, § 422; Kirby's Digest. Ark. §§ 6289; *et sub.;* Ohio Rev. St. 1906, 4153, *et sub.*

[87] Bowden v. Jacksonville, etc., R. Co., 41 So. Rep. 400.

[88] Denver, etc., R. Co. v. Warring, 86 Pac. Rep. 305.

[89] Atchison, etc., R. Co. v. Fajardo, 86 Pac. Rep. 301.

The personal representative, or administrator, is held to be the only competent party to sue, in the following cases: Stewart v. Louisville, etc., R. Co., 83 Ala. 493; 4 So. Rep. 373; Georgia Pac. R. Co. v. Propst, 83 Ala. 518; 3 So. Rep. 476; Little Rock, etc., R. Co. v. Townsend, 41 Ark. 382; 21 Am. & Eng. R. Cas. 619; Kramer v. San Francisco, etc., R. Co., 25 Cal 434; Kansas Pac. R. Co. v. Miller, 2 Colo. 442; 20 Am. Ry. Rep. 245; Soule v. New York, etc., R. Co., 24 Conn. 575; Louisville, etc., R. Co. v. Chaffin, 84 Ga. 519; 11 S. E. Rep. 891; Hecht v. Ohio, etc., R. Co., 132 Ind. 507; 32 N. E. Rep. 302; 54 Am. &

§ 70. **Those dependent for support upon deceased.**— Under some of the statutes giving a cause of action for death, the right of action, in the absence of widow or others of the preferred class, is given to those dependent for support upon the deceased. The dependency, as such statutes are

Eng. R. Cas. 75; Warden v. Humeston, etc., R. Co., 72 Iowa 201; 33 N. W. Rep. 629; Givens v. Kentucky, etc., R. Co., 89 Ky. 231; 12 S. W. Rep. 257; Vicksburg, etc., R. Co. v. Phillips, 64 Miss. 693; 2 So. Rep. 537; 30 Am. & Eng. R. Cas. 587; Crumpley v. Hannibal, etc., R. Co., 98 Mo. 34; 11 S. W. Rep. 244; 37 Am. & Eng. R. Cas. 357; Johnston v. Cleveland, etc., R. Co., 7 Ohio St. 336; Brickman v. South Carolina R. Co., 8 So. Car. 173; Louisville, etc., R. Co. v. Connor, 9 Heisk (Tenn.), 19; 19 Am. Ry. Rep. 368; Galveston, etc., R. v. Nolan, 53 Texas 139; 3 Am. & Eng. R. Cas. 387; Dimmey v. Wheeling, etc., R. Co., 27 W. Va. 32.

An administrator is not permitted to sue, in many States, for the benefit of nonresident alien next of kin, or relatives of the deceased. Cleveland, etc., R. Co. v. Osgood (Ind.), 70 N. E. Rep. 839; Deni v. Pennsylvania R. Co., 181 Pa. St. 525; 37 Atl. Rep. 558; 59 Am. St. Rep. 676; McMillan v. Spider Lake, etc., R. Co. (Wis.), 91 N. W. Rep. 979; 60 L. R. A. 589; Mulhall v. O'Fallon, 176 Mass. 266; 57 N. E. Rep. 386; 54 L. R. A. 934; 79 Am. St. Rep. 309; McDonald v. Pittsburg, etc., R. Co., 144 Ind. 459; 43 N. E. Rep. 447; 32 L. R. A. 309; 55 Am. St. Rep. 185.

Where the administrator is given a right to sue, for the benefit of certain persons, named in the statute, no action can be maintained by the administrator, in the absence of the persons named. Chicago, etc., R. Co. v. La Porte (Ind.), 71 N. E. Rep. 166.

In California, the administrator can sue only when there are heirs, for whose benefit the action is to be maintained. Webster v. Norwegian, etc., Co., 137 Cal. 399; 70 Pac. Rep. 276.

An administrator of deceased is the only person entitled to sue for the death, in Illinois. Chicago Terminal, etc., R. Co. v. O'Donnell, 114 Ill. App. 345; 72 N. E. Rep. 1133.

Either a temporary administrator or the general administrator of the decedent, can sue for his intestate's wrongful death, in Indiana. Lake Erie, etc., R. Co. v. Charman; 67 N. E. Rep. 923; Louisville, etc., R. Co. v. Chaffin, 84 Ga. 519; 11 S. E. Rep. 891.

A New Jersey administrator is held competent to sue in Pennsylvania for the death of his intestate in that State. Boulden v. Pennsylvania R. Co., 205 Pa. St. 264; 54 Atl. Rep. 906. See. also, Cincinnati, etc., R. Co. v. Thiebald, 114 Fed. Rep. 918; 52 C. C. A. 538; Hoes v. New York, etc., R. Co., 77 N. Y. S. 117; 73 App. Div. 363.

generally construed, is not a mere voluntary support but the dependency is usually restricted to those occupying a legal dependency, or those toward whom the deceased owed some duty to support, as distinguished from a mere charitable or voluntary impulse. Under the Massachusetts statute,[90] an invalid sister, unable to work regularly or earn enough to pay her doctor bills, who had received an average of thirty or thirty-five dollars a month for a period of several years, from the deceased, and who in fact received her support from him and was dependent upon him for support, was held to come within the protection of the statute and was entitled to maintain an action for her brother's death, due to his employer's negligence.[91] But it was held, under the same statute, that a half-sister, who did not live with her deceased brother, but resided in her own home, with her two children, but who was visited occasionally by her brother, who sometimes gave her money and paid her rent, was not so legally dependent upon him, as to enable her to maintain an action against his employer for his death.[92]

Where the right of action is given to the children of the deceased, without reference to the condition of their dependency for support, the dependency of support is not a prerequisite to maintain the action,[93] but there must generally be some reasonable expectation of a pecuniary ad-

[90] Massachusetts St. 1887, ch. 270, § 2.

[91] Daly v. New Jersey, etc., Co., 155 Mass. 1; 29 N. E. Rep. 507.

[92] Hodnett v. Boston, etc., R. Co., 156 Mass. 86; 30 N. E. Rep. 224.

[93] Barron v. Illinois Central R. Co., 1 Biss. (U. S.) 412; Petrie v. Columbia, etc., R. Co., 29 So. Car. 303; 35 Am. & Eng. R. Cas. 430; 7 S. E. Rep. 515.

"Under the statute giving children a right of action for negligence causing the death of their father, the right of action is not limited to minors or to such children as cannot support themselves, nor is it necessary to prove that the father actually contributed anything to the support of his children." Beaumont Traction Co. v. Dilworth (Tex. Civ. App. 1906), 94 S. W. Rep. 352.

vantage from a person bearing the family relation, for the death of the party from whom it arose, to sustain a cause of action,[94] and if the only pecuniary benefit the plaintiff had in the life of the deceased was derived by virtue of a contractual relation, the action could not be maintained.[95]

§ 71. **Actions by nonresidents.**— The right of nonresidents to sue for the wrongful death of their decedent beyond the limits of the State where the action is filed, has already been discussed in considering the jurisdictions of various actions.[96] As there presented, in order for a nonresident to sue beyond the limits of the State where the death occurred, the statute of the State where the action is brought must generally authorize actions by the same class of persons, or authorize the particular action filed, or no such right will be recognized, by implication.[97] Such right is not generally recognized as an asset of the decedent's estate, upon which administration, in the case of a nonresident, can be obtained.[98]

In some States, however, where the action is attempted to be prosecuted by a class of persons similar to those authorized to sue by the law of the State where the suit is filed, the right to prosecute the action is recognized as a matter of comity. In Tennessee, an action may be prosecuted by a

[94] Pennsylvania R. Co. v. Adams, 55 Pa. St. 499; Carpenter v. Buffalo, etc., R. Co., 38 Hun (N. Y.) 116.

[95] Sykes v. Northeastern R. Co., 44 L. J. C. P. 191; 32 L. T. 199; 23 W. R. 473.

A petition in an action by a parent, which fails to allege any loss of services by the parent, but only seeks a recovery for burial expenses, is held to be fatally defective, in New Jersey. Ferguson v. Delaware, etc., Co., 58 Atl. Rep. 74.

[96] See chapter, *Jurisdiction of Actions, Law of Place.*

[97] Cleveland, etc., R. Co. v. Osgood (Ind.), 70 N. E. Rep. 839; Deni v. Pennsylvania R. Co., 181 Pa. St. 525; 37 Atl. Rep. 558; 59 Am. St. Rep. 676.

[98] Marvin v. Maysville, etc., R. Co., 49 Fed. Rep. 436.

nonresident, where her husband had been killed by the negligence of a railroad in another State, while in its employment, although the deceased was also a nonresident and the contract of employment was entered into out of the State of Tennessee.[99] And a similar holding obtains in Georgia[1] and Kentucky.[2] A foreign administrator is authorized to sue for the death of his decedent, in some States,[3] but he is generally not permitted to maintain the action where he is prohibited from prosecuting the same action in the State of his appointment.[4]

[99] Chesapeake & Ohio R. Co. v. Higgins, 85 Tenn. 620; 4 S. W. Rep. 47.

[1] Augusta R. Co. v. Glover, 58 Am. & Eng. R. Cas. 269; 18 S. E. Rep. 406. See, also, Philpott v. Missouri Pac. R. Co., 85 Mo. 164; 27 Am. & Eng. R. Cas. 323.

[2] Marvin v. Maysville, etc., R. Co., 49 Fed. Rep. 436.

[3] Central R. Co. v. Swint, 73 Ga. 651; 26 Am. & Eng. R. Cas. 422; South Carolina R. Co. v. Nix, 68 Ga. 572; Wabash, etc., R. Co. v. Shacklett, 105 Ill. 364; 12 Am. & Eng. R. Cas. 166; Jeffersonville, etc., R. Co. v. Hendricks, 41 Ind. 48.

[4] Limekiller v. Hannibal, etc., R. Co., 33 Kansas 83; 5 Pac. Rep. 401; 19 Am. & Eng. R. Cas. 184; Vawter v. Missouri Pac. R. Co., 84 Mo. 679; 54 Am. Rep. 105.

Nonresident beneficiaries are held entitled to sue for the death of their decedent, under the Ohio statute. Naylor v. Pittsburg, etc., R. Co., 26 Ohio Cir. Ct., 277. See, also, in New York, Hirschkovitz v. Pennsylvania R. Co., 138 Fed. Rep. 438. And in Virginia, Pocahontas Co. v. Ruke's Admr., 51 S. E. Rep. 449.

A suit may be brought in one State, for death of plaintiff's decedent, in another, in the federal courts, sitting in the latter State, if the act where the death occurred is not inconsistent with the law of the State where the action is instituted. Texas & Pac. R. Co. v. Cox, 145 U. S. 593; 12 Sup. Ct. Rep. 905.

CHAPTER V.

EVIDENCE IN RAILWAY ACCIDENT CASES.

§ 72. Scope of chapter.
73. Injury must result from negligent act.
74. What presumptions are indulged in in such actions.
75. Rule of evidence — Conflict of laws.
76. When negligence of defendant presumed.
77. Defendant's ownership or control must be shown.
78. Relation of employer and employee must be shown.
79. Defendant's notice of defects must be shown.
80. Plaintiff's ignorance of the danger.
81. Reasonable safety of place or appliance sufficient.
82. Defective roadbed and track.
83. Same — Condition of track at other places.
84. Evidence of defective hand-holds.
85. Knowledge of incompetency of employees must be shown.
86. Evidence of employee's reputation for care.
87. Burden of establishing vice-principalship.
88. Ordinances as evidence of negligence.
89. Proving assumed risk and contributory negligence.
90. Enforcement and reasonableness of rules.
91. What declarations admissible as part of *res gestæ*.
92. Displaying injured member to jury.
93. Physical examination of plaintiff — When ordered.
94. Evidence of subsequent repairs inadmissible.
95. Prior or subsequent negligent acts or conditions.
96. Photographs of place or appliance.
97. Evidence of prior accidents incompetent.
98. Expert testimony — What is.
99. Customs and opinions as to relative methods.
100. Opinions of medical experts as to permanency of injury.
101. When opinions based wholly on history of case.
102. Running of trains — Train sheets and time-tables as evidence of.
103. Reports of railway company's employees.
104. Speed of trains.
105. Mortality tables, competent when.

§106. When negative evidence is admissible.
107. Evidence of settlement with other employees incompetent.
108. Evidence of employer's insurance incompetent.
109. Evidence must correspond with pleading.

§ 72. **Scope of chapter.**— It is not the intention in this chapter, to attempt to discuss all the questions arising in railway accident cases, or to cite all the authorities bearing upon any particular phase of the law of evidence underlying such cases, as distinguished from other personal injury actions, but only to cite authorities upon some of the questions that customarily arise in the trial of personal injury actions against railroads, both on the part of the plaintiff and for the defendant, in such cases, in order to furnish to the practitioner some ready precedents, in the preparation or trial of his case. There is no difference in the law of evidence, as applied to personal injury actions against railroads and the law of evidence in personal injury actions in other vocations,[1] except in so far as the public character of the business of such companies and the dangerous and powerful agencies employed in the business, have made new rules or decisions necessary, in the recognition, by the courts of the principles of the law, necessary for the protection of the lives and limbs of citizens.

§ 73. **Injury must result from negligent act.**— Both in the opening chapter, discussing the elements of actionable negligence, and the chapter on proximate and remote cause, it will be seen that in order for the plaintiff to recover in any case, for an injury alleged to be due to the act of another, he must be able to establish both a breach of duty toward himself, by the one charged with such injury and that his injury, resulted, proximately, from such breach of duty, or

[1] For discussion of the law of evidence as applied to actions for personal injuries in mines, see White, Per. Inj. in Mines, §§ 69 to 100.

negligent act. In other words, both by his pleading and his proof, the plaintiff must connect his injury with the negligent act of the defendant, alleged as the cause of such injury.[2]

The burden of proof is always on the plaintiff, to show these essential facts, whether the circumstances are such as to raise a presumption of negligence from the happening of the accident, or not. The doctrine *res ipsa loquitur* does not relieve the plaintiff of the burden of proof in the case, or raise any presumption in the plaintiff's favor, but would only carry the cause to the jury, permitting it to infer negligence and find, on all the evidence, whether the plaintiff had sustained his burden of proof, or not.[3]

§ 74. **What presumptions are indulged in in such actions.**— It will not be attempted, in this limited space, to give all the presumptions that the courts will indulge, in personal injury actions, for text books have been written on presumptive evidence, but some of the presumptions of fact that courts will receive, in actions for personal injuries against railroads, will be given.

The incorporation of a railroad company is presumed;[4] it

[2] Byrd v. Southern Express Co. (N. C. 1905), 51 S. E. Rep. 851.

Burden is always on an employee to establish that his injury was due to the defendant's negligence. Missouri K. & T. R. Co. v. Greenwood (Texas), 89 S. W. Rep. 810.

The burden of proving defendant's negligence is on the plaintiff. Cully v. Northern Pac. R. Co., 35 Wash. 241; 77 Pac. Rep. 202.

[3] Ross v. Double Shoals, etc., Co. (N. C. 1905), 52 S. E. Rep. 121; 1 L. R. A. (N. S.) 298.

The "fellow-servant law" of Missouri, does not dispense with the proof of an injury due to an act of a coemployee, before negligence can be successfully charged against the company. Caldwell v. Missouri Pac. R. Co., 181 Mo. 455; 80 S. W. Rep. 897.

[4] Cummings v. Evansville, etc., R. Co., 115 Ind. 417; 18 N. E. Rep. 6; 36 Am. & Eng. R. Cas. 147; Kostendader v. Pierce, 37 Iowa 645; Busey v. Hooper, 35 Md. 15.

is presumed that the railroad company is lawfully in possession of its right of way;[5] that one is employed in the capacity in which he acts;[6] that employees did their duty;[7] that employees are competent;[8] that proper regulations for the management of the business had been adopted;[9] that a state of facts shown to exist has continued for a reasonable time;[10] that the common law is in force in other jurisdictions;[11] that persons are in the possession of their normal faculties[12] and, that the owner of a railroad track is engaged in the operation thereof.[13]

There are many other presumptions that the courts have held will be received in such cases, but specific works upon the subject of evidence must be consulted for all such.

[5] Glass v. Memphis, etc., R. Co., 94 Ala. 581; 10 So. Rep. 215; Drake v. Chicago, etc., R. Co., 63 Iowa 302; 19 N. W. Rep. 215; 17 Am. & Eng. R. Cas. 45; Rafferty v. Missouri Pac. R. Co., 91 Mo. 33; 3 S. W. Rep. 393; Ulini v. New York, etc., R. Co., 101 N. Y. 98; 4 N. E. Rep. 536; 23 Am. & Eng. R. Cas. 3.

[6] Hughes v. New York, etc., R. Co., 4 J. & S. (N. Y.) 222; Hoffman v. New York, etc., R. Co., 12 J. & S. 1; Lampkins v. Vicksburg, etc., R. Co., 42 La. Ann. 997; 8 So. Rep. 530; 47 Am. & Eng. R. Cas. 622; Austin v. St. Louis, etc., P. Co., 15 Mo. App. 197.

[7] Jewett v. Kansas City, etc., R. Co., 50 Mo. App. 547.

[8] Potter v. New York, etc., R. Co., 136 N. Y. 77; 32 N. E. Rep. 603.

[9] Potter v. New York, etc., R. Co., 136 N. Y. 77, 32 N. E. Rep. 603.

[10] Haskins v. St. Louis, etc., R. Co., 58 Mo. 302; Wabash R. Co. v. Keim, 42 Ill. App. 272; Goodsell v. Taylor, 41 Minn. 207; 42 N. W. Rep. 873.

[11] Eichelburger v. Pittsburg, etc., R. Co. (Ohio), 9 Am. & Eng. R. Cas. 158.

[12] Frazer v. South, etc., R. Co., 81 Ala. 185; 1 So. Rep. 85; 28 Am. & Eng. R. Cas. 565; Ford v. Central, etc., R. Co., 69 Iowa 627; 21 N. W. Rep. 587; 17 Am. & Eng. R. Cas. 599.

[13] Blair v. St. Louis, etc., R. Co., 27 Fed. Rep. 176; Lake Shore, etc., R. Co. v. Clark, 41 Ill. App. 343; Peabody v. Oregon, etc., R. Co., 21 Oregon 121; 26 Pac. Rep. 1053; 47 Am. & Eng. R. Cas. 598; Walsh v. Missouri Pac. R. Co., 102 Mo. 582; 14 S. W. Rep. 873; Ferguson v. Wisconsin, etc., R. Co., 63 Wis. 145; 23 N. W. Rep. 123; 19 Am. & Eng. R. Cas. 285.

§ 75. **Rule of evidence — Conflict of laws.**— As a general rule, in the trial of an action in one State, for an injury occurring in another State, the rules of evidence and practice and the conduct of the trial will be governed by the law of the forum.

Accordingly, it was held, in Alabama, that the law of another State, where the injury to the plaintiff occurred, prescribing a rule of evidence for the enforcement of the cause of action, which was in opposition to the rule prevailing in Alabama, would not be applied in a suit brought in the State of Alabama.[14]

§ 76. **When negligence of defendant presumed.**— Whether the happening of an injurious accident raises a presumption that it was due to some negligent act or acts, upon the defendant's part, depends upon the nature of the accident and the surrounding circumstances which characterize it and the relation of the parties, as affecting the measure of care required from the one sought to be charged. While the mere happening of an accident, producing injury, does not raise such a presumption, it may reasonably be ascribed to negligence, if it was not such an injury as would have occurred, had due care been exercised by the defendant.[15]

[14] Helton v. Alabama Midland R. Co., 97 Ala. 275; 12 So. Rep. 276.

[15] Cincinnati, etc., Ry. Co. v. South Fork, etc., Co., 139 Fed. Rep. 528; 1 L. R. A. (N. S.) 533.

The mere fact of youth in an employee will raise no presumption of negligence, in case of an injury, in an action against his employer, as the burden of proving negligence is on the plaintiff, as in other cases. McMillan v. Grand R. Co., 130 Fed. Rep. 827.

In an action by an engineer for injuries from a boiler explosion, before the fact of the explosion will raise the presumption of negligence on the employer's part, it must appear that the engineer was not himself guilty of negligence. Illinois Cent. R. Co. v. Prickett, 109 Ill. App. 468; 210 Ill. 140; 71 N. E. Rep. 435.

§ 77. **Defendant's ownership or control must be shown.**—Before a liability will result for an injury on a railroad, the evidence of the plaintiff must show either ownership of the place or appliance causing the injury, by the defendant, or such control or authority over the same as would render the defendant responsible for the condition causing the injury.[16]

It has been held competent to establish ownership or control of the appliance causing the injury, sufficient to render the defendant liable therefor, by showing that the defendant's name was on the engine which injured the plaintiff;[17] that the defendant was generally regarded as the owner of the railroad where the injury was received;[18] or that it had sent its surgeon or physician to render medical or surgical aid and assistance to the plaintiff.[19]

From this it will be seen that the rule requiring proof of ownership or control of the place or appliance causing the injury is not enforced with great strictness, but if there is a total absence of proof of the defendant's ownership or control of the cause of the injury, there would be an absence of one of the essentials of a cause of action.[20]

§ 78. **Relation of employer and employee must be shown.**—Where the injury to the plaintiff was received while he occupied the relation of an employee of the defendant, the evidence must show that such relation existed, since it would only result from the duty owing to him as such employee that the conclusion that the breach of that duty would amount

[16] Indianapolis, etc., R. Co. v. Lawn, 30 Ind. App. 515; 66 N. E. Rep. 508.

[17] East St. Louis, etc., R. Co. v. Altgen, 210 Ill. 213; 71 N. E. Rep. 377.

[18] Chicago, etc., R. Co. v. Schmitz, 211 Ill. 446; 71 N. E. Rep. 1050.

[19] Chicago, etc., R. Co. v. Carroll, 206 Ill. 318; 68 N. E. Rep. 1087.

[20] Indianapolis, etc., R. Co. v. Lawn, 30 Ind. App. 515; 66 N. E. Rep. 508.

to actionable negligence, could be indulged in. Hence, unless the relation is admitted by the pleadings, it is always necessary to show by the evidence that this relation did exist in order to show one of the essential elements of negligence on the defendant's part.[21]

But it is not necessary for the plaintiff to establish, by direct evidence, that such relation existed, but it is sufficient if from all the facts and circumstances submitted to the court or jury, it can be ascertained, with reasonable certainty that such relation did exist, as where it appeared that the plaintiff was performing work and labor for the defendant, on his property, or about his business, and that this was done with the consent of the defendant and that the injury was received while discharging duties that enured to the benefit of the defendant, with his knowledge and consent; this will be ordinarily sufficient, from which the law will imply a promise to pay for such services, so rendered and from which the conclusion can be drawn that the plaintiff was an employee of the defendant.[22]

[21] Valley v. Hall, 184 Mass. 358; 68 N. E. Rep. 829; Henderson v. Kansas City, 177 Mo. 477; 76 S. W. Rep. 1045.

Evidence that an injured switchman was engaged in straightening a bent link and defendant's foreman knew his location is admissible. Alabama, etc., R. Co. v. Bonner, 39 So. Rep. 619.

[22] Ringue v. Oregon, etc., Co., 75 Pac. Rep. 703.

Mere request of a foreman that the injured or deceased alleged employee perform certain service is not sufficient evidence from which it can be held that the relation of employer and employee existed. Baker's Admr. v. Lexington, etc., R. Co., 28 Ky. L. R. 140; 89 S. W. Rep. 149.

To create the relation of employer and employee there must be a contract, or some act on the part of the one impliedly recognizing the other as his employee. One engaged by an unauthorized employee is a mere volunteer, to whom no duty is due, except not to wantonly injure him, after discovery of his danger. Atlanta, etc., Ry. Co. v. West, 121 Ga. 641; 49 S. E. Rep. 711; 67 L. R. A. 701.

As to a mere volunteer, there is not the duty to adopt means to avoid injury, that obtains toward an employee, but only care to avoid injury, after discovery of his peril, need be exercised, although the

§ 79. **Defendant's notice of defects must be shown.**— It being not only essential to show the defect from which the injury resulted, but also the fact that defendant had knowledge thereof a sufficient length of time to have enabled him, in the exercise of due care, to have repaired it, or that it had existed for a length of time sufficient for him to have acquired such knowledge, in the exercise of ordinary care, these facts must also appear before a *prima facie* case is established by the plaintiff.[23]

But the law will imply notice from a defect that has existed a sufficient length of time for the employer, in the exercise of ordinary care, to have discovered the defect, and hence, it is not essential in every case to prove actual notice, provided facts are shown from which notice can be legally inferred.[24] In Missouri, proof of notice of a defect on the day of the accident, is held not to be sufficient to show negligence, where it would ordinarily have taken longer than this to remedy the defect [25] and a period of from three to six days, after the defect was known to exist, by the employee, unac-

volunteer is a minor. Atlanta, etc., Ry. Co. v. West, 121 Ga. 641; 49 S. E. Rep. 711; 67 L. R. A. 701.

Where the evidence shows that the plaintiff was a minor and when he entered the employer's service, his father forbid his employment on a train and that he was injured when so engaged, it was held improper to show emancipation by the father, and the relation of employer and employee was held not to exist. Coleman v. Himmerberger-Harrison Co. (Mo.), 79 S. W. Rep. 981.

Where an employer lends his employee to a third person, to render some particular service, he is, as to such service, the employee of the third person, though he remains the general employee of his employer. Weist v. Coal Cr. R. Co. (Wash.), 84 Pac. Rep. 725.

[23] Burnes v. Kansas City, etc., R. R. Co., 129 Mo. 41; O'Malley v. Missouri Pac. Ry. Co., 113 Mo. 319.

[24] Hamman v. Central, etc., Co., 156 Mo. 232; Currelli v. Jackson, 77 Conn. 115; 58 Atl. Rep. 762.

[25] Abbot v. Marion Min. Co., 112 Mo. App. 550, holding that where knowledge of a situation is relied upon to show culpability, it must be shown to be prior knowledge, with time to remove the danger.

companied by notice at all, on the employer's part, was held insufficient in Iowa.[26] An employee injured by stumbling over a grain door, left by the side of a railroad track, cannot recover, in the absence of evidence of defendant's knowledge of such obstruction;[27] nor could an employee injured by smoke in a tunnel, sustain a verdict, unless the evidence showed defendant's prior notice of the existence of such smoke.[28]

[26] Thayer v. Smoky Hollow Co., 98 N. W. Rep. 718.

[27] Burnes v. Kansas City, etc., R. R. Co., 129 Mo. 41.

[28] O'Malley v. Missouri Pac. Ry. Co., 113 Mo. 320.

In Burnes v. Railroad, *supra*, Judge Gantt, said: "The rule in this State, in this class of cases, requires the servant to show the unsafe place or defective machinery, and that the master knew of the unsafe condition, or that the exercise of ordinary care, on the master's part, would have discovered the defect. Beginning with the well-considered case of Gibson v. Railroad (46 Mo. 163), this has been the uniform ruling in this State." Elliott v. Railroad, 67 Mo. 272; Crane v. Railroad, 87 Mo. 588; Gutridge v. Railroad, 94 Mo. 468; Bowen v. Railroad, 95 Mo. 268.

Knowledge or an opportunity to know of a defect in an appliance, is essential to a liability. Smith v. Gulf, etc., R. Co. (Texas), 65 S. W. Rep. 83.

And notice to a coemployee of a defect is not notice to the employer. Chicago, etc., R. Co. v. Merriam, 95 Ill. App. 628.

Evidence of notice to a vice-principal is competent to show notice to the employer himself. Dutro v. Metropolitan, etc., R. Co., 111 Mo. App. 258; 86 S. W. Rep. 915.

No recovery can be had for an injury from a defective drawhead, without proof of notice of such condition to the company. Welch v. New York, etc., R. Co., 43 N. Y. 958; 17 N. Y. S. 342.

Without notice to a company of a bad track of another road and the inadaptability of its engine to such track, no recovery can be had for an injury therefrom. Dunlap v. Richmond, etc., R. Co., 81 Ga. 136; 7 S. E. Rep. 283.

No liability will result from an injury from a defective ladder or hand-hold to a car or engine, unless the evidence shows that it had existed a sufficient time for the employer, in the due course of the business, to have acquired notice thereof and repaired it. Missouri Pac. R. Co. v. Door (Kan.), 85 Pac. Rep. 533; Galveston, etc., R. Co. v. Smith (Texas), 93 S. W. Rep. 184; 98 S. W. Rep. 240.

§ 80. **Plaintiff's ignorance of the danger.**— In most of the States it is not essential for the plaintiff, in an action for a personal injury, to establish that he was wholly ignorant of the defect that occasioned the injury, but for the employer's defense of assumed risk to prevail — in case this is the defense — the employer himself must establish that the plaintiff had notice of the defect causing the injury, as well as the danger resulting therefrom.[29] But where the defect in the appliance or place is so glaring as to bring notice home to the injured employee, as where an appliance is obviously defective, then the law will imply that the injured plaintiff had the same notice that everyone who came in contact with it must have and such notice will be imputed to him, in law,

Knowledge for a month, of a defective track, is sufficient to impart notice thereof, in law. Houts v. Transit Co., 108 Mo. App. 686; 84 S. W. Rep. 161.

To bring to a company notice of a defective car, it is not essential that notice be given the person named by its rules with duty of seeing to the safety of such car. Chicago & A. Ry. Co. v. Walters, 217 Ill. 87; 75 N. E. Rep. 441.

Where a railroad brakeman was killed, by the unsafe condition of a car load of logs, it is held, in Colorado, that the company is liable, if it could have known of such unsafe condition of the load, although actual notice is not shown. Roche v. Denver & R. G. R. Co., 73 Pac. Rep. 880.

Notice to a railroad of a defect in a coupling appliance was presumed, in Kansas. Brinkmeier v. Missouri Pac. R. Co., 77 Pac. Rep. 586.

It is held, in Kansas, that in the absence of evidence to the contrary, an employer is presumed to have notice of defects in his appliances. Brinkmeier v. Missouri Pac. R. Co., 69 Kan. 738; 77 Pac. Rep. 586.

And, in Illinois, it is held that an employee is presumed to have no such knowledge. Pressed Steele Car Co. v. Herath, 110 Ill. App. 596.

This latter presumption is indulged in, in the presence of the fact that the employee comes in closer contact with the appliances with which he works than his employer; that he has more frequent means of information, and working with an appliance, ought to know its condition, for his own safety, better than one who entrusts him with its use. Such a presumption is unreasonable.

[29] Hamman v. Central, etc., Co., 156 Mo. 232; Cole v. St. Louis, etc., Co., 183 Mo. 81; 81 S. W. Rep. 1138.

from such knowledge and it would prevent his recovery.[30] An employee is charged in law with a notice of all conditions surrounding him, which he cannot fail to see and know and he is bound to know and consider such surroundings, with reference to his personal safety. If, as a matter of fact, the presence of danger would be suggested by the appearances of his surroundings, to a man of ordinary prudence, he should give notice of such impending danger to his employer and, failing to do this, he could not recover for an injury received from the threatened obvious danger.[31]

§ 81. **Reasonable safety of place or appliance sufficient.**— The employer being negligent only when it can be established that he has failed to use such care as ordinarily prudent men in the same business use in the management of their affairs, it is never held that he is negligent when he uses such appliances or places, in his business, as ordinarily careful men in the same business customarily use. Evidence on

[30] Renfro v. Railroad Co., 86 Mo. 302; Jackson v. Railroad, 104 Mo. 448; Alcorn v. Railroad, 108 Mo. 81; Railroad Co. v. Trimble, 35 N. E. Rep. 716; Pennsylvania R. Co. v. Congdon, 134 Ind. 226; Macklin v. Railway Co., 58 N. W. Rep. 999; Hickey v. Taafe, 105 N. Y. 26; Buckley v. Railway Co., 113 N. Y. 540; Crown v. Orr, 140 N. Y. 450; Pratt v. Prouty, 153 Mass. 333; Nugent v. Milling Co., 131 Mo. 241.

[31] Montgomery, etc., Co. v. Barringer, 109 Ill. App. 185; Nugent v. Milling Co., 131 Mo. 241.

An employee injured while on a track, by an engine, must allege, in Illinois, a want of notice to himself, of the fact of the approach of the engine. Chicago, etc., R. Co. v. Bell, 111 Ill. App. 280.

The burden of proving all the facts from which the conclusion of an assumption of the risk will result, is on the employer. Missouri, etc., R. Co. v. Jones (Texas), 80 S. W. Rep. 852.

Under an allegation of assumed risk, the burden of establishing this defense is on the defendant. Arenschield v. Chicago, etc., R. Co., 128 Iowa 677; 105 N. W. Rep. 200.

The employer must show the employee's knowledge of danger and unless he proves it, it is not presumed. Pressed Steel Car Co. v. Herath, 110 Ill. App. 596.

his part that his appliances or places for work were such as were in ordinary use by such men, is, therefore, usually held to be sufficient evidence with which to meet the charge that such appliances or places were dangerous or defective.[32]

Where the appliances are such as usually are used by ordinarily prudent men in the same business, they are held to come up to the legal standard of appliances that are reasonably safe for the purpose for which they are utilized and after proof of such place or appliance, as the one causing the injury, if there is no countervailing proof, it would ordinarily be a duty of the court to hold that the employee could not recover,[33] or if the evidence on this issue was conflicting it would be the duty of the court to advise the jury, by proper instruction, that such was the standard of ordinary care and no employer could be held negligent who came up to this legal standard.[34]

§ 82. **Defective roadbed and track.**— In an action for an injury from a derailment caused by an alleged defective roadbed and track, at the place where the derailment occurred, evidence that at a point a considerable distance before the place of the disaster was reached which had previously caused similar trouble, was found to be in good condition and was watched by section forces, and that the track at the place of the disaster was considered safe, should be admitted on behalf of the defendant, to rebut the evidence of notice

[32] Bohn v. Chicago & Alton R. Co., 106 Mo. 429; Pence v. California, etc., Co., 27 Utah, 378; 75 Pac. Rep. 934.

[33] Northern Pac. R. Co. v. Dixon, 139 Fed. Rep. 737; Fore v. Chicago & Alton R. Co., 114 Mo. App. 551; 89 S. W. Rep. 1034.

[34] If the employee injured is not a person of ordinary skill, it will usually be a question of whether the machine used by him was reasonably safe for one of his experience. Chicago & C. R. Co. v. Daugard, 118 Ill. App. 67.

of a dangerous or defective track, at the place of the injury.[35]

And, generally, where an accident occurred at a particular place, evidence is admissible of the condition of the track, in the neighborhood of that place, either to establish a defective condition, or to show a proper condition of the same.[36]

§ 83. **Same — Condition of track at other places than where injury occurred.**— It would seem, under the strict rule of pleading and proof which obtains in personal injury actions, that under an allegation of an unsafe place and a resulting injury, at a certain portion of a railroad track, that it would be incompetent to establish an unsafe or dangerous track at any other place and many of the cases hold that this cannot be done,[37] any more than one could allege an injury from one appliance or place and recover on proof of an injury due to a wholly different place or appliance.

But apparently for erroneous reasons, this class of seem-

[35] Central, etc., R. Co. v. Kent, 84 Ga. 351; 10 S. E. Rep. 965.

[36] Sweat v. Boston, etc., R. Co., 156 Mass. 284; 31 N. E. Rep. 296.

[37] The condition of a track after a derailment, but before repair, may be shown, but not if months elapse, or the condition is changed. Cronk v. Wabash R. Co., 123 Iowa 349; 98 N. W. Rep. 884.

The condition of a railroad track at a place other than that where an injury occurred is not admissible, in Pennsylvania. Briggs v. Railroad, 206 Pa. 564; 56 Atl. Rep. 36.

The condition of track at other times or places than alleged in petition, was held incompetent, in the following cases: Sidekum v. Wabash, etc., R. Co., 93 Mo. 400; 4 S. W. Rep. 701; 30 Am. & Eng. R. Cas. 640; Grant v. Raleigh, etc., R. Co., 108 N. Car. 462; 13 S. E. Rep. 209; Louisville, etc., R. Co. v. Fox, 11 Bush (Ky.), 495; Stewart v. Everts, 76 Wis. 35; 44 N. W. Rep. 1092; 44 Am. & Eng. R. Cas. 313; Laughlin v. Grand Rapids, etc., R. Co., 62 Mich. 220; 28 N. W. Rep. 873; 26 Am. & Eng. R. Cas. 377; Missouri Pac. R. Co. v. Mitchell, 75 Texas 77; 12 S. W. Rep. 810; 41 Am. & Eng. R. Cas. 224; Little Rock, etc., R. Co. v. Eubanks, 48 Ark. 460; 3 S. W. Rep. 808; 31 Am. & Eng. R. Cas. 176; Grand Rapids, etc., R. Co. v. Huntley, 38 Mich. 537; Stoher v. St. Louis, etc., R. Co., 91 Mo. 509; 4 S. W. Rep. 389; 31 Am. & Eng. R. Cas. 229.

ingly incompetent evidence is admissible, in some of the States, as where it was held competent, in order to show the surrounding circumstances, or to prove constructive or actual notice to the railway company,[38] as if evidence of notice of a condition at one time or place would raise any presumption of a like notice of a wholly different place or condition.

§ 84. **Evidence of defective hand-holds.**— In an action for an injury due to an absence of hand-holds on a tank car, used by the defendant, it is held competent, in Massachusetts, to show that they would be convenient and useful and that other similar cars, belonging to the defendant, have them, as this is held to be a circumstance for the jury to consider, in determining the presence or absence of negligence, on defendant's part.[39]

It is also held to be competent, in Missouri, where the in-

[38] The condition of a railroad track at points other than where the accident occurred, was held admissible, in the following cases: Jacksonville, etc., R. Co. v. Southworth, 135 Ill. 250; 25 N. E. Rep. 1093; Allison v. Chicago, etc., R. Co., 42 Iowa 274; Worden v. Humeston, etc., R. Co., 76 Iowa 310; 41 N. W. Rep. 26; Ohio Valley, etc., R. Co. v. Watson, 93 Ky. 654; 21 S. W. Rep. 244; Holyoke v. Grand Trunk R. Co., 48 N. H. 541; Texas, etc., R. Co. v. DeMilley, 60 Texas 194; Murphy v. New York, etc., R. Co., 66 Barb. (N. Y.) 125.

In an action for injury to an engineer from a low joint in a track, evidence that all the ties in the cut were rotten, is held to be competent to show the surrounding circumstances and conditions and also to show notice to the defendant, or facts from which it could have been derived. Southern Ry. Co. v. Sittasen (Ind.), 74 N. E. Rep. 898.

Evidence of severe rain storms about the same time as a storm which washed out the roadbed, causing the injury to plaintiff, is held competent, in Texas, to show that it should have been anticipated and its effects provided for. Gulf, etc., Ry. Co. v. Boyce, 87 S. W. Rep. 395.

Evidence that switch lights were used on other portions of the defendant railroad company's road and on other roads quite generally at such places as that where plaintiff was injured, was held competent, in Virginia. Southern Ry. Co. v. Blanford's Admr., 54 S. E. Rep. 1.

[39] Graham v. Boston, etc., R. Co., 156 Mass. 4; 30 N. E. Rep. 359.

jury is alleged to result from a defective hand-hold, to permit the plaintiff to show the manner in which the hand-hold was fastened to the car and the condition of the screws and wood, immediately after the injury to the plaintiff.[40]

§ 85. **Knowledge of incompetency of coemployee must be shown.**— Where the injury which furnishes the basis of the action is alleged to be the result of the incompetency of a coemployee, it is essential to show that the employer had notice of the incompetency, or that if he had exercised reasonable care, he would have learned of such incompetency, or no liability on the part of the employer will result.[41] In short, the same rule, so far as the burden of proof and the essentials of showing facts from which negligence in the particular case will result, applies to this kind of a case as that which obtains in the case of an injury from a defective machine, or appliance, or a failure to furnish a reasonably safe place to work. In all such cases, before negligence can be said to exist, a notice of the facts from which the duty would spring, must be shown to exist, or facts from which this notice would be inferred, in law.

The presumption is that the employer has performed his duty in the employment of competent employees [42] and when it is shown that an employee was competent when employed, he is presumed to continue competent.[43] Such presumption, of course, may be overcome by proof of facts from which

[40] Gutridge v. Missouri Pacific Ry. Co., 105 Mo. 520; 16 S. W. Rep. 943.

[41] Harper v. Railroad Co., 47 Mo. 567; Moss v. Railroad Co., 49 Mo. 167; Blake v. Railroad, 70 Me. 63; Gorman v. Railway Co., 78 Iowa 509; 43 N. W. Rep. 303; Coppins v. Railway Co., 122 N. Y. 563; 25 N. E. Rep. 915.

There is a presumption of the competency of coemployees. Wilkinson, etc., Co. v. Dickinson, 35 Ind. App. 230; 73 N. E. Rep. 957.

[42] Bailey, Mas. Liab. Inj. Serv., p. 55.

[43] Michigan Central Ry. Co. v. Gilbert, 46 Mich. 176; 9 N. W. Rep. 243.

notice and incompetency both would result, but this must be done, in every case, to justify a recovery. Proof of continued intoxication,[44] numerous incompetent acts, with the knowledge of the employer, or such a series of incompetent acts,[45] or intoxication, as to inform the employer, if he had used reasonable care, will usually overcome the presumption of due care, upon the part of the employer and competency on the part of the employee. And if several such acts have been shown, it is usually held to be a question for the jury to determine whether, under the facts of the case, the employer had notice of the incompetency of the given employee, or ought to have known of his incompetency, by the exercise of due care on his part.[46]

[44] Gilman v. Railroad Co., 13 Allen, 433; Laning v. Railway Co., 49 N. Y. 521; Hilts v. Railway Co., 55 Mich. 437; 21 N. W. Rep. 878.

[45] Incompetency will not be shown by proof of one careless act. Melville v. Railway Co., 48 Fed. Rep. 820; Houston, etc., Ry. Co. v. Patton (Tex.), 9 S. W. Rep. 175; Michigan Central Ry. Co. v. Gilbert, *supra;* Lake Shore, etc., Ry. Co. v. Stupak, 123 Ind. 210; 23 N. E. Rep. 246.

[46] Michigan Central Ry. Co. v. Gilbert, *supra;* Bailey, Mas. Liab. Inj. Serv., p. 57.

It is error to exclude the evidence of a superintendent that when he employed the conductor, whose incompetency is alleged as the cause of the accident, he did not know that he was incompetent. Frazier v. Pennsylvania R. Co., 38 Pa. St. 104.

And after evidence that an employee was competent when employed, it is held, in New York, that he is presumed to continue competent. Chapman v. Erie R. Co., 55 N. Y. 579.

Evidence of notice to a conductor of different acts of negligence on the part of an alleged incompetent brakeman, was held competent to show knowledge of such incompetency on the employer's part, in Texas. Gulf, etc., Ry. Co. v. Hays, 89 S. W. Rep. 29.

Evidence that an alleged incompetent brakeman the night before the injury was "out with the girls" is error. Gulf, etc., Ry. Co. v. Hays (Texas), 89 S. W. Rep. 29.

Specific acts of negligence or of drunkenness, or lack of skill, are inadmissible to prove incompetency of an employee, unless the employer is shown to have had notice thereof. Southern Pac. R. Co. v. Hetzer, 135 Fed. Rep. 272; 68 C. C. A. 26.

§ 86. **Evidence of employee's reputation for care.**— Where the ground of negligence alleged is the employment or retention of an incompetent or unskilled employee in the service, whose act caused the injury, since the basis of the negligence charged is the known employment or retention of an incompetent employee, it is sometimes held competent, to meet the evidence to show notice of such incompetency, on the employer's part, by evidence of the general reputation of the employee, whose reputation for care is attacked, as being a careful man. This was held to be competent evidence, in a Rhode Island case,[47] and, in Texas, when an employee's reputation for care is attacked, it is held to be competent for him to show a general custom for the performance of the duty he was performing at time of the injury, in the same way that he was performing it, when the injury occurred,[48] but further than this it is doubted if evidence of reputation is competent, in an action for negligence, although, in an Illinois case, where both an engineer and his fireman were killed in an explosion, and more direct proof of his care and prudence could not be had, it was held competent to

Evidence of other specific acts of negligence on the part of an alleged incompetent vice-principal, was held competent, in Washington, in order to show notice thereof to his employer. Dossett v. St. Paul, etc., Co., 40 Wash. 276; 82 Pac. Rep. 273.

Where the ground of negligence is the incompetency of an engineer, it was held competent, in Washington, to show two prior negligent acts on the same engineer's part, where the employer had notice thereof. Conover v. Neher Ross Co., 38 Wash. 172; 80 Pac. Rep. 281.

[47] Evidence of a deceased engineer's reputation for care is admissible to rebut evidence of his negligence, in a boiler explosion. Illinois, etc., R. Co. v. Prickett, 210 Ill. 140; 71 N. E. Rep. 435; Havens v. Rhode Island Co., 26 R. I. 48; 58 Atl. Rep. 247.

The general reputation for care among railroad men, of an alleged incompetent brakeman, was held competent, in Texas. Gulf, etc., Ry. Co. v. Hays, 89 S. W. Rep. 29.

[48] International, etc., R. Co. v. Penn, 79 S. W. Rep. 624.

establish his general reputation as "a sober, careful and competent engineer." [49]

§ 87. **Burden of establishing vice-principalship.**— At common law all coemployees engaged in the common service were presumed to be coemployees and this presumption obtained, regardless of the grade of the service,[50] and hence it is incumbent upon the plaintiff who alleges that he was injured as a result of the negligence of an employee, delegated by the employer with power of control, to establish this affirmative allegation.[51] The facts going to show the delegation of the power of supervision or control are generally required to be proved by the plaintiff.[52]

If the negligence charged is that of a wrong order, at the time of the injury, then the proof must show that the plaintiff was acting under such order when injured and if this does not appear there would be a material variance between the pleading and the proof.[53]

But notwithstanding the general rule at common law that all employees in the same common employment were con-

[49] Illinois Central R. Co. v. Prickett, 210 Ill. 140; 109 Ill. App. 468; 71 N. E. Rep. 435.

After proof of the incompetency of an employee, his general reputation among those acquainted with him is competent to bring home notice of his incompetency to the employer; but reputation of only a few of those who knew him, including a part only of those who knew his character, was held to be incompetent, in Utah. Southern Pac. R. Co. v. Hetzer, 135 Fed. Rep. 272; 68 C. C. A. 26.

[50] Cooley, Torts, p. 640.

[51] Shaw v. Bambrick Bates Co., 102 Mo. App. 666; 77 S. W. Rep. 96; Boyd v. Blumenthal (Del.), 52 Atl. Rep. 330.

In determining whether an alleged vice-principal was, in fact, such, it is competent to show that he directed employees and the repair of appliances. Wysocki v. Wisconsin, etc., Co., 121 Wis. 96; 98 N. W. Rep. 950.

[52] *Ante idem.*

[53] Bohn v. Chicago & Alton R. Co., 106 Mo. 434.

sidered as coemployees, it is held, in Illinois,[54] that the burden of establishing that the plaintiff was injured by the negligence of a coemployee is upon the defendant, as this would come within the rule requiring the defendant to establish the defense of assumed risk, by facts from which the relation showing an assumption of the risk would appear, but the opinion loses sight of the rule by which such defense would be made out, in the absence of evidence, by the legal presumption that ought to obtain, in the absence of a counter showing.

§ 88. **Ordinances as evidence of negligence.**— The violation of an ordinance by the defendant is not conclusive proof of the defendant's negligence, but is to be considered along with other evidence of the negligence by the court and jury, going to establish such conduct as will show a want of ordinary care on his part. The Supreme Court of Pennsylvania, in a recent case, tersely states the rule as follows: "Ordinances and their violation are admissible, not as substantive and sufficient proof of the negligence of the defendant, but as evidence of municipal expression of opinion, on a matter as to which the municipal authorities had acted, that the defendant was negligent and are to be taken into consideration with all the other facts in the case." [55] Ordinances limiting the speed of trains within a municipal corporation; those providing for warning by bell or whistle, at street crossings, and those providing for flagmen, or gatemen, at crossings, are all admissible in evidence, for the purpose of establishing the negligence of the defendant, but they are not conclusive proof thereof.[56]

[54] Southern R. Co. v. Stewart, 108 Ill. App. 652. See, also, Consolidated Kansas City, etc., R. Co. v. Osborne, 66 Kan. 393; 71 Pac. Rep. 838.

[55] Ubelman v. American, etc., Co., 209 Pa. 398; 58 Atl. Rep. 849.

[56] Galveston, etc., R. Co. v. Levy (Texas), 79 S. W. Rep. 879; Mathieson v. Omaha, etc., R. Co. (Neb.), 97 N. W. Rep. 243.

In Illinois, it is held that the absence of a gate is such a conclusive invitation to a traveler to cross a railroad track, where an ordinance provides a gate shall be maintained, that no contributory negligence of the traveler will prevent the conclusion of negligence on the defendant's part,[57] but in this State contributory negligence is no defense to ordinance or statutory negligence — although the negligence of the plaintiff is the direct cause of the injury — [58] and this rule is not followed in Missouri, or many other States, but the violation of an ordinance requiring a flagman,[59] like that requiring a warning by bell or whistle, would be only some evidence of negligence on the defendant's part and if the plaintiff's negligence, notwithstanding such negligence of the defendant, was shown to have contributed to the injury, there could be no recovery.[60]

§ 89. **Proving assumed risk and contributory negligence.**— The burden of proof is on the defendant to establish the special defenses of contributory negligence or assumed risk, as the party holding the affirmative of any issue is always bound to establish the facts upon which such issue depends.[61]

[57] Chicago, etc., R. Co. v. Schmitz, 211 Ill. 446; 71 N. E. Rep. 1050; Chicago, etc., R. Co. v. Wise, 206 Ill. 453; 69 N. E. Rep. 500.

[58] Riverton, etc., Co. v. Shepard, 111 Ill. App. 294; 207 Ill. 395; 69 N. E. Rep. 921; Fulton v. Wilmington, etc., Co., 133 Fed. Rep. 193; 68 L. R. A. 168.

[59] Montgomery v. Missouri Pac. R. Co., 182 Mo. 495.

[60] Briggs v. Boston, etc., R. Co., 188 Mass. 463; 74 N. E. Rep. 667; Van Riper v. New York, etc., R. Co., 71 N. J. L. 345; 59 Atl. Rep. 26; Watson v. Erie R. Co., 8 Ohio N. P. 18; 10 Ohio S. & C. P. 454; Stack v. New York, etc., R. Co., 89 N. Y. S. 112; 96 App. Div. 575.

[61] Nord v. Boston, etc., M. Co. (Mont.), 75 Pac. Rep. 681; Missouri, etc., R. Co. v. Jones (Texas), 80 S. W. Rep. 852; Arenschield v. Chicago, etc., R. Co., 128 Iowa 677; 105 N. W. Rep. 200.

Under a general allegation of contributory negligence, any evidence is admissible going to show negligence on the plaintiff's part. Bell v. Gulf, etc., R. Co. (Texas), 81 S. W. Rep. 134.

This does not mean, however, that the defendant is always required to offer evidence on his side of the case, for if the defense of either assumed risk or contributory negligence is established by the evidence of the plaintiff himself, the defendant would be entitled to a direction of the verdict, for the facts thus presented should not be ignored by the court, although established by the evidence of the plaintiff himself.[62]

§ 90. **Evidence of enforcement and reasonableness of rule.**— Before a rule of the railway company will constitute a defense to an action for personal injury received by an employee while violating such rule, it must generally be shown that the rule was properly promulgated; that it was enforced and that it was a reasonable rule.[63]

Whether the rule is reasonable and intelligent or not, is generally a question of law for the court, but the application of the rule to the duty that was being performed by the employee at the time of his injury is a question of fact for the jury.[64] If it is shown that a reasonable rule, properly promulgated and enforced, was being violated at the time of the injury to the employee this will be held competent evidence going to show the contributory negligence on the part of the injured employee,[65] but if the violation of the rule did not occasion or was not connected with the injury, or the violation of the rule was caused by an accident or unavoidable occurrence on his part, it would not constitute a bar to a recovery by the employee.[66]

[62] Iowa G. M. Co. v. Diefenthaler, 76 Pac. Rep. 981; Bier v. Hosford, 35 Wash. 544; 77 Pac. Rep. 867; Epperson v. Postal Tel., etc., Co., 155 Mo. 372; Schlereth v. Railway Co., 96 Mo. 509.

[63] Johnson v. Union Pac. Co., 76 Pac. Rep. 1089.

[64] LeDuc v. Northern Pac. R. Co. (Minn.), 100 N. W. Rep. 108; Francis v. Kansas City, etc., Ry. Co., 110 Mo. 387; 19 S. W. Rep. 935.

[65] Schaub v. Hannibal, etc., Ry. Co., 106 Mo. 74.

[66] Junction Co. v. Ench, 111 Ill. App. 346.

§ 91. What declarations admissible as part of res gestæ.—As a general rule to make acts or declarations admissible in connection with the other evidence of a personal injury, alleged to be due to the negligence of the defendant, such acts or declarations must be so intimately connected with the transactions causing the injury that they have a tendency to illustrate or explain it, as a part of the occurrence itself.[67] If, instead of occurring contemporaneously with, or immedi-

Parol proof of a railroad's rules is incompetent. Cincinnati, etc., R. Co. v. McMullen, 117 Ind. 439; 20 N. E. Rep. 287; 38 Am. & Eng. R. Cas. 165; Missouri Pac. R. Co. v. Lamothe, 76 Texas 219; 13 S. W. Rep. 194; Louisville, etc., R. Co. v. Orr, 94 Ala. 602; 10 So. Rep. 167; Sobieski v. St. Paul, etc., R. Co., 41 Minn. 169; 42 N. W. Rep. 863; Price v. Richmond, etc., R. Co., 38 So. Car. 199; 17 N. E. Rep. 732.

The defendant's rules are admissible, although not pleaded. Galveston, etc., R. Co. v. Fitzpatrick (Texas), 83 S. W. Rep. 406; Pierson v. Chicago, etc., R. Co. (Iowa), 88 N. W. Rep. 505.

It is always competent to establish the promulgation of rules or the fact that an employee's attention was called thereto. Huggins v. Railway Co. (Ala.), 41 So. Rep. 856; Worcester v. Galveston, etc., R. Co. (Texas), 91 S. W. Rep. 339.

The law presumes that all necessary rules were prescribed and the plaintiff must rebut this legal presumption by proof of the necessity for the rule relied upon. Hill v. Boston, etc., R. Co., 72 N. H. 518; 57 Atl. Rep. 924.

Before constant violation of a rule will amount to a waiver by the company, it must be shown that it had knowledge of such violation by its employees. Wallace v. Boston, etc., R. Co., 72 N. H. 504; 57 Atl. Rep. 913.

Evidence that car repairers on the defendant's railroad when they worked in a car or about it, did not place the flags required by a rule, at one or both ends of such car, but that they only complied with such rule when they worked under the car, is not competent to show a customary violation of the rule, with the knowledge of the defendant. Canadian Pac. R. Co. v. Elliott, 137 Fed. Rep. 904.

[67] Williams v. Southern R. Co., 68 S. C. 369; 47 S. E. Rep. 706; Redmond v. Metropolitan, etc., R. Co., 185 Mo. 1; 84 S. W. Rep. 26; Nashville, etc., R. Co. v. Miller, 120 Ga. 453; 47 S. E. Rep. 959; Battis v. Chicago, etc., R. Co., 124 Iowa 483; 103 N. W. Rep. 481; Estes v. Missouri Pac. R. Co., 110 Mo. App. 725; McHugh v. Transit Co., 190 Mo. 85; 88 S. W. Rep. 853; Indianapolis, etc., R. Co. v. Schmidt, 163 Ind. 360; 71 N. E. Rep. 201.

ately following the accident, such acts or declarations are so remote as to be more properly classed as mere narrations of the completed event, they are not admissible, as a part of the original transaction.[68] It is held, in an action for injuries due to a failure to follow proper train orders, that the orders are admissible as part of the *res gestæ;* [69] the declarations of a child while being removed from under a car, were held admissible,[70] as were declarations or acts within five minutes,[71] or a longer time, if forming a part of the occurrence producing the injury.[72] But the remarks of a passenger to the operatives of a train, about an injury which occurred while it was in motion, after the train had stopped, are not admissible as a part of the *res gestæ*; [73] nor are statements of the extent of the injury received or the pain caused thereby; [74] declarations made in response to direct questions, asked after the completion of the injury; [75] or statements made at a time or place removed from the scene of the injury,[76] or made under circumstances such as to indicate that they are intended to be used as evidence,[77] for in all such cases the acts

[68] Di Prisco v. Wilmington, etc., R. Co. (Del.), 57 Atl. Rep. 906.

[69] Wallace v. Boston, etc., R. Co., 72 N. H. 504; 57 Atl. Rep. 913.

[70] Di Prisco v. Wilmington, etc., R. Co., 57 Atl. Rep. 906; Chicago, etc., R. Co. v. White, 110 Ill. App. 23.

[71] Leach v. Oregon, etc., R. Co., 29 Utah 285; 81 Pac. Rep. 90; Missouri, etc., R. Co. v. Jones, 35 Tex. Civ. App. 584; 80 S. W. Rep. 852.

[72] Gulf, etc., R. Co. v. Willoughby (Texas), 81 S. W. Rep. 829.

[73] Indianapolis, etc., R. Co. v. Taylor, 164 Ind. 155; 72 N. E. Rep. 1045.

[74] Klingaman v. Fish, etc., Co. (S. D.), 102 N. W. Rep. 601.

[75] Guild v. Pringle, 130 Fed. Rep. 419; Hot Springs, etc., R. Co. v. Hildreth, 72 Ark. 572; 82 S. W. Rep. 245; White v. Southern R. Co., 123 Ga. 353; 51 S. E. Rep. 411; Boyd v. West Chicago R. Co., 112 Ill. App. 50.

[76] Redmond v. Metropolitan, etc., R. Co., 185 Mo. 1; 84 S. W. Rep. 26.

[77] De Prisco v. Wilmington, etc., R. Co., 57 Atl. Rep. 906.

The declaration of the injured person, made at the moment of the accident, that she alone was to blame, is competent, as part of the

or declarations cannot properly be said to be a part of the original transaction.

§ 92. **Displaying injured member to jury.**— The admissibility of the injured member, by displaying it in evidence

res gestæ. DeMaley v. Morgen's, etc., R. Co., 45 L. Ann. 1329; 14 So. Rep. 61; 58 Am. & Eng. R. Cas. 448.

Under an allegation of an unsafe bridge to run trains over, the speed of trains run over the bridge is held competent as part of the *res gestæ*. Louisville, etc., R. Co. v. Pedigo, 108 Ind. 481; 8 N. E. Rep. 627; 27 Am. & Eng. R. Cas. 310.

The following acts and declarations have been held competent, as part of the *res gestæ*:. To show that defendant's engineer was intoxicated at time of wreck, Hobson v. New Mexico, etc., R. Co. (Ariz.), 28 Am. & Eng. R. Cas. 360; 11 Pac. Rep. 545; the rate of speed at time of an injury, Taylor v. St. Louis, etc., R. Co., 83 Mo. 386; that no signal was given at the backing of a car, Spotts v. Wabash, etc., R. Co., 111 Mo. 380; 20 S. W. Rep. 190; statements of conductor a few moments before a collision, Chicago, etc., R. Co. v. Holland, 122 Ill. 461; 13 N. E. Rep. 145; 30 Am. & Eng. R. Cas. 590; what had been said by a passenger as to his destination, Cincinnati, etc., R. Co. v. Howard, 124 Ind. 280; 24 N. E. Rep. 892; the telegraphic correspondence between train dispatcher and engineer, before a collision, Deverson v. Eastern R. Co., 58 N. H. 129; orders of brakeman for passenger to "hurry up," while alighting, Waller v. Hannibal, etc., R. Co., 83 Mo. 608; admonitions of other passengers to a boy about to jump from a moving train, Hemminway v. Chicago, etc., R. Co., 72 Wis. 42; 37 N. W. Rep. 804; 33 Am. & Eng. R. Cas. 511; 7 Am. St. Rep. 823; declarations of a decedent as to cause of injury, made at time and place thereof, Stoeckman v. Terre Haute, etc., R. Co., 15 Mo. App. 503; Gardner v. Bennett, 6 J. & S. (N. Y.) 197; statements made by a brakeman, at time of an assault, Marion v. Chicago, etc., R. Co., 64 Iowa 568; 21 N. W. Rep. 86; Alabama, etc., R. Co. v. Frazier, 93 Ala. 45; 9 So. Rep. 303; statements made by a civil engineer in repairing an embankment, that it was not properly constructed, Brehm v. Great Western R. Co., 34 Barb. (N. Y.) 256; declarations of defendant's engineer, causing the injury, made at the time of injury, Hanover R. Co. v. Coyle, 55 Pa. St. 396; Vicksburg, etc., R. Co. v. O'Brien, 119 U. S. 99; statement of the defendant's manager, as to cause of disaster, Kragg v. Atlanta, etc., R. Co., 77 Ga. 202; 4 Am. St. Rep. 79; what was said by employee when he fell, after fatal injury, Louisville, etc., R. Co. v. Earl, 94 Ky. 368; 22 S. W. Rep. 607; that no complaints

before the jury, is generally classified as demonstrative evidence of the injury and in personal injury actions, such testimony is usually held to be competent. The better rule may perhaps be said to be that such evidence is admitted, but is

were made of an alleged injury, at the time, to those present, Fuller v. Jamestown, etc., R. Co., 75 Hun 273; 26 N. Y. Supp. 1078; the statement by a passenger, immediately after an injury, that he was made to alight from a moving train, International, etc., R. Co. v. Smith (Texas), 14 S. W. Rep. 642; 44 Am. & Eng. R. Cas. 324; an admission of a foreman that he expected the injury to an employee, just after it occurred, Elledge v. National City, etc., R. Co., 100 Cal. 282; 34 Pac. Rep. 720; statements of the engineer directly after a collision, McLeod v. Ginther, 80 Ky. 399; 8 Am. & Eng. R. Cas. 162; Hooker v. Chicago, etc., R. Co., 76 Wis. 542; 44 N. W. Rep. 1085; 41 Am. & Eng. R. Cas. 498; and statements of a traveler immediately after a collision at a crossing, Quincy, etc., R. Co. v. Gnuse, 137 Ill. 264; 27 N. E. Rep. 190.

But the following acts and declarations have been held to be incompetent, as a part of the *res gestæ*, viz: What an engineer had said before an accident about his engine being defective, Louisville, etc., R. Co. v. Stewart, 56 Fed. Rep. 808; or what brakemen said about brakes on the cars, prior to an accident, Virginia, etc., R. Co. v. Sayers, 26 Gratt (Va.) 328; details of how an injury had happened by the injured party, after the accident, Johnston v. Oregon, etc., R. Co., 23 Oregon 94; 31 Pac. Rep. 283; Sullivan v. Oregon, etc., R. Co., 12 Oregon, 392; 7 Pac. Rep. 508; 21 Am. & Eng. R. Cas. 391; Chicago, etc., R. Co. v. Becker, 128 Ill. 545; 21 N. E. Rep. 524; what the trainmen said right after the accident, Memphis, etc., R. Co. v. Womack, 84 Ala. 149; 4 So. Rep. 618; 37 Am. & Eng. R. Cas. 308; Adams v. Hannibal, etc., R. Co., 74 Mo. 553; 7 Am. & Eng. R. Cas. 414; Leahey v. Cas Avenue, etc., R. Co., 97 Mo. 165; 10 S. W. Rep. 58; the declarations of a bystander, running to relief of injured person, Gulf, etc., R. Co. v. Montgomery, 85 Texas 64; 19 S. W. Rep. 1015; the self-serving acts or statements of injured person, made after the accident, Kennedy v. Rochester, etc., R. Co., 130 N. Y. 654; 29 N. E. Rep. 141; Newsom v. Georgia R. Co., 66 Ga. 57; Lahey v. Ottman, 25 N. Y. Supp. 897; 56 N. Y. S. R. 109; 73 Hun 63; Whitaker v. Eighth Ave., etc., R. Co., 51 N. Y. 295; Martin v. New York, etc., R. Co., 103 N. Y. 626; 9 N. E. Rep. 505; Chicago, etc., R. Co. v. Johnson, 36 Ill. App. 564; Texas, etc., R. Co. v. Crowder, 70 Texas 222; 7 S. W. Rep. 709; declarations of employees as to cause of accident, after it had occurred, St. Louis, etc., R. Co. v. Sweet, 57 Ark. 287; 21 S. W. Rep. 587; Weideman v. Tacoma, etc., R. Co., 7 Wash. 517; 35 Pac.

largely in the discretion of the court, for if the display of the injured member would be obscene or indecent, it would not be held to be a violation of the discretion of the court to re-

Rep. 414; San Antonio, etc., R. Co. v. Robinson, 73 Texas 277; 11 S. W. Rep. 327; Curl v. Chicago, etc., R. Co., 63 Iowa 417; 16 N. W. Rep. 69; 11 Am. & Eng. R. Cas. 85; a statement of a coemployee as to the cause of plaintiff's injury, made after the accident, Hellmuth v. Katschke, 35 Ill. App. 21; Chicago, etc., R. Co. v. Becker, 128 Ill. 545; a traveler's statement after a collision at a crossing, to his driver, McCabe v. Dry Dock, etc., R. Co., 15 Daly 504; 8 N. Y. Supp. 336; 28 N. Y. S. R. 879; what the conductor had said at the next station after an accident, Central, etc., R. Co. v. Kelly, 58 Ga. 107; Alabama, etc., R. Co. v. Hawk, 72 Ala. 112; 18 Am. & Eng. R. Cas. 194; 47 Am. Rep. 403; declarations of injured person or employees made five minutes after injury, Richmond, etc., R. Co. v. Hammand, 93 Ala. 181; 9 So. Rep. 577; Durkee v. Central, etc., R. Co., 69 Cal. 533; 11 Pac. Rep. 130; 58 Am. Rep. 562; statements of injured person or third parties made from a half of an hour to an hour after injury, Chesapeake, etc., R. Co. v. Reeves (Ky.), 11 S. W. Rep. 464; Vicksburg, etc., R. Co. v. O'Brien, 119 U. S. 99; Pittsburg, etc., R. Co. v. Wright, 80 Ind. 182; 5 Am. & Eng. R. Cas. 628; Savannah, etc., R. Co. v. Holland, 82 Ga. 257; 10 S. E. Rep. 200; 41 Am. & Eng. R. Cas. 196; Armil v. Chicago, etc., R. Co., 70 Iowa 130; 30 N. W. Rep. 42; 28 Am. & Eng. R. Cas. 467, or any statements made several days after the injury occurred. Baltimore, etc., R. Co. v. State, 75 Md. 526; 24 Atl. Rep. 14; Macon, etc., R. Co. v. Johnson, 38 Ga. 409; Powell v. Augusta, etc., R. Co., 77 Ga. 192; 3 S. E. Rep. 757; Moore v. Chicago, etc., R. Co., 59 Miss. 243; 9 Am. & Eng. R. Cas. 401.

A statement of a manager of a railroad to a subordinate employee the day after an injury, due to the negligence of a certain employee, that such employee was incompetent, is not admissible in evidence, in Rhode Island. Havens v. Rhode Island, etc., R. Co., 26 R. I. 48; 58 Atl. Rep. 247.

Upon the competency of an inquiry by a section-man, as to the cause of his injuries, upon recovery of consciousness, the Supreme Court of Missouri, in the recent case of Hinzeman v. Missouri Pacific Ry. Co. (199 Mo., p. 66), said: "The office given that remark by this court, was that it was competent, and potent as tending to show Hinzeman had no knowledge or notice of the oncoming train. We remain satisfied with the significance we attached to that remark. It was made on the spot and in the presence of witnesses to the transaction. His mind apparently took up the thread of his life precisely at the point it was broken, when struck by the locomotive

ject such evidence.[78] If the injured member of the plaintiff's body could not be said to be of such part thereof as to be improper to expose in public, then it is generally held to be proper to permit the display of the injuries to the jury[79] and while such displays may be calculated to appeal to the passions or emotions of the jury, it is a sufficient reply to such objections that this is the primary or demonstrative evidence of the injury — an essential element of the plaintiff's case — and for this reason the evidence cannot be rejected, for, as recently said by the Kentucky court: "Evidence of this character is really the best evidence obtainable of the extent and character of the injury that the person seeking damages has sustained and the jury have the right to be aided in making up their verdict by a personal view of the injured member."[80]

and the first instinctive and spontaneous inquiry was, "What hit me?" that meant he did not know. The exclamation was part of the *res gestæ* and, therefore, was properly admitted and is lodged in the case for what it is worth."

See, also, on former appeal, Hinzeman v. Missouri Pacific Ry. Co., 182 Mo. 611; 81 S. W. Rep. 1134.

But the supposed statement of an engineer, on arriving at the next station that he had "knocked a hobo" off the track, was held incompetent, as part of the *res gestæ*, in Frye v. St. Louis, etc., R. Co., 200 Mo. 377; 98 S. W. Rep. 566.

[78] "It is competent for the plaintiff to exhibit the injured member to the jury, and this he may do, upon the request of his counsel, or of the adverse party — provided that the exhibition does not violate any rule of propriety or decency. Whether it does so or not, is, of course, a question that must be left largely in the discretion of the trial judge." Ford v. Providence Co. (Ky.), 99 S. W. Rep. 611.

[79] Such as an amputated leg. *Ante idem.*

[80] Newport, etc., R. Co. v. Carroll, 31 S. W. Rep. 132; 17 Ky. L. R. 374; Williams v. Nally, 20 Ky. L. R. 244; 45 S. W. Rep. 874; Ford v. Providence Co., 99 S. W. Rep. 611.

The practice of permitting a physician to exhibit the injuries of plaintiff to jury, is approved in the following cases: Citizens, etc., R. Co. v. Willoby, 134 Ind. 563; 33 N. E. Rep. 627; 58 Am. & Eng. R. Cas. 485; Cunningham v. Union Pacific R. Co., 4 Utah 206; 7 Pac.

§ 93. **Physical examination of plaintiff — When ordered.**— In many jurisdictions, in an action for damages for personal injuries, where the nature and extent of the injuries is an issue in the cause, the plaintiff may be required by the court, upon the defendant's application, to submit to a surgical examination, to ascertain the character and extent of the injuries for which damages are claimed.[81]

Where the right to compel such an examination is recognized, the court would not be warranted in refusing the examination by a committee of representative and disinterested physicians, merely because the plaintiff happened to be a young lady of delicate and refined feelings, as her right to damages and the nature of her injuries were none the less

Rep. 795; Barker v. Perry, 67 Iowa 146; 25 N. W. Rep. 100; Malhado v. Brooklyn, etc., R. Co., 30 N. Y. 370.

A proper exhibition of an injured person's deformity was held competent evidence in the following cases: Missouri, etc., R. Co. v. Moody (Texas), 79 S. W. Rep. 856; Minden v. Vedene (Neb.), 101 N. W. Rep. 330.

But a dramatic exhibition was held a ground for reversal, in Nebraska, in Felsch v. Babb, 101 N. W. Rep. 1011.

Amputated parts of the body were held competent to be admitted in evidence, in California, in Anderson v. Seropian, 147 Cal. 201; 81 Pac. Rep. 521. It is also held competent to exhibit clothing worn by the deceased, at time of his death, in Alabama. Northern Alabama R. Co. v. Mansell, 138 Ala. 548; 36 So. Rep. 459.

But it is held to be reversible error, to send the jury out of the presence of the court, to make a physical examination of the plaintiff, in Fordyce v. Key, 74 Ark. 19; 84 S. W. Rep. 797.

It was held to be competent, in Missouri, to introduce clothing of one who had been run over by a car. Senn v. Southern R. Co., 108 Mo. 142; 18 S. W. Rep. 1007.

[81] Atchison, etc., R. Co. v. Thul, 29 Kansas 466; 44 Am. Rep. 659; 10 Am. & Eng. R. Cas. 783; Lloyd v. Hannibal, etc., R. Co., 53 Mo. 515; Alabama, etc., R. Co. v. Hill, 90 Ala. 71; 8 So. Rep. 90; 44 Am. & Eng. R. Cas. 441; Schroeder v. Chicago, etc., R. Co., 47 Iowa 375; 14 Am. Ry. Rep. 359; White v. Milwaukee, etc., R. Co., 61 Wis. 536; 21 N. W. Rep. 524; 50 Am. Rep. 154; 18 Am. & Eng. R. Cas. 213; McNair v. Manhattan, etc., R. Co., 22 N. Y. S. R. 840; 51 Hun 644; 123 N. Y. 664; 34 N. Y. S. R. 1010.

an issue in the cause, upon which the defendant was held entitled to some evidence.[82]

The United States Supreme Court holds [83] that there is no power on the part of the federal courts, on the application of the defendant in advance of the trial, to order the plaintiff to submit to a physical examination of his person, and it is likewise held in many States that no such power exists, on the part of the court, in the absence of a statute on the subject.[84]

In still other States the right to compel a physical examination of the injured person, is held to be a matter of sound discretion, on the part of the trial court, which will not be interfered with, in the absence of evidence of a clear abuse of the discretion,[85] and the selection of the experts to conduct the examination is generally held to rest entirely within the discretion of the trial judge, who is not required to yield to the suggestions or wishes of either party to the cause.[86]

[82] Alabama, etc., R. Co. v. Hill, 90 Ala. 71; 8 So. Rep. 90; 44 Am. & Eng. R. Cas. 441.

[83] Union Pacific R. Co. v. Botsford, 141 U. S. 250; 11 Sup. Ct. Rep. 1000; 47 Am. & Eng. R. Cas. 406.

[84] Baltimore, etc., R. Co. v. Andrews, 50 Fed. Rep. 728; 53 Am. Am. & Eng. R. Cas. 523; Joliet, etc., R. Co. v. Call. 143 Ill. 177; McQuigan v. Delaware, etc., R. Co., 129 N. Y. 50; 29 N. E. Rep. 235; 41 N. Y. S. R. 382; 60 Hun 576; 48 Am. & Eng. R. Cas. 490; Pennsylvania R. Co. v. Newmeyer, 129 Ind. 401; 28 N. E. Rep. 860; 52 Am. & Eng. R. Cas. 454; Peoria, etc., R. Co. v. Rice, 46 Ill. App. 60; 144 Ill. 227; 33 N. E. Rep. 951; Gulf, etc., R. Co. v. Norfleet, 78 Texas 321; 14 S. W. Rep. 703; 45 Am. & Eng. R. Cas. 207; Chicago, etc., R. Co. v. Holland, 122 Ill. 461; 13 N. E. Rep. 145; 30 Am. & Eng. R. Cas. 590. See N. Y. Act, 1893, ch. 721.

[85] Shepard v. Missouri Pacific Ry. Co., 85 Mo. 629; 55 Am. Rep. 390; Sidekum v. Wabash R. Co., 93 Mo. 400; 4 S. W. Rep. 701; 30 Am. & Eng. R. Cas. 640; Richmond, etc., R. Co. v. Childress, 82 Ga. 719; 9 S. E. Rep. 602; 3 L. R. A. 808; 41 Am. & Eng. R. Cas. 216; Terre Haute, etc., R. Co. v. Brunker, 128 Ind. 542; 26 N. E. Rep. 178.

[86] Alabama, etc., R. Co. v. Hill, 93 Ala. 514; 9 So. Rep. 722.

"The Supreme Court of Utah has in a carefully considered opinion aligned itself with those courts which deny their power in a personal

§ 94. **Evidence of subsequent repairs inadmissible.**— As the burden rests upon the plaintiff, of establishing, by a preponderance of the evidence, the negligence of the defendant, as the proximate cause of the injury to him, this burden is

injury case to order the plaintiff to submit to a physical examination by disinterested physicians. Larson v. Salt Lake City, 97 Pac. Rep. 483. In this course the court is following the lead of well-reasoned recent cases upon a question wherein there is a considerable amount of conflict. The court finds no weight in the suggestion that the power is essential to the administration of justice in order to prevent fraud, an argument advanced in 3 Wigmore on Evidence, p. 3020; Railway Co. v. Botsford, 141 U. S. 258, in the dissenting opinion of Brewer and Brown, JJ.; and in the earliest case before a court of last resort upholding the power, Schroeder v. Chicago, etc., R. Co., 47 Iowa 375, decided in 1877.

Such arguments, says the Utah court, 'may all be cogent reasons and appropriate addresses to be considered by legislative bodies why courts ought to have such a power and why it ought to be exercised by them; but they are very far from pointing out anything which in anywise tends to show from what source such a power is derived, or by what authority it may be lawfully exercised. It is readily conceded that the 'end of litigation is justice, and that knowledge of the truth is essential thereto,' and that courts are organized 'to establish and enforce equal and exact justice' between the litigants. Such plastic phrases and pointless truisms, however, do not argue anything nor elucidate or answer the point of inquiry.' The powers of courts are not measured by their own opinion of what will promote justice, but by the constitution and statutes of the State along with the common law. In none of these sources is found a power to compel the plaintiff to submit to a physical examination in advance of the trial.

The court intimates, however, that when at the trial the plaintiff has testified in his own behalf he may, as a part of his cross-examination and as a part of his testimony, be required at the defendant's request to exhibit his injuries to the jury, when the exhibition is free from indecency. Further, 'though the plaintiff does not take the stand, but evidence has been given in his behalf concerning his injuries, he may nevertheless be called by either party in a proper case to exhibit the injured parts as corroborating or affecting the testimony which has been given concerning the injuries.' We doubt whether these dicta, though elaborated at some length, are reconcilable with the reasoning which lies at the basis of the actual decision."— *Law Notes*, December 1908.

not discharged by evidence which does not show a negligent condition to have existed at the time of the injury and it manifestly can have no bearing upon this issue what course the defendant may have pursued subsequent thereto, in the way of repairing the place or appliance causing the injury. Such repairs would not, in any way, go to prove that the place or appliance was not reasonably safe, at the time of the injury, for a reasonably safe place or appliance can be repaired as well as a dangerous place and the fact that the repairs would change the condition that existed at the time of the injury, after such changed condition, could throw no light upon the condition then existing and such evidence could only operate to punish the employer for his care or vigilance for the protection of his employees, before the trial jury, without in any way meeting the issue for the court to decide, hence, such evidence is very generally held to be incompetent.[87] Notwithstanding the general rule, however, the United States Supreme Court, in a recent case, held that it was not error, in the trial of an action for the death of a trainman, killed by coming in contact with a water spout, alleged to have been located too near the track, to permit the plaintiff to show that after the death the spout was constructed at a greater distance from the track, where the trial court charged that such incompetent evidence was only received for the purpose of testing the correctness of the measurements of the defendant, offered to establish that the spout was not originally located dangerously near the track.[88] The

[87] Glang v. Alabama, etc., Co., 141 Ala. 537; 37 So. Rep. 784; Stevens v. Boston, etc., R. Co., 184 Mass. 476; 69 N. E. Rep. 338; Wager v. Lamont, 135 Mich. 521; 98 N. W. Rep. 1; Bailey v. Kansas City, 189 Mo. 503; 87 S. W. Rep. 1182; Russell v. New York, etc., R. Co., 89 N. Y. S. 429; 96 App. Div. 151; Southern R. Co. v. Simpson, 131 Fed. Rep. 705; 65 C. C. A. 563; St. Louis, etc., R. Co. v. Arnold (Texas), 87 S. W. Rep. 173.

[88] Choctaw, Oklahoma & Gulf Ry. Co. v. McDade, 191 U. S. 64; 48 L. Ed. 96.

prejudicial nature of this evidence is readily to be appreciated and notwithstanding the eminent authority for the admission of such testimony, it is doubtful if such incompetent and prejudicial evidence should be admitted, because offered for an alleged legitimate reason. Good reasons can always be given for the admission of incompetent evidence.

The same eminent tribunal which rendered the decision in the McDade case, *supra*, in Columbia, etc., R. Co. v. Hawthorne (144 U. S. 202), used this language: "It is now settled, upon much consideration, by the decisions of the highest courts of most of the States, in which the question has arisen, that the evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, *and is calculated to distract the minds of the jury from the real issue and to create a prejudice against the defendant.*" If such effect was to be given to this character of proof in this case, it is difficult to see why it should not have been given the same incompetent evidence in the McDade case. The court, in the Columbia, etc., R. Co., case cites the following cases, *viz.*, Morse v. Minneapolis, etc., R. Co., 30 Minn. 465; Ely v. St. Louis, etc., R. Co., 77 Mo. 34; Missouri Pac. R. Co. v. Hennesey, 75 Texas 155; Terre Haute, etc., R. Co. v. Clem, 123 Ind. 15; Shinners v. Prop. Locks, etc., Co., 154 Mass. 168; 12 L. R. A. 554.

Proof of increased precautions or subsequent repairs was held competent in the following cases: To show that a street crossing was repaired, Shaber v. St. Paul, etc., R. Co., 28 Minn. 103; 9 N. W. Rep. 575; 2 Am. & Eng. R. Cas. 185; that a sharp curve had been altered, Augusta, etc., R. Co. v. Renz, 55 Ga. 126; abandonment of a dangerous car, Crane v. Missouri Pac. R. Co., 87 Mo. 588; 25 Am. & Eng. R. Cas. 440; employment of additional men, Harvey v. New York, etc., R. Co., 19 Hun (N. Y.) 556; repair of station platform, Bateman v. New York, etc., R. Co., 47 Hun 429; 14 N. Y. S. R. 454; removal of a rotten platform, Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315; removal of track to a greater distance from obstruction, West Chester, etc., R. Co. v. McElwee, 67 Pa. St. 311, or increase in size of a waterway, St. Louis, etc., R. Co. v. Weaver, 35 Kansas 412; 11 Pac. Rep. 408; 28 Am. & Eng. R. Cas. 341. But see, *contra*, Columbia, etc., R. Co. v. Hawthorne, 144 U. S. 202; subsequent repairs of a gate, Woods v. Missouri, etc., R. Co., 51 Mo. App. 500, and the subsequent repair of an appliance an employee was required to use. Atchison, etc., R. Co. v. McKee, 37 Kansas 592; 15 Pac. Rep. 484.

Additional precautions or repairs was held to be incompetent, in

§ 95. **Prior or subsequent negligent acts or conditions.**— Where the evidence shows that the conditions have not been changed or altered since a given state or condition was shown to exist, then evidence of prior conditions is competent, as going to show the condition at the time of an injury,[89] but the condition or altered state of a place or appliance causing an injury, subsequent to the date of such injury is very generally held to be incompetent to be shown.[90] The reason for this rule is manifest, for the plaintiff is bound to show a negligent condition at the time of his injury, and the condition at a subsequent period would be wholly irrelevant to the issue upon which the liability would depend.

the following cases: Subsequent repairs, generally not admissible, Cleveland, etc., R. Co. v. Doerr, 41 Ill. App. 530; Gulf, etc., R. Co. v. Compton, 75 Texas 667; 13 S. W. Rep. 667; 44 Am. & Eng. R. Cas. 637; Atchison, etc., R. Co. v. Parker, 55 Fed. Rep. 595; Columbia, etc., R. Co. v. Hawthorne, 144 U. S. 202; Morse v. Minneapolis, etc., R. Co., 30 Minn. 465; 16 N. W. Rep. 358; Shinners v. Prop. Locks & Canals, 154 Mass. 168; 28 N. E. Rep. 10; Terre Haute, etc., R. Co. v. Clem, 123 Ind. 15; 23 N. E. Rep. 965; 42 Am. & Eng. R. Cas. 229; 7 L. R. A. 588; held, not admissible to show different construction of bridge, when rebuilt, Isaacs v. Southern Pac. R. Co., 49 Fed. Rep. 797; to show repair of railroad track, Jacques v. Bridgeport, etc., R. Co., 41 Conn. 61; Hipsley v. Kansas City, etc., R. Co., 88 Mo. 348; 27 Am. & Eng. R. Cas. 287; Sidekum v. Wabash R. Co., 93 Mo. 400; 30 Am. & Eng. R. Cas. 640; Mahaney v. St. Louis, etc., R. Co., 108 Mo. 191; 18 S. W. Rep. 995; Dougan v. Champlain Tr. Co., 56 N. Y. 1; Fordyce v. Chancey, 2 Texas Civ. App. 24; 21 S. W. Rep. 181; Knapp v. Sioux City, etc., R. Co., 71 Iowa 41; 32 N. W. Rep. 18; removal of a building, near the track, Thompson v. Toledo, etc., R. Co., 91 Mich. 255; 51 N. W. Rep. 995; the replacement of a wooden bridge by an iron one, Dale v. Delaware, etc., R. Co., 73 N. Y. 468, or the spreading of ashes or cinders over ice formed on a station platform. Simpson v. Manhattan, etc., R. Co., 17 N. Y. S. R. 68; 1 N. Y. Supp. 673.

[89] Johnson v. Union Pac. Co. (Utah), 76 Pac. Rep. 1089; Brazil Coal Co. v. Gibson, 66 N. E. Rep. 882; Revolinsky v. Adams Coal Co., 95 N. W. Rep. 122.

[90] Goble v. Kansas City, 148 Mo. 470; 50 S. W. Rep. 84; Meyers v. Highland Boy G. M. Co., 77 Pac. Rep. 743.

Where the defense is contributory negligence on the plaintiff's part, it is held competent to show prior negligent acts on his part, as this is held competent as affecting his conduct at the time of the injury, for it is not always to be said that one who is customarily negligent is to be considered only careful when injured and such injury is shown as a basis for a liability by which another can be made to respond in damages.[91] One or two negligent acts, however, would not throw light upon the conduct of the party at another time, unless connected therewith in some way and it is never competent to establish a negligent reputation in such cases, by mere general repute or opinion evidence.[92]

[91] International & G. N. R. Co. v. Penn (Texas), 79 S. W. Rep. 624; Coleman v. Mechanics Iron Co., 2 Am. Neg. Rep. 374.

[92] Goble v. Kansas City, 148 Mo. 470; 50 S. W. Rep. 84.

In discussing the question of the admissibility of evidence of prior negligent acts or injuries, Judge Goode, in the recent case of Calcaterra v. Iovaldi, (100 S. W. Rep. 676), used the following language and authorities:

"Evidence that a defect in a sidewalk, street, machinery, or appliance which is alleged to have caused an injury in suit had caused injuries to other persons before is held by some courts to be competent, while others hold the contrary, as will be seen by comparing the following authorities: Dist. of Columbia v. Arms, 107 U. S. 519, 2 Sup. Ct. 840, 27 L. Ed. 618; McCarragher v. Rogers, 120 N. Y. 526, 24 N. E. 812; Morse v. Railroad, 30 Minn. 465, 16 N. W. 358; Hanrahan v. Railroad, 6 N. Y. Supp. 395, 53 Hun 420; Larkin v. O'Neill, 48 Hun 591, 1 N. Y. Supp. 232; Pacheco v. Mfg. Co., 113 Cal. 541, 45 Pac. 833; Howland v. Railroad, 115 Cal. 487, 47 Pac. Rep. 225; Rumpel v. Railroad, 35 Pac. 700, 22 L. R. A. 725, 4 Idaho 13; Pittsburg, etc., R. R. v. Ruby, 38 Ind. 294, 10 Am. Rep. 111; Dalton v. Railroad, 114 Iowa 257, 86 N. W. Rep. 272; Robinson v. Railroad, 7 Gray (Mass.) 92; Maguire v. Railroad, 115 Mass. 239; Southern Kan. R. R. v. Robbins, 43 Kan. 145, 23 Pac. 113; Shearman & Redfield, Negligence (5 ed.), § 50b, and note 2; 1 Wigmore, Evidence, § 199, and note 1. In this State the admissibility of previous accidents at a defective place in a sidewalk was condered in Goble v. Kansas City, 148 Mo. 470, 50 S. W. Rep. 84, and such evidence ruled to be inadmissible, in effect overruling Golden v. Clinton, 54 Mo. App. 100. In the opinion in the Goble case the Supreme Court noticed the conflict in the decisions, and said the

§ 96. **Same — Photographs of the place or appliance causing injury.**— The courts generally admit accurate photographs of the place or appliance causing an injury, upon

weight of authority was that such evidence should be excluded as tending to divert the minds of the jury from the question to be decided to collateral issues, create a prejudice in their minds against the defendant, and surprise him with an issue the pleadings did not present. Those, in substance, are the grounds on which text-writers state that such testimony is held inadmissible in most jurisdictions." 1 Greenleaf, Evidence (16 ed.), § 14a. The competency of a collateral fact in a given case turns, as we have said, on whether or not the court deems its bearing on the main issue to be so intimate and valuable that the objections to collateral evidence may be disregarded. Obviously there will often be a diversity of views on such a matter. Hence the conflict in the opinions dealing with the subject. Likely proof of a negligent custom is admissible as tending to show negligence in an alleged instance of the custom. 1 Wigmore, Evidence, § 97; Brunke v. Telephone Co., 115 Mo. App. 36, 90 S. W. Rep. 753.

Judge Thompson, in his work on Negligence (Thompson, Neg., vol. 6, § 7870, p. 764), states the rule as follows:

"But in such cases the evidence will be received *only* where it is clear that the condition of the place or appliance *has not changed meanwhile.*"

See The Edwin, 87 Fed. Rep. 540; Powers v. R. R., 175 Mass. 466; 56 N. E. Rep. 710; Jones v. R. R., 20 R. I. 210; see also Columbia & Puget Sound R. R. Co. v. Hawthorne, 144 U. S. 202; 36 L. Ed. 405.

Where the evidence shows that conditions have not changed after an injury, up to the time the evidence of the subsequent condition refers to, it is held that such evidence is admissible, in the following cases, in order to show what the condition was at the time of the accident. Jackson, etc., Co. v. Cunningham, 141 Ala. 206; 37 So. Rep. 445; Logan v. Metropolitan R. Co., 183 Mo. 582; 82 S. W. Rep. 126; Norton v. Kramer, 180 Mo. 536; 79 S. W. Rep. 699.

Evidence of condition of track after an accident, without some showing that the condition had not been changed, is error. Culver v. South Haven, etc., R. Co., 144 Mich. 254; 107 N. W. Rep. 908; 109 N. W. Rep. 256.

Proof of the method adopted at a station to stop a train, at the first stop after an injury at same station, was held error, in Michigan. Moon v. Pere Marquette R. Co., 143 Mich. 125, 136; 106 N. W. Rep. 715.

It is held competent, in Georgia, that after a homicide, the engines of the defendant were run more slowly than before the death. Savannah, etc., R. Co. v. Flannaghan, 82 Ga. 579; 9 S. E. Rep. 471; 39 Am.

evidence that the same are true likenesses of the conditions exposed to the camera and as the same conditions cannot always be had at the time of the photographs and the time an accident occurred, with the evidence of the altered condition before it, the court will generally admit the photograph in evidence, although the conditions are different from those existing when the injury happened, where such changed conditions are also shown. In a well-considered California case,[93] an employee was killed by the fall of a derrick and a photograph of the appliance was made from an exposure had a few days after the injury to the deceased; at the time of the photograph the workmen were engaged in repairing the appliance and the place, but this fact, shown by the evidence was not held to affect the admissibility of the photograph

& Eng. R. Cas. 661. But see, *contra*, Baird v. Daly, 68 N. Y. 547; Nalley v. Hartford Co., 51 Conn. 524; 50 Am. Rep. 47.

Where there is evidence that grass and weeds obscured a switch, it was held, in Texas, that it was competent for the defendant to show, in rebuttal, that the morning after the injury, no grass or weeds were apparent and there was no evidence of any fresh cut grass or weeds. St. Louis S. W. Ry. Co. v. Arnold, 87 S. W. Rep. 173.

[93] Dyas v. Southern Pac. R. Co., 73 Pac. Rep. 972.

Without proper verification of the model or photograph, it is not admissible. Stone v. Lewiston, etc., R. Co., 99 Me. 243; 59 Atl. Rep. 56; Chicago, etc., R. Co. v. Cross, 113 Ill. App. 547; Houston, etc., R. Co. v. Cluck (Texas), 84 S. W. Rep. 852.

If capable of verbal description, a photograph of the place is held not to be admissible, in New York, in Cirello v. Metropolitan, etc., Co., 88 N. Y. S. 932.

It must be shown that there has been no change in the condition after the accident and before the photograph is taken. Maynard v. Oregon, etc., R. Co. (Or.), 78 Pac. Rep. 983; Chicago, etc., R. Co. v. Cross, 214 Ill. 602; 73 N. E. Rep. 865.

A court in Maine condemns the practice of admitting photographs of people in assumed positions. Babb v. Oxford, etc., Co., 59 Atl. Rep. 290.

But photographs of a decedent whose death is caused by a wrongful act, taken just before and just after the injury, were held admissible, in North Carolina. Davis v. Seaboard, etc., R. Co., 136 N. C. 115; 48 S. E. Rep. 591.

in evidence, as showing the true conditions, in other respects, at the time of the injury.

§ 97. **Evidence of prior accidents incompetent — When.—** The liability of the employer or carrier, depending upon the existence of a negligent condition, causing the injury to the plaintiff, it is no proof that such condition existed, to establish that similar accidents had occurred before, for injuries may result from other causes than the defendant's negligence, and hence, it is very generally held that proof of prior accidents at the same place, or with the same appliance, is incompetent.[94]

And for the reason that a negligent place or appliance may be used for a long time, by the exercise of a high degree of care, without accident, it is likewise incompetent for the defendant to attempt to establish due care as to a given place or appliance, by proof that same had been used for a long time, without resulting accidents.[95]

But although evidence of other accidents is generally held incompetent to show a negligent condition, where the proof shows that the condition has existed for a long time, it is sometimes held competent to show other accidents for the purpose of showing constructive notice of the condition, to the defendant[96] and, in Kentucky, it is held that proof of other accidents, is competent to show a negligent condition that ought to have been known by the defendant.[97]

[94] Gustafson v. Young, 86 N. Y. S. 851; 91 App. Div. 433; Cohen v. Hamblin, etc., Co., 186 Mass. 544; 71 N. E. Rep. 948; Mueller v. Northwestern, etc., Co., 125 Wis. 326; 104 N. W. Rep. 67; Roche v. Llewellen Iron Co., 140 Cal. 563; 74 Pac. Rep. 147.

[95] Mobile, etc., R. Co. v. Vallowe, 214 Ill. 124; 73 N. E. Rep. 416; Kelly v. Parker-Washington Co., 107 Mo. App. 490; 81 S. W. Rep. 631; Newcomb v. New York, etc., R. Co., 182 Mo. 687; 81 S. W. Rep. 631.

[96] Nelson v. Union, etc., R. Co., 25 R. I. 251; 58 Atl. Rep. 780; Whittelsey v. Burlington, etc., R. Co., 121 Iowa 597; 90 N. W. Rep. 516.

[97] Yates v. Covington, 83 S. W. Rep. 592.

§ 98. **Expert testimony — What is.**— An expert has been defined to be "one possessing, in regard to a particular subject or department of human activity, knowledge not ac-

Evidence of other similar accidents were held admissible in the following cases: Of other injuries from the same appliance, caused by the same defect, Morse v. Minneapolis, etc., R. Co., 30 Minn. 465; 16 N. W. Rep. 358; 11 Am. & Eng. R. Cas. 168; Clapp v. Minneapolis, etc., R. Co., 36 Minn. 6; 29 N. W. Rep. 340; Dye v. Delaware, etc., R. Co., 130 N. Y. 671; 29 N. E. Rep. 320; 53 Am. & Eng. R. Cas. 286; to show that other trains were ditched on the same track, within a period of a few weeks prior to the injury complained of, Mobile, etc., R. Co. v. Ashcraft, 48 Ala. 15; evidence that other passengers aside from the plaintiff, had met with similar injuries on a defective station platform, Missouri, etc., R. Co. v. Neiswanger, 41 Kan. 621; 21 Pac. Rep. 582; 39 Am. & Eng. R. Cas. 471; or a defective car step, Hanrahan v. Manhattan, etc., R. Co., 24 N. Y. S. R. 790; 53 Hun 420; 130 N. Y. 658; 29 N. E. Rep. 1033; Chase v. Jamestown, etc., R. Co., 15 N. Y. S. 35; to show similar injuries to other travelers, at a defective crossing, Birmingham, etc., R. Co. v. Alexander, 93 Ala. 133; 9 So. Rep. 525; Wooley v. Grand St., etc., R. Co., 83 N. Y. 121; 3 Am. & Eng. R. Cas. 398; that other children had been similarly injured on defendant's turntable, Gulf, etc., R. Co. v. Evansick, 63 Texas 54, and that other employees had received similar injuries from the same defective bridge, Louisville, etc., R. Co. v. Wright, 115 Ind. 378; 16 N. E. Rep. 145; 38 Am. & Eng. R. Cas. 41.

But evidence of other similar accidents were held incompetent, in the following cases: To show other injuries from the same place or appliance, Cleveland, etc., R. Co. v. Wynant, 114 Ind. 525; 17 N. E. Rep. 118; 35 Am. & Eng. R. Cas. 328; Early v. Lake Shore, etc., R. Co., 66 Mich. 449; 33 N. W. Rep. 813; 30 Am. & Eng. R. Cas. 163; other injuries after that to the plaintiff, Johnson v. Manhattan, etc., R. Co., 52 Hun 111; evidence of other similar injuries to other passengers, Davis v. Oregon, etc., R. Co., 8 Oregon 172; that other trains had broken in two, Louisville, etc., R. Co. v. Schmetzer (Ky.), 22 S. W. Rep. 603; that other travelers on the same crossing had been injured by failure to ring the bell or sound the whistle, Menard v. Boston, etc., R. Co., 150 Mass. 386; 32 N. E. Rep. 214; other injuries on turntable, not shown to have been brought to attention of the defendant, Bridger v. Ashville, etc., R. Co., 27 So. Car. 456; 3 S. E. Rep. 860, or other injuries from the chipping of other hammers, not shown to have been of the same metal, as none of these accidents would be material or competent for any purpose, as against the defendant, Georgia, etc., R. Co. v. Nelms, 83 Ga. 70; 9 S. E. Rep. 1049; 39 Am. & Eng. R. Cas. 355; 29 Cent. L. J. 352.

quired by ordinary persons." [98] An expert is elsewhere said to be one " who can see all sides of a subject." [99] His knowledge may be derived either from experience or from study and direct mental application and, in either case, if he is possessed of more than the average knowledge on the subject upon which he qualifies, he will be classed as an expert.

Such persons, shown to possess technical or peculiar knowledge on the subject undergoing investigation, are generally allowed to give their opinions whenever the question or issue is such as the jurors would be unable to correctly decide, without the aid of such opinions.[1] If the subject is one of common experience and observation, about which the jury would know as much as any other man, then opinion evidence cannot be introduced and it is generally held to be incompetent to give opinions upon the issues in a case before a court, regardless of the common or uncommon nature of the issue, unless the question at issue is one of science or skill, for otherwise the opinion evidence would encroach directly upon the province of the jury and amount to a complete usurpation of their functions.[2]

[98] 12 Amer. & Eng. Enc. Law (2 ed.), p. 422.

[99] Ford v. Providence, etc., Co. (Ky.), 99 S. W. Rep. 611.

[1] Ford v. Providence Co., *supra*, 12 Amer. & Eng. Enc. Law, p. 440; Louisville, etc., Co. v. Hart, 92 S. W. Rep. 951; Claxton's Admr. v. Lexington, etc., R. Co., 13 Bush. 636.

[2] Ford v. Providence, etc., Co., 99 S. W. Rep. 611.

" That which is within the common knowledge of mankind is not the proper subject of expert testimony." State v. Dusenberry, 112 Mo. 278. See, also, State v. Foley, 144 Mo. 600; 6 Thompson Neg., §§ 7747–7748 and cases cited; Johnson v. Coal Co., 76 Pac. Rep. 1089; Luman v. Golden Ancient Channel Min. Co., 74 Pac. Rep. 30.

In Haviland v. Railway Company (172 Mo. 115), the plaintiff claimed to have strained his back in carrying a steel rail, which was shown to weigh about 600 pounds; it was contended that the defendant should have provided more men to carry it and upon the safety of carrying it with the force of men provided, the plaintiff introduced expert testimony to establish that such a force could not safely carry such a weight. The trial court afterwards struck out this pretended

§ 99. Customs and opinions as to relative methods.— Upon the issue of what ordinarily prudent men in the same business do in a given case for the protection of their employees, it is held proper to show the custom in force among ordinarily

expert evidence and upon this action, the Supreme Court of Missouri, speaking through Marshall, J., said:

"This is the expert testimony that the court struck out. And is it surprising that the court did so? Is any court obliged to believe any such absurd testimony, or to allow any such manifest nonsense to go to the jury? Is it not an insult to common intelligence to be asked to believe that a section-hand can only lift thirty-seven and a half pounds? Or that such a section-hand can only push a seventy-five pound weight up a greased incline plane of about forty degrees?

"It is too obvious for debate that such testimony shows conclusively that the witness was not an expert or else that he was playing upon the credulity or gullibility of the jury. The court properly struck out such testimony." Haviland v. Railroad Co., 172 Mo., p. 115. See, also, Central Ry. Co. v. Goodwin, 120 Ga. 83; 1 Am. & Eng. Ann. Cas., p. 806.

The following matters have been held incompetent as opinion evidence, i. e., What the witness would have done, under like circumstances, Denver, etc., R. Co. v. Vitello (Colo.), 81 Pac. Rep. 766; what was the cause of a derailment of a train, Schultz v. Union, etc., R. Co., 181 N. Y. 33; 73 N. E. Rep. 491; whether a passenger could safely stand on a foot board of a car, Allen v. Transit Co., 183 Mo. 141; 81 S. W. Rep. 1142; whether the alignment of a track would be disturbed by the dragging of a car, Cronk v. Wabash R. Co., 123 Iowa 349; 98 N. W. Rep. 884, or whether the method employed was reasonably safe, or the appliances in a proper condition. Johnson v. Union Pac. Co., 28 Utah 46; 76 Pac. Rep. 1089; Coe v. Van Why, 33 Colo. 315; 80 Pac. Rep. 894.

The following subjects have been held the proper subject of expert opinion, *viz.*, the speed of trains, International, etc., R. Co. v. McGhee (Texas), 81 S. W. Rep. 804; Chicago, etc., R. Co. v. Bundy, 210 Ill. 39; 71 N. E. Rep. 28; the sufficiency of a force employed to do the work delegated, Dell v. McGrath, 92 Minn. 187; 99 N. W. Rep. 629; the time required to stop a train, where familiarity with the grade and methods is shown, Meng v. St. Louis, etc., R. Co., 108 Mo. App. 553; 84 S. W. Rep. 213; Chicago, etc., R. Co. v. Kapp (Texas), 83 S. W. Rep. 233; the relative safety of blocked and unblocked switch frogs. Schroeder v. Chicago, etc., R. Co., 128 Iowa, 365; 103 N. W. Rep. 985; how switch points should be placed, Buckalew v. Chicago, etc., R. Co., 107 Mo. App. 575; 81 S. W. Rep. 1176, or the necessity and

prudent men in the same business,[3] for this throws some light upon the issue whether or not the defendant has used due care in the premises. But to make such evidence competent it must appear that the custom is a general custom, as distinguished from a usage of one or more employers and it should also be shown that the custom was in force among employers of usual care or prudence, for otherwise the evidence of a custom among men of known careless methods or exceedingly careful practices would throw no light at all upon this issue.[4]

Evidence, by alleged experts of the relative safety, in their opinions, between different methods or customs, is always incompetent, for the reason that this encroaches upon the province of the jury and asks of such witnesses the decision of the very issue for the jury to determine.[5] The proper

manner of placing tell-tales over a bridge, Pittsburg, etc., R. Co. v. Lamphere, 137 Fed. Rep. 20.

[3] Illinois Central R. Co. v. Prickett, 210 Ill. 140; 109 Ill. App. 468; 71 N. E. Rep. 435; Bohn v. Chicago, etc., R. Co., 106 Mo. 429; Anderson v. Fielding (Minn), 99 N. W. Rep. 357; Hamilton v. Mendota Co. (Iowa), 94 N. W. Rep. 282; Koons v. R. R. Co., 65 Mo. 592; Greenwell v. Crow, 73 Mo. 638; Grand Trunk Co. v. Richardson, 91 U. S. 454; 23 L. Ed. 357.

[4] Dolan v. Boot, etc., Mills, 185 Mass. 576; 70 N. E. Rep. 1025; Gamel v. Monfort (Texas), 81 S. W. Rep. 1029; Marks v. Harriett Mills, 135 N. C. 287; 47 S. E. Rep. 432.

[5] Nash v. Downing, 93 Mo. App. 156; Johnson v. Union Pac. Co. (Utah), 76 Pac. Rep. 1089; Avery v. Dordyke, etc., Co., 70 N. E. Rep. 888; but see, Kaminski v. Tudor Iron Works, 167 Mo. 462.

The Missouri Appellate Court admitted comparison of methods in moving a heavy piece of machinery in Fogus v. Chicago, etc., R. Co., 50 Mo. App. 250.

Proof of custom has been held competent in the following cases: To show that old rails were generally placed in side tracks; Doyle v. St. Paul, etc., R. Co., 42 Minn. 79; 43 N. W. Rep. 787; 41 Am. & Eng. R. Cas. 376; Chicago, etc., R. Co. v. Carpenter, 56 Fed. Rep. 451; the custom as to locking turntables; Bridger v. Ashville, etc., R. Co., 27 So. Car. 456; 3 S. E. Rep. 860; 13 Am. St. Rep. 653; where trains are usually stopped; McGee v. Missouri Pac. R. Co., 92 Mo. 208; 4 S.

determination of the issue of negligence depends upon facts, not conclusions, or opinions which of themselves solve such issue.

§ 100. **Opinions of medical experts as to permanency of injuries.**— As it is impossible to get any better evidence than

W. Rep. 739; 31 Am. & Eng. R. Cas. 1; that passengers were carried on freight trains; McGee v. Missouri Pac. R. Co., 92 Mo. 208; that telegrams by engineers were not always reduced to writing; Deverson v. Eastern, etc., R. Co., 58 N. H. 129; that a railroad station was usually lighted, Wentworth v. Eastern, etc., R. Co., 143 Mass. 248; 9 N. E. Rep. 563, and that it was not customary for a given road to inspect cars coming from a given direction, at a certain place. Coffee v. New York, etc., R. Co., 155 Mass. 21; 28 N. E. Rep. 1128; 48 Am. & Eng. R. Cas. 370.

Evidence of a given custom was held incompetent in the following cases: To show the average length of trains at a given season of the year; Newsom v. Georgia, etc., R. Co., 62 Ga. 339; to establish the usual way roadbeds are constructed; Georgia Pac. R. Co. v. Dooley, 86 Ga. 294; 12 S. E. Rep. 923; 48 Am. & Eng. Cas. 437; the usual way a street or highway is crossed by trains; Gahagan v. Boston, etc., R. Co. (Mass.), 1 Allen 187; the method pursued by a conductor in taking up tickets; Marshall v. Boston, etc., R. Co., 145 Mass. 164; 13 N. E. Rep. 385; 31 Am. & Eng. R. Cas. 18; Johnson v. Concord, etc., R. Co., 46 N. H. 213, or that railroads always required stock shippers to release them from liability for being carried free. Missouri Pac. R. Co. v. Eagin, 72 Texas, 127; 9 S. W. Rep. 749; 2 L. R. A. 75.

Regardless of the custom of other roads, the charge of negligence remains a question for the jury, so it is error to instruct that it is negligence for defendant to run its trains backwards, without a watchman thereon, although this is shown not to be the general custom of railroads, as it is the province of the jury to say whether or not the defendant's conduct was negligence, regardless of the conduct of other roads. Rickard v. Chicago, etc., R. Co., 141 Fed. Rep. 905; 73 C. C. A. 139.

An employee cannot state that it was his custom to always examine bridges and culverts on the road. Central, etc., R. Co. v. Kant, 84 Ga. 351; 10 S. E. Rep. 965.

Evidence of the customary way of coupling and uncoupling cars at a switch is held incompetent, in Illinois. Chicago, etc., R. Co. v. Clark 108 Ill. 113; 15 Am. & Eng. R. Cas. 261.

A witness familiar with different appliances in use on railroads

the opinions of medical experts upon the probable duration or permanency of an injury, since the cause cannot be held open, indefinitely, for time and the processes of nature to develop such fact, it is generally held to be competent for a physician to give his opinion as to the extent or permanency of the injury and the future effects upon the injured per-

was permitted to state the relative safety of different appliances but not the superiority of those of one road over that of another. Norfolk & W. R. Co. v. Bell (Va.), 52 S. E. Rep. 700.

Evidence that an inspection of a tender was of the kind and character in use on other roads in the country and that the inspector knew that his son would go out on the engine, is relevant. Hoover v. Chicago, etc., Ry. Co. (Texas), 89 S. W. Rep. 1084.

Evidence of custom of brakemen is admissible to show that the plaintiff, a brakeman, was not negligent. International, etc., R. Co. v. Penn (Texas), 79 S. W. Rep. 624.

It is error, in a suit by a section man, injured while near the railroad track, to permit his coemployees to testify that they relied upon the defendant's custom to ring the bell or blow the whistle, as a warning to them. Norfolk & Western R. Co. v. Gesswine, 144 Fed. Rep. 56.

Evidence of the existence of a custom of a railway company to notify regular trains of the location of work trains, is admissible, as the custom would be regarded as an incident of the business and have the force and effect of a rule. Gulf, etc., R. Co. v. Hays (Texas), 89 S. W. Rep. 29.

Upon the issue of a necessity for blocking rails in a switch yard, evidence of a general custom as to use of blocking in similar yards is admissible, but evidence of what one or two railroads did, was improper. Lee v. Missouri Pac. R. Co., 195 Mo. 400; 92 S. W. Rep. 614.

In the following cases, it is held competent to show conditions and methods used by other employers: Alabama, etc., R. Co., v. Overstreet, 85 Miss. 78; 37 So. Rep. 819; Bodie v. Charleston, etc., R. Co., 66 S. C. 302; 44 S. E. Rep. 943; Schroeder v. Chicago, etc., R. Co., 128 Iowa 365; 103 N. W. Rep. 985.

Evidence of the custom of other roads, as to inspection of engines and cars, must be limited to those where reasonably safe methods are used. Illinois, etc., R. Co. v. Prickett, 210 Ill. 140; 71 N. E. Rep. 435.

Evidence that blocked switch frogs were commonly used safety devices was held competent, in Iowa, in Schroeder v. Chicago, etc., Ry. Co., 103 N. W. Rep. 985.

Evidence that other railroads put old rails in side tracks is immaterial. Chicago, etc., R. Co. v. Kinnare, 115 Ill. App. 132.

son.[6] It is held, in Alabama, that it is also competent to ask the medical expert what will be the probable effects of the injury, if any, upon other organs of the body [7] and it is quite generally held to be competent for the physician to state whether or not, in his opinion, the injury could have been caused by the accident, or what could have caused it.[8]

Medical experts, however, as such, are not permitted to give their opinions about other matters than those requiring medical skill or knowledge, unless they also qualify as to such other matters,[9] nor are they qualified to enter the realm of speculation and give their opinions in response to questions calling for speculative evidence, such as whether or not the injury would be likely to produce some other condition, not then existing, for the reason that verdicts cannot be based upon speculations of medical experts any more than upon similar incompetent evidence of other experts, and physicians, like other experts, are confined to legitimate facts, as the basis of their opinions.[10]

"In an action for injuries to a railroad brakeman while riding on the pilot of the engine of his train, evidence that it was the custom of defendant's employees to ride on the pilots of defendant's engines while engaged in switching in the yards was admissible, without proof that defendant had knowledge thereof. Atchison, T. & S. F. Ry. Co. v. Sowers, (Tex. Civ. App.) 99 S. W. Rep. 190.

[6] St. Louis, etc., R. Co. v. Rea (Texas), 87 S. W. Rep. 324; Norfolk & Western R. Co. v. Spratley, 103 Va. 379; 49 S. E. Rep. 502; Kansas City, etc., R. Co. v. Butler (Ala.), 38 So. Rep. 1024.

[7] Southern R. Co. v. Bonner, 141 Ala. 517; 37 So. Rep. 702. See, also, Faber v. Reiss, etc., Co., 124 Wis. 554; 102 N. W. Rep. 1049.

[8] Wood v. Metropolitan, etc., R. Co., 181 Mo. 433; 81 S. W. Rep. 152; Redmond v. Metropolitan, etc., R. Co., 185 Mo. 1; 84 S. W. Rep. 26; Illinois Central R. Co. v. Smith, 111 Ill. App. 177; Birmingham, etc., R. Co. v. Enslen (Ala.), 39 So. Rep. 74.

[9] Knights Templars, etc., Co. v. Crayton, 209 Ill. 550; 70 N. E. Rep. 1066.

[10] Higgins v. Traction Co., 89 N. Y. S. 76; 96 App. Div. 69.

A physician can state the condition of an injured person, both before and after the injury and the future effects thereof. Gulf, etc., R. Co. v. Harriett, 80 Texas 73; 15 S. W. Rep. 556; Powell v. Augusta,

§ 101. **Same — Opinions based wholly on history of case by plaintiff incompetent.**— While it is competent for a medical expert to give his opinion as to the nature, extent and permanency of the plaintiff's injuries, and he is permitted to base that opinion in part upon the history of the case, as he receives it from the injured person, as well as present exclamations or acts and declarations, showing pain, in connection with the objective symptoms present,[11] it is very generally held incompetent to permit a medical expert to base his opinion entirely upon the history of the case as given him by the plaintiff, or on what he has learned wholly from the plaintiff, in the absence of objective evidences or symptoms of the injury, for this is basing his opinion wholly upon the self-serving declarations of the witness and would be making of him a mere medium for the introduction of otherwise incompetent hearsay testimony.[12]

etc., R. Co., 77 Ga. 192; 3 S. E. Rep. 757; Alabama, etc., R. Co. v. Yarbaugh, 83 Ala. 238; 3 So. Rep. 447; Stevens v. Central R. Co., 80 Ga. 19; 5 S. E. Rep. 253; 34 Am. & Eng. R. Cas. 413; Griffith v. Utica, etc., R. Co., 43 N. Y. S. R. 835; 137 N. Y. 566; Heddles v. Chicago, etc., R. Co., 77 Wis. 228; 46 N. W. Rep. 115.

[11] Taylor v. Railroad, 185 Mo. 255; Holloway v. Kansas City, 184 Mo. 35, 39; Williams v. Great Northern R. Co., 68 Minn. 55; Stone v. Railroad, 88 Wis. 98; People v. Murphy, 101 N. Y. 126; Heald v. Thing, 45 Me. 395; Railroad v. Shires, 108 Ill. 630; Davidson v. Cornell, 132 N. Y. 238; Robb v. Hackler, 23 Wend. 50; Reed v. Railroad, 45 N. Y. 574; Thayer's Cas. Evid. (2 ed.), p. 593; Greenl. Evid. (16 ed.), §§ 162a, 162b.

[12] In People v. Murphy (101 N. Y. 126), a physician called as an expert was permitted to give his opinion as to the physical condition of a woman then upon trial for crime, based upon what he had observed of her case and upon her narrative of the facts and it was held error. The court said:

"The opinion of the expert that a crime had been committed founded upon the narrative of the woman of previous facts, which narrative was in itself, inadmissible, and remained undisclosed, was given to the jury. Necessarily it carried with it damaging inferences of what that narrative of facts was, and drove the accused to the alternative of omitting all cross-examination as to the concealed basis of the opinion or admitting inadmissible and incompetent evidence."

§ 102. **Running of trains — Train sheets and time cards as evidence of.**— Where the time at which a particular train passed a given station or the customary time for the running of a given train, is in issue in a personal injury action, it is competent to establish the train time, either by someone who saw the train, and knows the facts, or by the properly authenticated or verified records of the company, as to the running of its trains.

And the Supreme Court of Maine held similar expert testimony inadmissible, and in a well-considered case (Heald v. Thing, 45 Me. 395), in considering the reasons why such evidence was improper, the court said:

"In this case, while it is admitted that the declarations above referred to were properly excluded, it is strenuously contended that an opinion based wholly upon them (for the witness was permitted to give his opinion based upon his own examination and observation), should go to the jury as competent evidence, upon which they would be authorized to act, upon the ground that the witness, being a person of skill, is authorized to determine the proper sources, in connection with his personal examination, from which to derive those opinions. The proposition contains two fundamental errors: First, it makes the witness decide the question of the competency of evidence, thus putting him in the place of the court. Next, while it excludes the declaration as incompetent testimony to go to the jury, it receives, as competent evidence, the opinion based upon that incompetent testimony, thus attempting to elevate the stream above the fountain; to make a corrupt tree bring forth good fruit."

And in Davidson v. Cornell (132 N. Y. 238), the court also said, as to such medical testimony, based on incompetent testimony:

"In the present case, the declarations in question, of plaintiff, were not instinctive, nor were they made to the physician with a view to medical treatment. They consisted, not of exclamations of present pain or suffering, but were the plaintiff's statements, so far as called for, by the doctor, of the effect upon him of the injury and the consequences which had followed in such respects from the time it occurred, a period of nearly fifteen months. This was hearsay, and is very different from that of a medical witness as to the expressions by a patient, or person, suffering from injury or disease, indicating pain or distress, or expressive of the present state of his feelings in that respect. We think the reception of the evidence was error. And although the plaintiff testified to the truth of the statements made to the doctor, his evidence did not cure the error. The character of his injuries was an im-

In a recent case, in Texas, where a section man was killed while removing a push car from a track, by being struck by a regular train, it was permitted his widow to testify to the regular schedule time for the train to pass and also that a second train which usually passed the same place was late.[13] Train sheets, shown to have been made from the train dispatcher's records, are competent evidence of the running of a given train, at a stated time,[14] and public time cards, issued for general circulation, have been held competent to show the regular running of trains,[15] but the better rule is that such time tables are only representations to the public of the running of its trains,[16] by a railroad company and as they are subject to constant change and alteration and trains are not frequently run in accordance with public time cards, they are, at best, but poor evidence of the running of a given train [17] and should not be admitted where better evidence of the running of the train can be had.

§ 103. **Reports of railway company's employees.**— In an

portant fact, bearing upon the question of damages, and although his evidence may have constituted the basis in part, at least, of a hypothetical question, for the opinion of the doctor, it cannot be said that the evidence given by the latter of the plaintiff's declarations, were not prejudicial to the defendant."

[13] International, etc., R. Co. v. McVey, 81 S. W. Rep. 991.

[14] Donovan v. Boston, etc., R. Co., 158 Mass. 450; 33 N. E. Rep. 583.

[15] Grimes v. Pennsylvania R. Co., 36 Fed. Rep. 72; Gonzales v. New York, etc., R. Co., 39 How. Pr. (N. Y.) 407; Sears v. Eastern, etc., R. Co., 14 Allen (Mass.) 433; Denton v. Great Northern R. Co., 5 El. & Bl. 860; 25 L. J. Q. B. 129.

[16] Briggs v. Grand Trunk R. Co., 24 U. C. Q. B. 510; Beauchamp v. International & G. N. R. Co., 56 Texas 239; 9 Am. & Eng. R. Cas. 307.

[17] Denver, etc., R. Co. v. Pickard, 8 Colo. 163; 18 Am. & Eng. R. Cas. 284; 6 Pac. Rep. 149; Price v. Richmond, etc., R. Co., 38 So. Car. 199; 17 S. E. Rep. 732.

The time tables and train sheets used on the day of the injury to an engineer, were held competent to show the running of the defendant's trains, on that day, in North Carolina. Stewart v. Raleigh, etc., Air Line R. Co., 53 S. E. Rep. 877.

action for an injury, from a collision between two engines, in Missouri, it was held that the report by an agent of the defendant company, to the division superintendent, was admissible in evidence, where it appeared that such reports were customary, after similar accidents, for the purpose of showing that at the time of the collision, the engineer of one of the engines permitted it to be run by other than an employee of the company, who was incompetent and unable to manage it, thereby causing the collision.[18]

But in an action by an employee for injuries received while in the service of a railroad company, a report that he may have made, giving the facts and details of the accident and how his injury was caused, is not admissible in his favor, for this would be permitting him to introduce, in his favor, a self-serving declaration of his own.[19]

§ 104. **Speed of trains.**— When properly in issue in a given case, it is generally held competent to establish the speed of trains by any one familiar therewith, whether experts or not.[20]

Both as regards the negligence of the defendant and the contributory negligence of the plaintiff, the question of the speed of a given train is often material to be shown. To ascertain the speed of a train, it is not only competent to

[18] O'Hare v. Chicago, etc., R. Co., 95 Mo. 662; 9 S. W. Rep. 23.

[19] Howard v. Savannah, etc., R. Co., 84 Ga. 711; 11 S. E. Rep. 452.

[20] Kansas City, etc., R. Co. v. Webb, 97 Ala. 157; 11 So. Rep. 888; Hoffman v. Metropolitan, etc., R. Co., 51 Mo. App. 273; Louisville, etc., R. Co. v. Hendricks, 128 Ind. 462; 28 N. E. Rep. 58; Detroit, etc., R. Co. v. Van Steiberg, 17 Mich. 99; Thomas v. Chicago, etc., R. Co., 86 Mich. 496; 49 N. W. Rep. 547; Chicago, etc., R. Co. v. Dillon, 123 Ill. 570; 32 Am. & Eng. R. Cas. 1; Evansville, etc., R. Co. v. Crist, 116 Ind. 446; 19 N. E. Rep, 310; Van Horn v. Burlington, etc., R. Co., 59 Iowa 33; 12 N. W. Rep. 752; 7 Am. & Eng. R. Cas. 591; Pence v. Chicago, etc., R. Co., 79 Iowa 389; 44 N. W. Rep. 686; 42 Am. & Eng. R. Cas. 126; Walsh v. Missouri Pac. R. Co., 102 Mo. 582; 14 S. W. Rep. 873; Ward v. Chicago, etc., R. Co., 85 Wis. 601; 55 N. W. Rep. 771.

offer the opinions of witnesses familiar therewith, but also the schedule time of a train over its entire run may be shown;[21] the distance and time consumed by a round trip of the train[22] or the time made just before or after a given place was passed,[23] as bearing upon the rate of speed made at such place.

But evidence of the speed of other trains than that in issue,[24] or the speed of the same train at other places where the conditions were different[25] or opinions of the speed of a given train, reached by comparisons with other trains,[26] is generally held incompetent, as would be the distance within which a given train was stopped, where the witness did not show a knowledge of the speed of the train.[27]

§ 105. **Mortality tables competent when.**— In an action for damages for wrongful death, or where loss of earning capacity is set up as one of the elements of damage and the claim is made of compensation for permanent injury, it is material to determine the life expectancy of the decedent or injured person and for this purpose standard tables of mortality are generally held competent evidence.[28]

[21] Nutter v. Boston, etc., R. Co., 60 N. H. 483.

[22] Central R. Co. v. Allman, 147 Ill. 471; 35 N. E. Rep. 725.

[23] Lyman v. Boston, etc., R. Co. (N. H.), 20 Atl. Rep. 976; 45 Am. & Eng. R. Cas. 163; Galveston, etc., R. Co. v. Kutac, 76 Texas 473; 13 S. W. Rep. 327; 37 Am. & Eng. R. Cas. 470; Savannah, etc., R. Co. v. Flannagan, 82 Ga. 579; 9 S. E. Rep. 471; 39 Am. & Eng. R. Cas. 661; Ohio, etc., R. Co. v. Selby, 47 Ind. 471; Chicago, etc., R. Co. v. Spiker, 134 Ind. 380; 33 N. E. Rep. 280; 55 Am. & Eng. R. Cas. 200.

[24] Meloy v. Chicago, etc., R. Co. (Iowa), 37 N. W. Rep. 335; 33 Am. & Eng. R. Cas. 358.

[25] State v. Boston, etc., R. Co., 58 N. H. 410; Craven v. Central Pac. R. Co., 72 Cal. 345; Shaber v. St. Paul, etc., R. Co., 28 Minn. 103.

[26] Grand Rapids, etc., R. Co. v. Huntley, 38 Mich. 537.

[27] Louisville, etc., R. Co. v. Marriott (Ky.), 19 Am. & Eng. R. Cas. 509.

[28] Tables of mortality are admissible in evidence, but are not absolute guides to the jury. Vicksburg, etc., R. Co. v. Putnam, 118 U. S.

In England, it has been held, that in a case where the life expectancy of a person is in issue, it is competent to establish by a skilled insurance agent, familiar with different life tables, the probable duration of the life in question,[29] but the witness would have to show a familiarity with the subject, the same as any other expert, before he would be qualified to state his opinion thereon, and if his experience was not sufficient to enable him to be classed as an expert, his opinion would not be competent.[30]

§ 106. **When negative evidence is admissible.**— From the very nature of the two kinds of proof, positive evidence is entitled to more weight than evidence of a negative character,[31] but this is rather a question of the weight of such testimony, than one of admissibility, for where persons are

545; 27 Am. & Eng. R. Cas. 291; St. Louis, etc., R. Co. v. Vickers, 122 U. S. 360; Mary, etc., R. Co. v. Chambliss, 97 Ala. 171; 11 So. Rep. 897; 53 Am. & Eng. R. Cas. 254; Diesen v. Chicago, etc., R. Co., 43 Minn., 454; 45 N. W. Rep. 864.

The Carlisle Tables, in the Encyclopædia, are admissible. Hayden v. Sioux City, etc., R. Co. (Iowa), 48 N. W. Rep. 733; Northeastern, etc., R. Co. v. Chandler, 84 Ga. 37; 10 S. E. Rep. 586; Scheffler v. Minneapolis, etc., R. Co., 32 Minn. 518; 21 N. W. Rep. 711; 19 Am. & Eng. R. Cas. 173; Scagel v. Chicago, etc., R. Co., 83 Iowa 380; 49 N. W. Rep. 990.

And so are the American Tables of Mortality. Richmond, etc., R. Co. v. Hissong, 97 Ala. 187; 13 So. Rep. 209; or similar tables, adopted by legislative act. Denman v. Johnson, 85 Mich. 387; 48 N. W. Rep. 565; Louisville, etc., R. Co. v. Miller (Ind.), 37 N. E. Rep. 343; 58 Am. & Eng. R. Cas. 304.

[29] Rowley v. London, etc., R. Co., 42 L. J. Ex. 153; 29 L. T. 180; Phillipps v. London, etc., R. Co., 27 W. R. 797; 40 L. T. 813.

[30] Donaldson v. Mississippi, etc., R. Co., 18 Iowa 280.

Courts will take judicial notice of the American Tables of Mortality, in estimating the probable length of human life. Louisville, etc., R. Co. v. Mothershed, 97 Ala. 261; 12 So. Rep. 714.

[31] Vail v. Jacobs, 62 Mo. 130; Sullivan v. Hannibal, etc., R. Co., 72 Mo. 195; Cathart v. Hannibal, etc., R. Co., 19 Mo. App. 113; Smith v. Wabash, etc., R. Co., 19 Mo. App. 120.

so situated as to have heard certain sounds, or to have seen certain things, the evidence of those persons that they did not see or hear such things is entitled to be received along with the positive evidence of those who did see or hear the same.[32] Of course the opportunity to see or hear, the distance removed from the scene of action and other facts and circumstances may more or less affect or destroy the weight of such negative evidence,[33] and if the distance of a witness is so far removed from the scene or noise described that he could not see or hear what others described, then the negative statement that he did not hear or see the same, would be inadmissible as any evidence at all.[34] But while the positive evidence of witnesses of equal credibility is entitled to more weight than the mere negative statements of others who did not see or hear the things testified to,[35] it is not always proper to give a charge to the jury that affirmative proof is entitled to the greater weight, for this depends upon the interest and character of the different witnesses, their opportunity for knowing the facts and so many other circumstances that the charge should not overlook.[36]

Negative evidence that bell or whistle was not heard by witnesses in a position to have heard it, is generally admissible. McDonald v. New York, etc., R. Co., 186 Mass. 474; 72 N. E. Rep. 55; Chicago, etc., R. Co. v. Pulliam, 111 Ill. App. 305.

[32] Statements of a plaintiff's neighbors that he did not make any complaint over an alleged injury are competent. Barrett v. Pennsylvania R. Co., 4 N. Y. S. 127; 21 N. Y. S. R. 109; 121 N. Y. 697; Kummer v. Christopher, etc., R. Co., 46 N. Y. S. R. 386; 20 N. Y. S. 116.

[33] Culhane v. New York, etc., R. Co., 60 N. Y. 133; Cathcart v. Hannibal, etc., R. Co., 19 Mo. App. 113; Bigelow v. Metropolitan, etc., R. Co., 48 Mo. App. 367.

[34] Chapman v. New York, etc., R. Co., 14 Hun (N. Y.) 484; Fox v. Penninsular, etc., Co., 92 Mich. 243; 52 N. W. Rep. 623.

[35] Isaacs v. Strainka, 95 Mo. 517; 8 S. W. Rep. 427.

[36] State, ex rel. Essex v. Kansas City, etc., R. Co., 70 Mo. App. 634; McCormick v. Kansas City, etc., R. Co., 50 Mo. App. 109,

§ 107. **Evidence of settlement with other employees incompetent.**— The plaintiff's right of recovery depending upon his ability to show that his injury resulted from the negligence of the defendant, it is apparent that the fact that his employer may have compromised or settled with other employees, hurt in the same accident, cannot be a fact in any way germane to the plaintiff's case, yet this proposition has been passed on by a Texas court and in an action where a fireman claimed that his injury resulted from the negligence of the engineer in failing to keep a constant lookout ahead to discover the presence of obstructions on the track, it was held to be incompetent to show that the company had settled with the engineer for injuries growing out of the same accident.[37]

§ 108. **Evidence of employer's insurance incompetent.**— It is not generally held to be competent to show that the employer is defending the action of an employee for personal injuries, through the intervention of an insurance company, as this could not affect the right of the plaintiff to recover, or establish the ground upon which a recovery would depend, but could only result in prejudice on the part of the jury against the defendant, by the proof of a fact in no way connected with the case.[38] In a New York case the mere asking of a question, by plaintiff's counsel, of a physician for the defendant, if he was not paid for his services by an insurance company, was held to constitute reversible error, although the question was excluded as incompetent, it being held that such question was calculated to prejudice the case of the defendant, by an incompetent and outside matter and

[37] Missouri, etc., R. Co. v. Keaveney, 80 S. W. Rep. 387.

[38] Roche v. Llewellyn Iron Works, 140 Cal. 563; 74 Pac. Rep. 147; Sawyer v. Arnold, 90 Me. 369; 38 Atl. Rep. 333; Anderson v. Duckworth, 162 Mass. 251; Barrett v. Bonham Oil Co. (Texas), 57 S. W. Rep. 602; Lipschulz v. Ross, 84 N. Y. S. 632.

that a verdict obtained by such methods could not be allowed to stand.[39]

§ 109. **Evidence must correspond with pleading.**— In personal injury actions, the rule is strictly enforced that the

[39] Manigold v. Black River Co., 84 N. Y. S. 861; 81 App. Div. 381. But see, Hedlum v. Holy Terror Min. Co. (S. D.), 92 N. W. Rep. 31; Burgess v. Stowe (Mich.), 96 N. W. Rep. 29.

Upon the various devices and practices resorted to by damage suit litigants, to avoid this rule and to take advantage of the known prejudice of trial juries against corporations and insurance companies in particular, the following contributed article from Law Notes, for May, 1908 (pages 28 and 29), may be read with some interest.

"A great deal of ingenuity has sometimes been exercised by counsel in actions by servants against masters to recover damages for personal injuries, to get before the jury the fact that the master in the particular case is protected by employer's liability insurance and will not be obliged to pay the damages which may be assessed against him. The courts have, of course, uniformily held that the fact that the defendant in such an action is insured cannot be considered by the jury in connection with the question of the defendant's negligence. The argument that a master who is insured is not so likely to exercise care to protect his servants from injury as a master who is not insured has never been recognized as a sufficient reason for admitting evidence of the fact of insurance. See the note to Coe v. Van Why (Colo.), 3 A. & E. Ann. Cas. 525.

It is difficult to conceive how the courts could have reached any other conclusion. This is a specious argument at the best, and besides it is probable that the companies who issue this class of insurance are sufficiently alive to their own interests to see to it that the employers whom they insure do not neglect the precautions which are generally recognized as necessary for the protection of their employees from accident.

* * * * * * * *

A very ingenious way of so conducting a cross-examination of a witness for the defense as to make the defendant's insurance against liability to employees admissible in evidence is illustrated in the case of Shoemaker v. Bryant Lumber, etc., Co., 27 Wash. 637. At the trial of this case a witness for the defendant was asked if he was not an officer of the defendant company. He answered that he was and that he owned about one-tenth of the capital stock of the company. The witness was then asked if he would have to pay his proportion of any judgment which might be rendered against the company. The answer

proof must correspond with the negligence alleged, and if there is a material varience between the pleading and the proof, the defendant will be protected, if timely objection is urged. Different methods of taking advantage of such varience is provided in different States, but the practice in this regard will not be noted here. An allegation of negligence

was that he would. He was then asked: "Would your company have to pay it?" His answer was, "Yes, sir." Thereupon the following question was asked: "Is it not a fact that, if judgment is recovered against this company, some other company will have to pay this judgment?" The trial court allowed the question to be asked, and the ruling was sustained on appeal, on the ground that the interest of the witness, as affecting his credibility, was material to go to the jury. 'The question objected to went directly to the credibility of the witness. He had already said that, if a judgment was obtained against the defendant, he would have to pay his proportion of it. This showed that he had a financial interest in the case. If he should answer the question in the negative, the evidence of interest, as affecting credibility, would be for the jury to consider. If he should answer in the affirmative, as he did in this instance, the inconsistent statements of the witness were proper to go to the jury, as affecting his credibility and the accuracy of his testimony generally.'

In examining jurors in cases of this character counsel for the plaintiffs have sometimes asked them whether they were interested in employer's liability insurance companies in which the defendants were insured. Very naturally this has given rise to complicated and perplexing questions. There can be no doubt that where it appears that such questions are asked simply for the purpose of bringing the fact that the defendant is insured to the attention of the jury, the subtlety of counsel will amount to misconduct constituting a ground for refusing to proceed with the trial, or, if this is not done, a ground for reversal. But where it cannot be shown but that counsel is in good faith endeavoring to secure an impartial jury, the question arises as to whether the belligerent charges of sharp practice on the part of the defendant's counsel, or the latent suspicions of the court, can be given effect. There are decisions by intermediate appellate courts to the effect that jurors cannot be asked questions of this character. But in later and better-considered cases by courts of last resort it is held that, where there is nothing to show a lack of good faith, the court may permit counsel for the plaintiff, in an action for personal injuries against his employer, to show that the defendant is indemnified by an accident insurance company, and to inquire of each juror upon his

arising from placing the plaintiff at work in a dangerous place, without warning or notice of the danger, is not sustained by proof of an injury from a defective appliance or place; [40] nor could a recovery be had upon the ground of a negligent order or direction of a vice-principal, or foreman, where the ground of negligence alleged was the furnishing of an improper and dangerous appliance,[41] as this ground of negligence would not advise the defendant of the nature of

voir dire if he is a stockholder, or in any manner interested, in the insurance company." Spoonick v. Backus-Brooks Co., 89 Minn. 354; Antletz v. Smith, 97 Minn. 217; Vion v. Brooks-Scanlon Lumber Co., 99 Minn. 97; Farber v. C. Reiss Coal Co. (1905), 124 Wash. 554, 102 N. W. Rep. 1042."

[40] Where the death of a brakeman was alleged to be due to a sudden jolt caused by a sudden application of the air brakes by the conductor, and there was no allegation of defective coupling, evidence on this fact was inadmissible. Ohlenkamp v. Union Pac. R. Co. (Utah), 67 Pac. Rep. 411; Moyer v. Ramsey-Brisbane Co., 119 Ga. 734; 46 S. E. Rep. 844; Studeroth v. Hammond Co., 106 Mo. App. 480; 81 S. W. Rep. 487; Palmer Brick Co. v. Chenal (Ga.), 47 S. E. Rep. 329; Simonds v. Georgia Iron Co., 133 Fed. Rep. 776.

In an action for an injury from a trainman coming in contact with a telegraph pole erected dangerously near the track, it is not a variance that the proof shows it was erected by another company, where the petition alleges that defendant permitted it to be erected near its track. Illinois Ter. R. Co. v. Thompson, 210 Ill. 226; 71 N. E. Rep. 328; Belt Ry. Co. v. Confrey, 209 Ill. 344; 70 N. E. Rep. 773.

[41] Bohn v. Chicago, etc., R. Co., 106 Mo. 429.

Where a petition alleges a failure to give necessary and suitable orders, it is held incompetent, in Illinois, to prove the giving of negligent or improper orders. Sanks v. Chicago, etc., R. Co., 112 Ill. App. 385.

Where a defective track is the sole cause of the injury alleged it is held to be no variance to show the rate of speed of the train. Chicago, etc., R. Co. v. Clark, 26 Neb. 645; 42 N. W. Rep. 703; 38 Am. & Eng. R. Cas. 192.

Evidence of a remark by the defendant's foreman, that if the plaintiff did not "get a move on him," he would get laid off, is not evidence of a negligent order to do the work being done. Alabama, etc., R. Co. v. Vail (Ala.), 38 So. Rep. 124.

It was said by the Supreme Court of Missouri in Bartlett v. R. R. Co. (148 Mo. l. c. 139):

the proof offered to sustain a recovery, upon the other ground and it would be entitled to know the ground of recovery relied upon, in order to properly prepare its defense.

"This is a specific charge of a specific act, * * * which was susceptible of positive and direct proof and excludes any idea or intention of the pleader to rely upon general negligence, but on the contrary, expressly limits him to proof of the specific negligence alleged."

See, also, Moyer v. Stone Co., 119 Ga. 734; 46 S. E. Rep. 844; Simonds v. Coal & Iron Co., 133 Fed. Rep. 776.

CHAPTER VI.

DEMONSTRATIVE EVIDENCE OF NEGLIGENCE — RULE RES IPSA LOQUITUR.

§ 110. What is demonstrative evidence of negligence.
111. Need not be specially pleaded.
112. Pleading facts to bring case within rule.
113. Limitations of the doctrine.
114. Trespassers or licensees cannot invoke rule.
115. The rule applies to plaintiff's negligence.
116. Collisions between railroad trains.
117. Injuries to employees from collisions.
118. Rule cannot be invoked by employee, in federal court.
119. Rule can be invoked by employees in many State courts.
120. Does not apply to injuries to employees from collisions.
121. Injuries to passengers from street car collisions.
122. Displacement of cars or appliances.
123. Assaults on passengers by employees.
124. Injuries from sudden jerks or jolts.
125. Sudden starting of street car or other public conveyance.
126. Frightening horses by noise from engine.
127. Falling of machinery or other objects.
128. Injuries from caving banks or pits.
129. Injuries from nurses at hospital.

§ 110. **What is demonstrative evidence of negligence.**— Although the right of the plaintiff to recover in a personal injury action depends upon his ability to establish a breach of duty owing to him by the defendant, as the cause of his injury and the burden of proving this fact is placed by the law upon the plaintiff, there are certain cases where the facts and circumstances connected with the injury itself, furnish such evidence of this breach of duty on the defendant's part, as to constitute a *prima facie* case of negligence and, unless explained by the defendant, in a manner consistent with right

conduct on his part, to be held a sufficient discharge of the burden of establishing an affirmative case, on the plaintiff's part. This demonstrative evidence of negligence [1] which is held sufficient to justify a recovery, arising from the mere narration of the facts and circumstances in connection with the injury, when unexplained, is held to apply in that class of cases where the narration of such facts and circumstances not only furnishes evidence of the fact of the injury, but also of the breach of duty on the defendant's part, sufficient to constitute a *prima facie* case of negligence. In such cases, the doctrine, known to the law of negligence as *res ipsa loquitur,* is held to apply, or, as this Latin phrase would mean in English, "the thing itself speaks." [2]

[1] Referring to such evidence of negligence as demonstrative evidence, Judge Thompson, says: "I have ventured to call it demonstrative evidence of negligence; for, although the evidence must always be detailed by the mouths of witnesses, yet when the facts are thus disclosed, they either demonstrate negligence, conclusively, or tend to demonstrate it, subject to explanation by the defendant, showing that his conduct was consistent with due care." 1 Thompson, Neg., § 15, p. 16.

"The principle of *res ipsa loquitur* is that when, through any instrumentality or agency under the management of a defendant or his servants, there is an occurrence injurious to the plaintiff, which, in the ordinary course of things, would not take place if the person in control were exercising due care, the occurrence itself, in the absence of explanation, affords *prima facie* evidence of a want of due care." Mumma v. Easton & A. R. Co. (N. J. 1906), 65 Atl. Rep. 208.

[2] The doctrine is applied or explained in the following cases: Fuchs v. St. Louis, 133 Mo. 168; 31 S. W. Rep. 115; Davidson v. Lake Shore, etc., R. Co., 171 Pa. 522; 33 Atl. Rep. 86; Brownell v. Chicago, etc., R. Co., 107 Iowa 254; 77 N. W. Rep. 1038; Snyder v. Wheeling, etc., R. Co., 43 W. Va. 661; 28 S. E. Rep. 733; 39 L. R. A. 499; St. Louis, etc., R. Co. v. Mitchell, 57 Ark. 418; 21 S. W. Rep. 883; Tennessee, etc., R. Co. v. Hays, 97 Ala. 201; 12 So. Rep. 98; Trenton, etc., R. Co. v. Cooper, 60 N. J. L. 219; 37 Atl. Rep. 730; 38 L. R. A. 637; McCray v. Galveston, etc., R. Co., 89 Tex. 168; 34 S. W. Rep. 35; 3 Am. & Eng. R. Cas. (N. S.) 276.

Under the rule *res ipsa loquitur,* negligence may be inferred from the accident and the attending circumstances. Eaton v. New York Cent. &. H. R. R. Co., 109 N. Y. Supp. 419.

§ 111. **Need not be specially pleaded.**— The application of the principle *res ipsa loquitur* depends upon the particular facts of each case. The principle does not apply to every case of injury, but only to those where the mere occurrence of the injury, of itself, in the law, implies a breach of legal duty on the defendant's part also. This presumption of negligence, from the proof of such a state of facts, is conditioned on the absence of other evidence of negligence, not on the absence of proper averments of negligence in the petition.[3] The rule is that a party may take advantage of the doctrine *res ipsa loquitur,* even though his pleading sets out specifically the facts of the negligence complained of, provided that the facts set out in the pleading are the ones which the legal inference of negligence fairly tends to establish, but before the evidence can be said to establish a case wherein the rule would apply, there must be, in addition to the proof of the injury, something in connection therewith which tends to show some neglect on the defendant's part, or an omission

"Where an accident itself, with all its surroundings, speaks in such way and is of such character as to show negligence on the part of defendant, the doctrine of *res ipsa loquitur* applies, and plaintiffs are entitled to recover in the absence of other proof." Wood v. Wilmington City Ry. Co., 64 Atl. Rep. 246.

[3] The doctrine of *res ipsa loquitur* does not relieve plaintiff of the burden of the issue, nor raise a presumption in plaintiff's favor, but it merely carries the case to the jury, permitting it to infer negligence and find, on all the evidence, whether the plaintiff has sustained his burden of proof. Ross v. Double Shoals, etc., Co. (N. C.), 52 S. E. Rep. 121; 1 L. R. A. (N. S.) 298.

"There must be something in them which, unexplained, 'speaks for itself'— which tends to show some neglect or omission of duty, as the proximate cause of the injury.* The principle does not apply to every cause of injury or accident, but only to those whose mere occurrence implies a breach of duty.* The legal presumption, when applicable, is conditioned on the absence of other evidence of negligence, not on the absence of *averments* of negligence in the petition." Judge Bond, in Gallagher v. Edison, etc., Co., 72 Mo. App., pp. 579, 580.

of duty, which is the proximate cause of the injury complained of.[4]

§ 112. **Pleading facts to bring case within the rule.**— In a recent Missouri case, the Kansas City Court of Appeals considered the right of a passenger to recover under the rule *res ipsa loquitur,* for an injury due to the sudden stopping of the train, where the rule was not invoked in the pleading, but other specific allegations of negligence on the part of the carrier, were relied upon.

In discussing this phase of the case, Presiding Judge Broaddus, speaking for the court, said: "However, the rule cannot be applied to this case, for the reason that the plaintiff relied solely for recovery upon the alleged negligent act of defendant, in suddenly stopping its train with unusual violence, which, as has been stated, was a proper thing to do in order to avert the peril of a collision with an approaching freight train. The rule is too well settled in this State to cite precedents to show that where a plaintiff, in his petition and instruction relies upon certain specific allegations of negligence he will not be entitled to recover for other or different causes of negligence, or upon the theory of *res ipsa loquitur.*" [5]

§ 113. **Limitations of the doctrine.**— It is not to be presumed from the foregoing explanation of this doctrine that the rule will apply in any abstract case, from the mere narration of an injury, connected with some act on the defendant's part, or caused by the acts of his employee's, but only to those cases where the facts and circumstances connected with such injury are sufficient to connect some wrongful or

[4] Turner v. Haar, 114 Mo. 335; Blanton v. Dold, 109 Mo. 74; Whittaker Smith's, Neg., § 419, p. 522.

[5] Todd v. Missouri Pacific Ry. Co., 126 Mo. App., 684, p. 692; 105 S. W. Rep. 671.

negligent act of the defendant, with the injury, as the efficient cause thereof.

In other words, it is only where "the thing" is shown to be under the management of the defendant, or subject to his control, or that of his employees, and the accident is such a one, as, in the ordinary course of events, would not have occurred if those having charge thereof had used proper care, that "it" will be held to "speak," within the rationale of this doctrine, sufficient to afford reasonable evidence that the accident was due to the negligence of the defendant, in the absence of other explanation.[6] Hence, the details connected with an injury may leave no doubt in the mind of the court that it was caused by an act of the defendant's or an act of his employee's, yet, if the cause of the injury is not an act that could be said to be a breach of legal duty owing by him to the plaintiff, but is an act consistent with proper and legal conduct on the defendant's part, "the thing itself" would not be held to "speak" in a manner sufficient to denominate such otherwise careful conduct as negligence, and the necessary evidence of a breach of legal duty on the defendant's part, would still be wanting, unless shown by other facts than the mere details of the injury itself.[7]

[6] This is, practically, the explanation of the Latin formula, given by Erle, J., in Scott v. London Docks Company (3 Hurl. & Colt. 596), an opinion that has been denominated as a "legal classic." 1 Thompson, on Neg., § 15, p. 16.

"Where, in an action for personal injuries, the facts are such that an inference that the accident was due to a cause other than the negligence of defendant could be drawn as reasonably as an inference that the accident resulted from defendant's negligence, the doctrine of *res ipsa loquitur* does not apply, and plaintiff cannot rely upon mere proof of the fact and circumstances, and require defendant to show that he was not negligent." McGrath v. St. Louis Transit Co. (Mo. 1906), 94 S. W. Rep. 872. See, also, Cathron v. Packing Co., 98 Mo. App. 343.

[7] Davidson v. Lake Shore, etc., R. Co., 171 Pa. 522; 33 Atl. Rep. 86; Snyder v. Wheeling, etc., R. Co., 43 W. Va. 661; 28 S. E. Rep. 733; 39 L. R. A. 499; Nelson v. Lehigh Valley, etc., R. Co., 50 N. Y. S.

§ 114. **Trespassers or licensees cannot invoke rule.**— Since the principle *res ipsa loquitur* applies only when the thing shown speaks of the *negligence* of the defendant,[8] and not merely of the happening of the accident or injury to the plaintiff, it is always essential for the application of the rule that connected with the accident or injury to the plaintiff, the facts must show a breach of legal duty on the defendant's part and, for this breach of duty to arise, the defendant must occupy such a relation toward the injured person as to create a duty toward him. The principle would not apply, therefore, in favor of one who is a mere trespasser, or licensee, for the obvious reason that as to such a person the defendant would owe no fixed duty to keep his premises or property in a safe condition, and hence, a trespasser or licensee, under a mere naked license, could not invoke the rule *res ipsa loquitur*.[9]

§ 115. **The rule applies to plaintiff's negligence.**— The rule *res ipsa loquitur* is not a one-sided rule, nor does it apply only

63; 25 App. Div. 535; Giraudi v. Electric, etc., Co., 107 Cal. 120; 40 Pac. Rep. 108; 24 L. R. A. 596.

The Federal Court, in Minnesota, has recently held that the rule *res ipsa loquitur* never applied in cases between employer and employee. Northern Pac. Ry. Co. v. Dixon, 139 Fed. Rep. 737.

[8] Paynter v. Traction Co., 67 N. J. L. 619; 52 Atl. Rep. 367; State v. Greene, 95 Md. 217; 52 Atl. Rep. 673.

The rule of *res ipsa loquitur* applies to a passerby, on a public street, struck on the head by a falling iron bar, under control of defendant. Schneider v. American Bridge Co., 79 N. Y. S. 634; 78 App. Div. 163.

[9] McLain v. Chicago & N. W. Ry Co., 121 Ill. App. 614; Gabriel v. Chicago & N. W. Ry Co., 121 Ill. App. 614. The doctrine of *res ipsa loquitur* does not apply in favor of one who is a trespasser, or one who is at the place of injury under a permission or mere naked license. McLain v. Chicago & N. W. Ry. Co., 121 Ill. App. 614; Gabriel v. Same, *id.*

There is no presumption of negligence from an injury to a third party, standing so close to a railroad track as to be struck by a protruding scantling on a car, as the negligence would rather be his, than the company's. Chicago, etc., R. Co. v. Reilly, 212 Ill. 506; 72 N. E. Rep. 454.

to the defendant's side of the case, but in cases where "the thing itself speaks" it speaks as well against, as for the plaintiff. Accordingly, if, in proving the circumstances of the accident, the plaintiff's evidence conclusively shows a condition from which it could only be inferred that he had himself caused the injury by his negligence or where his own act contributed actively to bring it about, the *prima facie* case would be made out for the defendant and he would not be entitled to go to the jury.[10] This result would follow where the plaintiff tried to cross directly in front of an approaching train or car;[11] or where he failed to use ordinary care to avoid a collision.[12] But the presumption would obtain that the plaintiff was in the exercise of reasonable care and before he could be held to be negligent, as a matter of law, the facts must show a condition where no two reasonable minds would differ as to the cause of his injury, or it would be a question for the jury.[13] Where, however, there is direct evidence of the surrounding circumstances of the injury, the presumption of proper care for his safety, will not be indulged in, if inconsistent with the conditions shown by the evidence, but the plaintiff will be held negligent, as matter of law, if his evidence shows this condition to exist.[14] And where an employee was violating a known rule of the em-

[10] Gilberson v. Bangor, etc., R. Co., 89 Me. 337; 36 Atl. Rep. 400; Gulf, etc., R. Co. v. Schreider, 88 Tex. 152; 30 S. W. Rep. 902; 28 L. R. A. 538; 1 Thompson, on Neg., § 395, p. 377.

[11] Huggart v. Ry. Co., 134 Mo. 673; Hayden v. Ry. Co., 124 Mo. 567; Fanning v. Transit Co., 103 Mo. App. 151; Clancy v. Transit Co., 192 Mo. 615.

[12] Holwerson v. Ry. Co. 157 Mo. 316.

[13] Eckhard v. Transit Co., 190 Mo. 593; 89 S. W. Rep. 602; Teal v. St. Paul, etc., R. Co., 96 Minn. 379; 104 N. W. Rep. 945. Crossing two hundred feet in advance of an approaching street car, cannot be held negligence, as matter of law, in Missouri. Hovarka v. Transit Co., 191 Mo. 441; 90 S. W. Rep. 1142.

[14] Ames v. Waterloo Transit Co. (Iowa), 95 N. W. Rep. 161.

ployer, at the time of the injury, the presumption of his negligence will obtain.[15]

§ 116. **Collisions between railroad trains.**— The rule being, when an accident proceeds from an act of such a character, that when due care is taken, in its performance, no injury ordinarily ensues from it, in similar cases, it will be presumed to have been negligent,[16] is held to apply to an injury resulting from a collision between railroad trains,[17] and hence, in the trial of an action for damages from a collision of trains, by a passenger, the mere fact of a collision between the trains will be held to be negligence on the defendant's part, unless explained or properly excused by it.

In a recent case, in Missouri,[18] the Supreme Court had

[15] Erickson v. Monson, etc., 100 Me. 107; 60 Atl. Rep. 708.

[16] Shuler v. Omaha, etc., R. Co., 87 Mo. App., 623; Clark v. Chicago, etc., R. Co., 127 Mo. 197; Transportation Co. v. Downer, 11 Wallace 129; Patterson Ry. Acc. Law, § 375.

[17] Shuler v. Omaha, etc., R. Co., 87 Mo. App. 623; Railway Co. v. Mowery, 36 Ohio St. 418; Railroad v. Allbritton, 38 Miss. 242.

[18] Clark v. Chicago, etc., Ry. Co., 127 Mo. 208.

Where an injury results from a collision, the doctrine of *res ipsa loquitur* applies, notwithstanding there was no contractual relation between the plaintiff and the defendant. Illinois Cent. R. Co. v. McCollum, 122 Ill. App. 531.

The fact of a collision was held to establish a *prima facie* case, against a passenger carrier, in the following cases: Magrane v. St. Louis, etc., R. Co. 183 Mo. 119; 81 S. W. Rep. 1158; Savage v. Marlborough, etc., R. Co., 186 Mass. 203; 71 N. E. Rep. 531; Chicago Union Traction Co. v. Crosby, 109 Ill. App. 644; Elgin, etc., Traction Co. v. Wilson, 217 Ill. 47; 75 N. E. Rep. 76; Howe v. Northern Pac. R. Co. (Texas), 70 S. W. Rep. 335.

But unless both agencies are under control of carrier, collision is held, in Illinois, to raise no presumption, in the following cases: Wolf v. Chicago Union Tr. Co., 119 Ill. App. 481; Chicago Tr. Co. v. Mee, 218 Ill. 9; 75 N. E. Rep. 800; reversing 119 Ill. App. 332; Chicago, etc., R. Co. v. Stroud, 114 Ill. App. 479. See, also, Fagin v. Rhode Island R. Co., 27 R. I. 51; 60 Atl. Rep. 672; Maher v. Metropolitan St. Ry. Co., 92 N. Y. S. 825; 102 App. Div. 517.

before it the cause of an injured passenger on the defendant's train, whose injuries resulted from a collision with a train of another company, running into the defendant's train, while it stood on a railroad crossing. The trial court had instructed the jury that the fact of the collision, under these circumstances, raised a presumption of negligence against the defendant and, if unexplained, the plaintiff was entitled to recover. Considering this instruction, the court, speaking by Judge Gantt, said: "The obligation of a steam railway carrier, to its passengers, is, as far as it is capable by human care and foresight, to carry them safely, and it is responsible for all injuries to its passengers from any, even the slightest neglect, and when the passenger suffers injury from the breaking down or overturning of the coach, the *prima facie* presumption is that it was occasioned by some negligence of the carrier, and the burden is cast upon the carrier to rebut and establish that there has been no negligence on its part and that the injury was occasioned by inevitable accident or by some cause which human precaution and foresight could not have averted." The instruction was approved and the judgment of the trial court was affirmed.

§ 117. **Injuries to employees from collisions.**— Under the common law doctrine of assumption of risks due to the negligence of coemployees, an injury from a collision would not give an employee a cause of action, without establishing something more than the mere fact of an injury from a collision of the defendant's trains, since the collision and consequent injury may as well have resulted from the negligent act of one of the plaintiff's coemployees, as from the act of some chief officer, or vice-principal, or the defendant itself. Mere proof of the collision would not establish which of these were culpable and hence the rule *res ipsa loquitur* would not apply.[19]

[19] The doctrine *res ipsa loquitur* is applicable only when the thing

But in those States where the rule has been adopted by legislative act, allowing the employee to recover from his employer in an action for injuries from the negligence of his coemployees, this common law rule would not apply and the fact of an injury due to a collision, would make out a *prima facie* case of negligence on the employer's part, for the employer being liable whether the negligence was its own, or that of a coemployee with the injured person, since the collision could only result from a negligent act, the mere proof of a collision would raise the presumption, in the absence of other explanation, that the injury was due to a breach of duty owing to the plaintiff and his right to recover would be the same as if he had been a passenger.[20] But of course this rule would not apply if the proof of the injury established that the cause thereof was the negligence of the plaintiff himself, for in such case, the presumption would be against him, rather than for him and without other evidence, the defendant would be entitled to a peremptory instruction for a verdict.[21]

§ 118. **Rule cannot be invoked by employee in federal courts.**— The United States Supreme Court and the courts of many of the various circuits, in the federal judiciary, in

shown speaks of the negligence of the defendant, not merely of the happening of the accident. Paynter v. Traction Co., 67 N. J. L. 619; 52 Atl. Rep. 367; State v. Greene, 95 Md. 217; 52 Atl. Rep. 673; Atchison, etc., R. Co. v. Salmon, 11 Kansas 83; Shuler v. Omaha, etc., Ry. Co., 87 Mo. App. 623.

[20] "Proof of collision of trains makes a *prima facie* case for an employee against the company, equally as well as if he had been a passenger." Shuler v. Omaha, etc., R. Co., 87 Mo. App. 624. But this is only true, because of § 2873, R. S. Mo. 1899. Stubbs v. Kansas City, etc., R. Co., 85 Mo. App. 192; Lee v. St. Louis, etc., Ry. Co., 112 Mo. App. 372; 87 S. W. Rep. 12; St. Clair v. St. Louis, etc., R. R. Co., 99 S. W. Rep. 775.

[21] Brown v. Northern Pac. R. Co. (Wash.), 86 Pac. Rep. 1053; Cole v. Blue Ridge Ry. Co. (S. C.), 55 S. E. Rep. 126.

the United States, have held that the rule *res ipsa loquitur* does not apply to injuries received by an employee while in the service of his employer.[22]

There is, of course, a broad distinction between cases of injuries between employees and their employers and those between passengers and carriers, so far as this rule of evidence is concerned, growing out of the difference in the degree of duty owed respectively, to a passenger and to an employee,[23] but the State courts where the doctrine is applied in favor of employees, the same as toward passengers, reply to this suggestion of the federal courts, with the statement that the doctrine is not dependent upon a contractual relation, between the injured one and the person causing the injury, but only upon the physical facts and circumstances in connection with the injury.[24] In view of the growing tendency of the State courts to extend the application of the doctrine, it may well be doubted, aside from the persuasive authority of the well-considered decisions of the federal courts, if it would not be well for the courts of the States to keep within narrow limits, if not to deny, the applicability of the doctrine to all classes of actions by employees.[25]

[22] Patton v. Texas & P. Ry. Co., 179 U. S. 658; 45 L. Ed. 361; 21 Sup. Ct. Rep. 275; Northern Pac. Ry. Co. v. Dixon, 139 Fed. Rep. 737; Chicago & N. W. Ry. Co. v. O'Brien, 132 Fed. Rep. 593; 67 C. C. A. 421; Shandrew v. Chicago, etc., R. Co., 142 Fed. Rep. 320; 73 C. C. A. 430; Mexican Cent. R. Co. v. Townsend, 114 Fed. Rep. 739; 52 C. C. A. 369.

[23] See well-written article on this subject in vol. 13, Case & Comment, No. 9, p. 123.

[24] *Ante idem.*

[25] This is, practically, the conclusion of the Supreme Court of Georgia, in the recent well-considered case of Palmer Brick Co. v. Chenall, 119 Ga. 837; 47 S. E. Rep. 329.

Judge Ellison, of the Court of Appeals, in Missouri, has recently considered the Missouri cases, bearing upon the application of the doctrine *res ipsa loquitur*, to employees, in the late case of Hamilton v. Kansas City & Southern Ry. Co. (100 S. W. Rep. 671), and goes into

§ 119. **Rule can be invoked by employees in many State courts.**— Many of the courts of the States, however, do not follow the rule of the federal courts in the application of the

the subject so extensively that it will not be out of place to quote at length from his opinion. He says:

"But the question in this case is, whether an employee may call such presumption to his aid. The plaintiff insists that he may. He contends that it is a rule of evidence with no existing reason why it should not be applicable to a servant as well as a passenger. We think that there is good reason for applying the rule to the latter class, and not to the servant. The passenger does not assume risks while the servant does. The instances of nonliability for injury to a passenger (in the absence of contributory negligence) are rare. The instances of liability to the servant are not nearly so frequent. The passenger is helpless, and he necessarily places himself in the carrier's hands. He knows nothing of the carrier's machinery, nor his methods, and it is impractical for him to ascertain. Whereas the servant is a part of the carrier's service. He has opportunity in a vastly greater degree than the passenger to ascertain the causes which led to his injury. The greater part of what we have just stated as to a passenger applies with equal reason to a stranger who may suffer injury; and so we find the courts extending the presumption to him in aid of his evidence against the party he charged with the wrong. The foregoing considerations have occurred to us as good reasons for a distinction between classes of persons. That the law has not granted the benefit of this presumption to a servant, and that it holds him to the necessity of an affirmative showing of negligence, is sustained by the great weight of authority: Johnstown Steel Co. v. Shields, 146 Ill. 603; 34 N. E. Rep. 234; Mister v. Coal Co., 152 Pa. 395; 25 Atl. Rep. 342; Redmond v. Lumber Co., 96 Mich., 545; 101 N. W. Rep. 1904; Toomey v. Eureka Works, 89 Mich. 249; 50 N. W. Rep. 850; Huff v. Austin, 46 Ohio St. 386; 21 N. E. Rep. 864; 15 Am. St. Rep. 234; Lincoln Ry. Co. v. Cox, 48 Neb. 807; 67 N. W. Rep. 740; Chicago Ry. Co. v. Kellogg, 55 Neb. 748; 76 N. W. Rep. 462; Kincaid v. Railway Co., 22 Or. 35; 29 Pac. Rep. 3; Johnson v. Railway Co., 36 W. Va. 73; 14 S. E. 432; Brownfield v. Chicago, etc., Railway Co., 107 Iowa 254; 77 N. W. Rep. 1038; Benedick v. Potts, 88 Md. 52; 40 Atl. Rep. 1067; 56 L. R. A. 478.

"There is, however, authority based on the best of reason, showing that the servant's case may be made out by mere proof of the occurrence which caused the injury in those instances where the occurrence itself, without the aid of a presumption, shows negligence. In case of a passenger, as we have seen, the occurrence itself may not show negligence and the presumption comes to his relief. But, in

doctrine *res ipsa loquitur* in the case of injuries by employees, but hold that the rule applies as well to those occupying the

the servant's case, if the occurrence is of that nature, which, of itself, shows negligence without the aid of a presumption, he may, as just stated, make a case by showing the occurrence only. Thus, where the employer tied the knot in a rope used in hoisting a hood for the top of a smokestack, which immediately became untied in the hoisting, it was held in Folk v. Schaeffer, 186 Pa. 253; 40 Atl. Rep. 401 (a court holding strictly to the rule that *res ipsa loquitur* does not apply in favor of servants), that it was sufficient *prima facie* evidence of negligence. The occurrence shown may be of that nature which could not in any degree of probability have happened without a negligent cause. Its proof is tantamount to the direct and affirmative proof of negligence.

"We have thus far discussed the case without referring to what has been said of kindred questions in this State. We have done so for the reason that there has been presented to us a number of decided cases, from the Supreme Court and the Courts of Appeals, by the respective counsel which, as each insists, determines the matter in his favor. We find that a number of those to which plaintiff refers are passenger cases, which do not aid us in determining the case of a servant. These are Dougherty v. Railway Co., 9 Mo. App. 478, and 81 Mo. 325; 51 Am. Rep. 239; Kelly v. Railway Co., 113 Mo. App. 468; 87 S. W. Rep. 583; and Hunt v. Railway Co., 14 Mo. App. 160. A number of other cases cited involved the rule as applied to a stranger, *viz.*, Gannon v. Gas Co., 145 Mo. 502; 46 S. W. Rep. 968; 47 S. W. Rep. 907; 43 L. R. A. 505; Hill v. Scott, 38 Mo. App. 370; Seiter v. Bischoff, 63 Mo. App 157; Gallagher v. Illuminating Co., 72 Mo. App. 576; Cleary v. Transit Co., 108 Mo. App. 433; 83 S. W. Rep. 1029; Tateman v. Railway Co., 96 Mo. App. 448; 70 S. W. Rep. 514. In McCarty v. Railway Co., 105 Mo. App. 596; 80 S. W. Rep. 7, the plaintiff was not a servant. These also, as we have shown, are not applicable. But some of plaintiff's citations are cases in which a servant brought the action. They are Blanton v. Dold, 109 Mo. 64; 18 S. W. Rep. 1149; Stoher v. Railway Co., 91 Mo. 509; 4 S. W. Rep. 389; Kelly v. Railway Co., 105 Mo. App. 365; 79 S. W. Rep. 973. It will, however, be noticed that in each of the latter cases it was considered that proof of the occurrence was, itself, proof of negligence. In Blanton v. Dold, Judge Barclay said: 'But some catastrophes are of a nature such as carry, in a mere statement of their occurrence, an implication of some neglect.' Stoher v. Railway Co. contains nothing in aid of the plaintiff. The engine upon which Stoher was fireman was thrown from the track by reason of a small culvert giving way after a heavy rain. The court, in speaking of the evidence in the

relation of employees, as to those held to be passengers.[26] The rule is held to be governed, in its application, by the physical facts and circumstances in connection with the in-

case in respect to the condition of the culvert and its sufficiency to carry off the waters collecting in time of heavy rains, stated that 'the sudden giving way of a part of the structure is, if unexplained, some evidence of negligence in its construction.' Nothing was intended by that statement more than that it was some evidence in the way of a link connected with the other evidence in the case. In the last of the cases just cited (Kelly v. Railway Co.) the St. Louis Court of Appeals, in keeping with the rule stated in Blanton v. Dold, held that, to make the master liable by mere proof of the occurrence, it must be such an occurrence 'as carries proof of negligence on its face.'

"We do not believe it ought to be said that any of these cases afford ground for the position that a servant may be aided by a presumption in making out his case. It is necessary that he produce tangible evidence of his master's negligence, and this, as we have just seen, the occurrence itself may in some instances supply for him. We think the cases in our appellate courts cannot be carried further than that. In so construing and distinguishing them we find them in harmony with the view taken by the Supreme Courts of Pennsylvania and other States. Furthermore, this view is borne out by other cases in the Supreme Court."

The cases referred to by the Supreme Court are those of Smith v. Ry. Co. (113 Mo. 70; 20 S. W. Rep. 896), in which Judge Gantt held that an employee was entitled to no presumption of negligence, from the mere proof of an injury, in any case; that of Howard v. Railway Co. (173 Mo. 524; 73 S. W. Rep. 467), where Judge Fox held that the fact that a handle bar of a car broke was not evidence of negligence, without proof of a defective condition and that of McGrath v. Transit Co. (197 Mo. 97; 94 S. W. Rep. 872), in which Judge Graves held that an employee could not invoke the rule, but in every case evidence of negligence must be produced on the employer's part, unless the circumstances in connection with the injury themselves showed his negligence, without any doubt. In the latter case, the court quotes and approves a similar holding by the Maryland court, in Benedick v. Potts, 88 Md. 52; 40 Atl. Rep. 1067; 41 L. R. A. 478.

The doctrine *res ipsa loquitur* is held, in Fitzgerald v. Southern R. Co. (N. C.), 6 L. R. A. (N. S.) 337, to apply where one employed in caring for a locomotive is injured by a heavy lump of coal falling in the process of transferring it from an adjoining car to the tender of the locomotive.

[26] Wright v. Southern Ry. Co., 127 N. C. 227; 37 S. E. Rep. 221;

jury, rather than the relation of the parties who receive and cause the injury and the reasoning of the courts is that there is nothing in the relation of employer and employee, to deny the application of the rule. Some of the more recent cases, where the question has been raised, so reason.[27] But the adjudications by the federal judiciary has tended to ascribe to the rule a narrower scope, as between employer and employee, than as between carrier and passenger, if not entirely to deny its applicability to the former class of cases,[28] and the Supreme Court of Georgia, in a recent well-considered case, has perhaps correctly stated the present trend of the State decisions, on this question, in the following language: "The maxim, *res ipsa loquitur,* is applicable, under certain circumstances, in suits by a servant against his master, for damages resulting from the master's negligence. The maxim, is, however, very rarely applicable to such cases, and only where the manner of the occurrence producing the injury, or the attendant circumstances, are such that the jury may reasonably infer that the occurrence could not have taken place unless the master was lacking in diligence, as to instrumentalities, place of work or fellow servants."[29]

Womble v. Merchants Co., 135 N. C. 474; 47 S. E. Rep. 493; Houston v. Brush, 66 Vt. 331; 29 Atl. Rep. 380; Graham v. Badger, 164 Mass. 42; 41 N. E. Rep. 61; Chenall v. Palmer Brick Co., 117 Ga. 106; 43 S. E. Rep. 443; St. Clair v. St. Louis & S. F. R. R. Co. (Mo. App.), 99 S. W. Rep. 775; Haas v. St. Louis & Sub. Ry. Co., 111 Mo. App. 706; 90 S. W. Rep. 1155; Blanton v. Dold, 109 Mo. 64; 18 S. W. Rep. 1149; Lee v. St. Louis, etc., Ry. Co., 112 Mo. App. 372; 87 S. W. Rep. 12. But see, *contra,* Smith v. Missouri Pac. Ry. Co., 113 Mo. 70; 20 S. W. Rep. 896; Trotter v. St. Louis & Sub. Ry. Co. (Mo. App.), 99 S. W. Rep. 508.

[27] St. Clair v. St. Louis, etc., R. Co., *supra,* by Nortoni, J.

[28] Vol. 13, No. 9, Case & Comment, for February, 1907, p. 122.

[29] Palmer Brick Co. v. Chenall, 119 Ga. 837; 47 S. E. Rep. 329.

The mere fact of the relation of employer and employee is not sufficient to render the doctrine *res ipsa loquitur* inapplicable between them.

§ 120. **Does not apply to injuries to employees from explosions.**— Notwithstanding the high degree of care required from the employer of men whose work consists in handling

Where a collision occurred between two trains of a railroad company so that an employee riding upon one of said trains in going to and from his work was injured, and the circumstances were such as to show the accident presumably would not have happened if due care had been exercised, the principle of *res ipsa loquitur* applied. St. Clair v. St. Louis, etc., R. Co., 122 Mo. App. 519.

The disputed question as to the applicability of the maxim, *Res ipsa loquitur*, in favor of an injured employee, is answered in Klebe v. Parker Distilling Co., 207 Mo. 480; 105 S. W. Rep. 1057; 13 L. R. A. (N. S.) 140, by holding that it may apply in a proper case, but only as a last resort to prevent miscarriage of justice, when direct and positive proof by living witnesses cannot be had. It was denied on the facts of the case, where the accident resulted from the breaking of an elevator rope or cable.

In discussing the application of the rule in the case of an injury to an employee, after pointing out the reasons for the nonapplication of the doctrine in cases between employer and employee, because of the knowledge of the conditions by the employee, as well as the employer, Judge Woodson, for the Missouri Supreme Court, in the recent case of Klebe v. Parker Company (105 S. W. Rep. 1057), said:

"Based upon the reasons just stated, a majority of the courts of this country, including the Supreme Court of the United States, make the broad statement, without qualification, that the rule mentioned has no application to master and servant."

The following are some of the many cases which so hold: Bowen v. Railroad, 95 Mo. 268; 8 S. W. Rep. 230; Oglesby v. Railway Co., 177 Mo. 272; 76 S. W. Rep. 623; Fuchs v. City of St. Louis, 167 Mo. 620; 67 S. W. Rep. 610; 57 L. R. A. 136; Patton v. Texas Ry. Co., 179 U. S. 658; 21 Sup. Ct. 275; 45 L. Ed. 361; Texas Pac. Ry. v. Barrett, 166 U. S. 617; 17 Sup. Ct. 707; 41 L. Ed. 1136; Shandrew v. Railway, 142 Fed. Rep. 320; 73 C. C. A. 430; Ash v. Verlenden, 154 Pa. 246; 26 Atl. Rep. 374; Stackpole v. Wray, 74 App. Div. 310; 77 N. Y. Supp. 633; Searles v. Railway, 101 N. Y. 662; 5 N. E. Rep. 66; Dobbins v. Brown, 119 N. Y. 188–193; 23 N. E. Rep. 537; Quincy Mining Co. v. Kitts, 42 Mich. 35; 3 N. W. Rep. 240; Brownfield v. Railway, 107 Iowa 254; 77 N. W. Rep. 1038; Kepner v. Traction Co., 183 Pa. 24; 38 Atl. Rep. 416; Louisville & N. Ry. Co. v. Campbell, 97 Ala. 147; 12 S. Rep. 574; Starer v. Stern, 100 App. Div. 393; 91 N. Y. Supp. 821; Reid v. Railroad, 81 Ga. 694; 8 S. E. Rep. 629; Davidson v. Davidson, 46 Minn. 117; 48 N. W. Rep. 560; Bohn v. Railway Co., 106 Mo.

dynamite or other dangerous explosives,[30] the same high degree of care for their own protection is so far required on the part of such employees, that in case of an injury from an explosion to employees, while they are handling such explosives, or discharging the duties of the employer, there is held to be no presumption of negligence on the part of the em-

429; 17 S. W. Rep. 580; Huff v. Austin, 46 Ohio St. 386; 21 N. E. Rep. 864; 15 Am. St. Rep. 613. While the Missouri cases above cited broadly state that the rule has no application to master and servant, yet it was not necessary for a proper determination of those cases to state the rule so broadly. In those cases this court held, and properly so, that the rule did not apply to the facts of those particular cases, but it did not intend to hold that it was a universal rule, without limitations or exceptions; but, upon the contrary, we have several times held that there were cases where the rule did apply, and the same ruling has been made by many other courts of respectability. Blanton v. Dold, 109 Mo. 74; 18 S. W. Rep. 1149; Turner v. Haar, 114 Mo. 335; 347; 21 S. W. Rep. 737; Sackewitz v. Am. Biscuit Co., 78 Mo. App. 151; Johnson v. Railway, 104 Mo. App. 588–592; 78 S. W. Rep. 275; Scott v. London Dock, 3 Hurl. & Colt. 596; Kearney v. Railway, 5 (Q. B.) 411, and L. R. 6 Q. B. 759; Ellis v. Waldron, 19 R. I. 369; 33 Atl. Rep. 869; Fairbank Canning Co. v. Innes, 24 Ill. App. 33, affirmed in 125 Ill. 410; 17 N. E. Rep. 720; Gerlach v. Edelmeyer, 88 N. Y. 645; Hartford Deposit Co. v. Sollitt, 172 Ill. 222; 50 N. E. Rep. 178; 64 Am. St. Rep. 35; Springer v. Ford, 189 Ill. 430; 59 N. E. Rep. 953; 52 L. R. A. 930; 82 Am. St. Rep. 464; Treadwell v. Whittier, 5 L. R. 498; Labatt on Master and Servant, § 834, and cases cited; Stearns v. Ontario Spinning Co., 184 Pa. 519; 39 Atl. Rep. 292; 39 L. R. A. 842; 63 Am. St. Rep. 807; Grant v. Railway Co., 108 N. C. 462; 13 S. E. Rep. 209. Having shown that the rule is in force in certain cases between master and servant, it now becomes our duty to determine whether or not the facts of this case bring it within its operation."

For diametrically opposite rule, as applied in the federal courts, see the recent case of Carnegie Steel Company v. Byers, 149 Fed. Rep. 667; 8 L. R. A. (N. S.) 677. And for note on same proposition, see 6 L. R. A. (N. S.) 337.

[30] Mather v. Rillston, 156 U. S. 391; 39 L. Ed. 464; 15 Sup. Ct. Rep. 464. See, for discussion of employer's duty, as regards explosives in mines and other places, White, Per. Inj. Mines, §§ 32, 155, 255, 475, and cases cited.

ployer,[31] for, in every case, where the injury may as well have resulted from one or more causes, it is always incumbent upon the employee to show a *prima facie* right of recovery, to establish that the injury was due to a negligent act on the defendant's part.[32] Nor would an injury to a licensee, or trespasser, caused by an explosion on the defendant's premises, raise a presumption of negligence on the latter's part,[33] but an injury to a passenger, during transit, from an explosion of substances under the carrier's control, would raise a legal presumption of negligence on the carrier's part.[34]

§ 121. **Injury to passengers from street car collision.**— The rule that a passenger of a steam railway establishes a *prima facie* case in tracing an injury to a collision of the cars in which he was riding, is held to apply with equal force to a collision between street cars, or wagons and street cars, and the proof of such a collision will ordinarily raise the presumption of negligence, sufficient to justify a verdict, if the cause of the collision is not explained.[35]

In a recent Missouri case,[36] the Supreme Court considered the liability of the defendant for an injury to a passenger on a street car, shown to have collided with a fire wagon, being rapidly driven to a fire at the time of the collision. The de-

[31] Omaha, etc., Co. v. Murray, 112 Ill. App. 233; Dullnig v. Duerler, etc., Co., 87 S. W. Rep. 332.

[32] Goronsson v. Riter, etc., Co., 186 Mo. 300; 85 S. W. Rep. 338; Meehan v. Great No. R. Co. (N. D.), 101 N. W. Rep. 183; Chicago, etc., R. Co. v. O'Brien, 132 Fed. Rep. 593; 67 C. C. A. 421.

[33] Obertoni v. Boston, etc., R. Co., 186 Mass. 481; 71 N. E. Rep. 980; 67 L. R. A. 422.

[34] Firebaugh v. Seattle, etc., El. Co., 40 Wash. 658; 82 Pac. Rep. 995; German v. Brooklyn, etc., R. Co., 95 N. Y. S. 557.

[35] Jackson v. Street Ry. Co., 118 Mo. 224; Hill v. Street Ry. Co., 109 N. Y. 239; Booth on Street Ry. Law, § 361; Clark v. Railroad, 127 Mo. 210.

[36] Olsen v. Citizens Ry. Co., 152 Mo. 426.

fendant contended that the proof did not make out a *prima facie* case of negligence on its part, as the evidence of the accident showed conclusively that the firemen in charge of the fire wagon were to blame, from the fact of the great speed with which they were driving on the public highway. The court, however, held that the proof of the collision made out a *prima facie* case of negligence, on behalf of the passenger, Judge Gantt, observing: "The plaintiff being absolutely free from negligence, on her part, and the collision having occurred and injured her, we think a *prima facie* case was made and the court did not err in refusing to declare the law, as asked by the defendant, even though plaintiff had not herself invoked this presumption." [37]

§ 122. **Displacement of cars or appliances.**— The care required of carriers, for the protection of their passengers, is so great that it is held, in Wisconsin,[38] and quite generally, that the mere fact that a train parts, in transit, as a result of which passengers are injured, is sufficient to raise a presumption of negligence against the carrier. So, it was held, in New York,[39] where the first two wheels of a street car passed safely over a switch, and the other two wheels were displaced, whereby a passenger was injured, under the doctrine *res ipsa loquitur,* the street car company was bound to explain the accident, or pay damages. And in Missouri, the rule was held to apply, to a hand rail, on a street car, in the hand of a passenger, which suddenly gave way, while he was struggling to regain his position on the moving

[37] Olsen v. Citizens Ry. Co., 152 Mo. 432.

The rule does not obtain in an accident to a passenger of a street car, who alights and steps around in front of a rapidly approaching car he had failed to look for. Horstein v. United Rys., 97 Mo. App. 271; 70 S. W. Rep. 1105.

[38] Feldschneider v. Chicago, etc., R. Co., 99 N. W. Rep. 1034.

[39] Klinger v. United Traction Co., 87 N. Y. S. 864; 92 App. Div. 100.

car, which had been suddenly started.[40] And, in Pennsylvania, the presumption of negligence on defendant's part, is held to obtain, where an injury on a street car is shown to have resulted from a broken brake chain,[41] and the same result would follow in case of an injury by being struck in the face by a brake handle, suddenly revolving,[42] or the giving down of a trap door, in a street car.[43]

§ 123. **Assaults on passengers by employees.**— The fact of an assault on a passenger, otherwise unexplained by the evidence, or apparently without excuse or justification, is so inconsistent with the high degree of care required by a car-

[40] McCarty v. St. Louis, etc., R. Co., 80 S. W. Rep. 7.

[41] Dougherty v. Pittsburgh Rys. Co., 213 Pa. 346; 62 Atl. Rep. 926.

[42] Thompson v. St. Louis, etc., R. Co. (Mo.), 86 S. W. Rep. 465.

[43] Jordan v. St. Louis, etc., R. R. Co., 99 S. W. Rep. 492.

The derailment of a passenger train was held to raise the presumption of negligence against the carrier, in the following cases: Cronk v. Wabash R. Co., 123 Iowa 349; 98 N. W. Rep. 884; Logan v. Metropolitan, etc., R. Co., 183 Mo. 582; 82 S. W. Rep. 126; Cincinnati, etc., R. Co. v. Bravard (Ind.), 76 N. E. Rep. 899; Minahan v. Grand Trunk R. Co., 138 Fed. Rep. 37; Southern Ry. Co. v. Cunningham, 123 Ga. 90; 50 S. E. Rep. 979; St. Louis S. W. Ry. Co. v. Harkie, 88 S. W. Rep. 506; Adams v. Union Ry. Co., 80 N. Y. S. 264; 80 App. Div. 136.

The breaking down or failure of the carrier's vehicle was held to raise a *prima facie* case of negligence, in the following cases: Christie v. Griggs, 2 Camp. 79; Railroad Co. v. Eraid, 1 Moo. P. C. C. (N. S.) 101; Carpue v. Railroad Co., 5 Q. B. 747; Bowen v. Railroad Co., 18 N. Y. 408; Curtis v. Railroad Co., 18 N. Y. 538; Railroad Co. v. Wightman, 29 Gratt. 431; Sullivan v. Railroad Co., 30 Pa. St. 234; Railroad Co. v. Beggs, 85 Ill. 80; Railway Co. v. Thompson, 56 Ill. 138.

Derailment has been held to raise no presumption of negligence, in the following cases: Omaha R. Co. v. Boesen (Neb.), 105 N. W. Rep. 303; Buckland v. New York, etc., R. Co. (Mass.), 62 N. E. Rep. 955.

And an error of the carrier or its employees was held to establish a *prima facie* case in the following cases: Skinner v. R. R. Co., 5 Exch. 786; Railroad Co. v. Pollard, 22 Wall. 341; Holbrook v. Ry. Co., 12 N. Y. 236; Fairchild v. Stage Co., 13 Cal. 599, all cited by Judge Thompson, in Dougherty v. Missouri Pac. Ry. Co., 9 Mo. App. 480, 481.

rier, for the protection of its passengers, that when unexplained, such a showing will raise a presumption of negligence, against the defendant, under the doctrine *res ipsa loquitur.*[44] This unusual occurrence on the part of a passenger carrier's employees, was held to make out a *prima facie* case where a conductor violently struck a passenger in the face.[45]

§ 124. **Injuries from sudden jerks or jolts.**— While the rule of law governing the passenger carrier's liability is the same, whether the passenger is carried upon a freight or passenger train, so far as injuries from negligence of the carrier, is concerned,[46] the manner of construction and operation of the two classes of trains is so different as to occasion a different rule, in the case of injuries from sudden jerks or jolts, on the two kinds of trains.

In the operation of passenger trains, sudden jolts or jerks are so unusual, on account of the air brakes and improved facilities used in such service, that injuries from sudden jerks or jars have been held actionable, under the rule *res ipsa loquitur.*[47]

[44] Kohner v. Capital Co., 22 App. D. C. 181; 62 L. R. A. 875.

[45] Kohner v. Capital Traction Co., *supra.*

A presumption of negligence, against a carrier, is held, in Kentucky, to arise, for an injury to one waiting at a station to take a passenger train, when he was struck by a piece of coal, thrown from the tender of a passing engine. Louisville & N. R. Co. v. Reynolds, 71 S. W. Rep. 516.

[46] Erwin v. Railway Co., 94 Mo. App. 289; Portuchek v. Wabash Ry. Co., 101 Mo. App. 52; Condy v. Railroad Co., 85 Mo. 79; Hempsey v. Railroad, 88 Mo. 348. "Life and limb are as valuable and there is the same right to safety, in the caboose, as in the palace car." Justice Swayne, in Indianapolis, etc., R. Co. v. Horst, 93 U. S. 296.

[47] Moorman v. Atchison, etc., R. Co., 105 Mo. App. 719; Barth v. Ry. Co., 142 Mo. 550. In Moorman v. Ry. Co., it is said: "In Dougherty v. Railway, 81 Mo. 325, it was said: 'Where the vehicle or conveyance is shown to be under the control or management of

But this rule is held not to obtain in the case of freight trains, where the manner of coupling causes from three to five inches of slack in the coupling appliance of each car [48] and the slack in a train of usual length is such, on the slowing down of the engine, or sudden stopping or starting of the train, to jerk and jolt the rear cars, so as to throw a person off his feet. In traveling by such trains, sudden jerks and jars are incident to the travel, as usually carried on and for this reason, a mere injury from a sudden jerk or jolt is not held to render the carrier liable, under the rule *res ipsa loquitur,* but, on the contrary, the carrier is not generally held responsible at all for such injuries.[49]

§ 125. **Sudden starting of street car or other public conveyance.**— The St. Louis Court of Appeals, in an opinion by Judge Thompson, held that where a horse car was started before a passenger had time to be seated in the car, as a result of which he was thrown against the side of the car and his hand was badly cut in the glass of the car window, this made out a *prima facie* case of negligence against the carrier, without other proof of negligence on its part.[50] In a New York case,[51] the plaintiff, a fleshy woman, was getting out of the defendant's omnibus when the horses suddenly started

the carrier, or his servants, and the accident is such, as, under an ordinary course of things, does not happen, * * * it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose for want of care.' And no good reason is seen why the application of this rule may not be invoked in resolving the question now before us."

[48] This was the evidence in this case. Erwin v. Kansas City, etc., Ry. Co., 94 Mo. App. 296.

[49] Portuchek v. Wabash Ry. Co., 101 Mo. App. 55; Wait v. Railway, 165 Mo. 612; 65 S. W. Rep. 1028; Chicago, etc., R. Co. v. Arnol, 144 Ill. 201; Olds v. New York, etc., R. Co., 172 Mass. 72; Erwin v. Kansas City, etc., Ry. Co., 94 Mo. App. 289; Guffey v. R. R., 53 Mo. App. 462.

[50] Dougherty v. Missouri Pacific Ry. Co., 9 Mo. App. 478.

[51] Roberts v. Johnson, 58 N. Y. 613.

and she was thrown to the ground and badly injured. The court held that this showed, *prima facie,* "either that the horses were unsuitable for such service, or the driver incompetent or negligent in the performance of his duty. If the starting of the horses was attributable to some other cause, for which the defendants were not responsible, it was for them to show it." And these cases are in accordance with the general rule applied to this class of public carriers. Street railways are common carriers of passengers, the same as steam railroads, and are held to the same degree of diligence for the protection of their patrons;[52] if an injury occurs under such circumstances as to raise the presumption that it could only have arisen as a result of negligence, the defendant will be held *prima facie* liable for such an injury and the rule *res ipsa loquitur* will apply. Such carriers are held to a very high degree of care for the protection of their passengers and if a passenger is injured from the starting of a car before he has time to alight,[53] or the car is stopped and a passenger alights in front of a rapidly approaching vehicle, as a result of which he is injured,[54] the defendant is, *prima facie,* liable for such injuries.

But the mere fact of an accident to a passenger, during transit, by a common carrier, without more, is not sufficient evidence upon which to base a verdict and unless the facts showing the injury are such as to leave the presumption that the cause of the injury was the negligence of the defendant, there could be no recovery.[55]

[52] Citizens Ry. Co. v. Carey, 56 Ind. 396; Chicago Ry. Co. v. Mumford, 21 Alb. L. J. 214; Maverick v. Ry. Co., 36 N. Y. 378.

[53] Crissey v. Railroad Co., 75 Pa. St. 83.

[54] Maverick v. Railroad Co., 36 N. Y. 378.

[55] Curtis v. R. R., 18 N. Y. 536; Brehm v. Ry. Co., 34 Barb. 256.

The sudden stopping or starting of cars was held to raise a presumption of negligence on carrier's part, in following cases: Paul v. Salt Lake, etc., R. Co. (Utah), 83 Pac. Rep. 563; Lincoln Traction Co. v. Shepard (Neb.), 104 N. W. Rep. 882; Hamilton v. Metropolitan St.

§ 126. **Frightening horses by noise from engine.**— To carry a case to the jury, under the doctrine *res ipsa loquitur,* the evidence must tend to establish that the negligence of the defendant was at least the proximate cause of the injury and where the evidence shows a state of facts equally as consistent with proper care, on defendant's part, as with his negligence, the rule has no application. Hence, where the injuries to plaintiff resulted from being thrown from a wagon by reason of a frightened team, caused by an engine letting off steam, it is not sufficient to make out a *prima facie* case, to simply establish the fact of the frightening of the team, by the escaping steam, but it must be shown that the noise made by the engine was unusual or unnecessary, in the skillful operation of the engine, before the agent in charge thereof could be held guilty of any negligence.[56] But in South Dakota, the injuring or killing of a traveler's horse, at a public highway, is held to establish a *prima facie* case for the plaintiff, which, if not explained by the defendant, will enable the plaintiff to uphold a verdict for the value of such horse.[57]

§ 127. **Falling of machinery or other objects.**— The mere fact of an injury, under circumstances which would not raise

R. Co., 114 Mo. App. 504; 89 S. W. Rep. 893; Joyce v. Los Angeles Ry. Co., 147 Cal. 274; 82 Pac. Rep. 204; Cody v. Market St. Ry. Co. (Cal.), 82 Pac. Rep. 666; Griffin v. California Elec. Co., 1 Cal. App. 678; 82 Pac. Rep. 1084; Georgia Ry. Co. v. Reeves, 123 Ga. 697; 51 S. E. Rep. 610; Langley v. Metropolitan Ry. Co., 74 N. Y. S. 857; Bartle v. Houghton Co. R. Co. (Mich.), 93 N. W. Rep. 620.

But not, in the following cases: Brown v. Manhattan Ry. Co., 94 N. Y. S. 190; 105 App. Div. 395; Young v. Mo. Pac. Ry. Co. (Mo.), 84 S. W. Rep. 175; Behen v. Transit Co., 186 Mo. 430; 85 S. W. Rep. 346; Conroy v. Detroit Ry. Co. (Mich.), 102 N. W. Rep. 641.

In New York, the sudden stopping of a car, by which a passenger was thrown against a car window and injured was held not to raise a presumption of negligence on defendant's part, in Johnson v. Interurban St. Ry. Co., 88 N. Y. S. 866.

[56] Louisville & N. R. Co. v. Mertz (Ala.), 40 So. Rep. 60.

[57] Dougherty v. Chicago, etc., R. Co., 104 N. W. Rep. 672.

the legal presumption that it was caused proximately by the defendant's negligence, is never sufficient for the application of the rule *res ipsa loquitur*. Hence, the mere fact of an injury, shown to have been caused by the falling or breaking of machinery, which the defendant was having operated, without other explanation of the cause of such fall or breaking, would not raise the presumption that the injury was caused by the negligence of the defendant.[58] A part of the machine may have been removed by the plaintiff himself, or his coemployees and this presumption is just as logical as that the defendant had removed or injured the machine and more so, where the plaintiff was himself in charge of the machine.

But where, from the peculiar facts of the case, the falling of the machinery or other object, would raise a presumption of negligence on the defendant's part,[59] or, from the facts established, it is apparent that the injury was caused by an adequate cause and that such cause was the breach of a legal duty owing the plaintiff by the defendant, then the rule would be held to apply, and no further proof of the negligence would be required than the circumstances connected with the injury.[60] An injury from a falling lamp, under the control of the defendant,[61] a falling timber, placed against an immovable upright,[62] a heavy iron "crowbar," thrown upon the plaintiff's head, in the defendant's premises;[63] a brick, from the overhead bridge of a railway company, falling upon a traveler's head, while a train was passing over the bridge,[64] have all been held to be cases where

[58] Plefka v. Knapp, Stout & Co., 145 Mo. 316; 46 S. W. Rep. 974.
[59] See Gallagher v. Edison Co., 72 Mo. App. 576, and cases cited.
[60] Sakewitz v. American, etc., Co., 78 Mo. App. 144.
[61] Gallagher v. Edison Co., 72 Mo. App., 576.
[62] Sakewitz v. American, etc., Co., 78 Mo. App. 144.
[63] Johnson v. Metropolitan, etc., Ry. Co., 104 Mo. App. 588.
[64] Kearney v. Railway Co., L. R. 5 Q. B. 411 and L. R. 6 Q. B. 759. Where there is an accident from the breaking of a machine, used

the facts showed a state of facts sufficient to raise the presumption that the injury was due to the negligence of the defendant and if unexplained, would entitle the injured person to a verdict.

§ 128. **Injuries from caving banks or pits.**— The cave-in of a railroad cut or embankment or of a ditch or other excavation, from which the plaintiff received injuries, may or may not have been caused by the defendant's negligence and, ordinarily, since the falling of such an earth bank may as well have resulted from natural forces or natural laws, as from any negligence on the defendant's part, an injury from such a cause, would not, generally, be held to be within the rule where any legal presumption would obtain against the defendant, from facts showing the falling of such bank and the resulting injury to the plaintiff.[65] In a well-considered case, in California, by the federal court, the rule *res ipsa loquitur* was held not to apply to an injury from a cave-in, and the mere fact of an injury to the plaintiff, from such a cause, was held not to make out a *prima facie* case against

by an employee, and there is neither proof of defects in the machine nor error in its use, the law will not draw the inference that the machine was defective or that there was lack of care in its use. Green v. Southern Ry Co., 72 S. C. 398; 52 S. E. Rep. 45; Stackpole v. Wray, 182 N. Y. 567; 75 N. E. Rep. 1134; Griffin v. Flank, 95 N. Y. S. 546.

The fact that staging, on which plaintiff was at work, gave way and fell, was held to raise no presumption of negligence on the employer's part, in Iowa. Bergman v. Altman, 127 Iowa 693; 104 N. W. Rep. 280. But see Gorman v. Milliken, 92 N. Y. S. 1126; 102 App. Div. 617.

An injury to a railroad section hand, by the slipping of a pike maul from the helve, raises no presumption of negligence against his employer. Deckard v. Wabash R. Co. (Mo.), 85 S. W. Rep. 982.

[65] Bradley v. Chicago, etc., R. Co., 138 Mo. 294; 39 S. W. Rep. 763; Aldrich v. Furnace Co., 78 Mo. 559; Brown v. Chattanooga Co., 101 Tenn. 252; 47 S. W. Rep. 415; Olsen v. McMullen, 34 Minn. 95; Swanson v. Great Northern Co., 68 Minn. 184; 70 N. W. Rep. 978; Del. Sejnore v. Halliman, 153 N. Y. 274; 47 N. E. Rep. 308; Hughes v. Malden, etc., Co., 168 Mass. 396.

the defendant, as the cave-in may have been caused by natural causes, without the intervention of any neglect on the defendant's part.[66] And, in Missouri, an injury from the fall of an embankment in a railroad cut, was held to raise no presumption of negligence against the defendant, but the plaintiff was required to produce evidence of a breach of duty owing to him by the defendant, before a recovery could be had.[67] And if the work of the plaintiff was of such a character as to cause the earth bank to fall, as where he was himself engaged in a work of excavation, or actively put in operation the familiar law of gravitation, instead of any presumption of negligence obtaining as against the defendant, the proof of such a state of facts would generally preclude a recovery by the plaintiff.[68]

§ 129. **Injuries from negligence of nurses at hospital.**— The rule *res ipsa loquitur* was recently considered by the Kansas City Court of Appeals, in Missouri, in a case where the plaintiff was injured by the negligence of nurses in a hospital.[69] The case was one of first impression in the State and the injuries sued for were alleged to have resulted from severe burns on the plaintiff's body and limbs, caused by hot water bottles, placed against his flesh by the nurses, while he was still under the influence of an anesthetic, given for the purpose of an operation, which had just been performed. The decision was by Judge Ellison, one of the ablest judges

[66] Mountain Copper Co. v. Van Buren, 123 Fed. Rep. 61.

[67] Bradley v. Chicago, etc., R. Co., 138 Mo. 293; 39 S. W. Rep. 763.

[68] Texas & Pac. R. Co. v. French, 86 Texas, 96; 23 S. W. Rep. 642; Aldrich v. Furnace Co., 78 Mo. 559; Watson v. Coal Co., 52 Mo. App. 366; Brown v. Chattanooga Co., 101 Tenn. 252; 47 S. W. Rep. 415; Reiter v. Winona, etc., Co., 72 Minn. 225; 75 N. W. Rep. 219. See for list of cases on cave-in in mines, etc., White, Per. Inj., Mines, §§ 141, 153.

[69] Adams v. University Hospital, 99 S. W. Rep. 453.

in that State, and in the course of his opinion, the court observed: "We will say, at the outset, that, if the defendant's liability is to be ascribed to the negligence of its nurses, the manner of his injury was such as to authorize the rule of *res ipsa loquitur* to be invoked.[70]

And if such liability is to be based upon the negligence of defendant in selecting competent nurses, that rule will also apply. For, in either case, the injury is of itself, a sufficient showing, unexplained, that it resulted from one or the other of these sources of negligence, and we see no reason why the defendant (if liable at all) should not be held to be obliged to exculpate itself, by showing, in the latter instance, that it had used proper care in the selection of its nurses, as it would, in the former, by showing that the nurses had not, themselves, been negligent."

The court then held that the defendant in that case was not liable, because of the fact that it was a charitable institution, but that if the rule of liability would otherwise apply, that the acts of the nurses, unexplained, was, of itself, sufficient evidence of negligence to bring the case within the rule of *res ipsa loquitur*.[71]

[70] Olsen v. Ry. Co., 152 Mo. 426; 54 S. W. Rep. 470; Johnson v. Railway Co., 104 Mo. App. 588; 78 S. W. Rep. 275; Dougherty v. Ry. Co., 9 Mo. App. 478; Haggerty v. Ry. Co., 100 Mo. App. 424; 74 S. W. Rep. 456.

[71] Adams v. University Hospital, 99 S. W. Rep. 453.

CHAPTER VII.

ISSUES FOR THE COURT ALONE.

§ 130. Scope of chapter.
131. Questions of law for the court.
132. Mixed questions of law and fact for court.
133. When there is total absence of negligence.
134. Court to decide whether duty owing or not.
135. Failure to prove negligence alleged.
136. Whether injury connected proximately with defendant's negligence.
137. Court should determine demurrer to evidence.
138. When undisputed evidence shows contributory negligence.
139. Injury due to neglect of coemployee.
140. Selecting more dangerous way to perform duty.
141. Jury cannot erect special standards for control of business.
142. When court should decide necessity for rule.
143. Reasonableness of rule a judicial determination.
144. Open, obvious risks assumed as matter of law.
145. When safety of place a question of law.
146. When competency of employee a question of law.
147. When injury from collision a question for the court.
148. Where evidence disputes physical facts.
149. Questions of variance for the court.

§ 130. **Scope of chapter.**— Under the growing tendency toward damage suit litigation in the United States and the not uncertain demand of those representing the plaintiffs in such suits for a broader construction of the law of negligence and the submission to the jury of almost every conceivable issue which arises in such cases, it becomes important to ascertain, what, if any issues should be withheld from the jury, within proper limitations, in the orderly administration of the law and what should be decided by the court. If any issues should be determined by the court,

as such, as distinguished from the unskilled jurymen who often determine questions which come up in the trial of personal injury actions, in case such issues are not decided by the court, but are submitted to a jury, then those possessing no qualification to decide such issues are apt to decide wrong as often as they may decide right and in such case there is apt to be a failure of justice, for if the right prevails at all, it is more or less a matter of haphazard or guess. Manifestly, it is of primal importance that issues which should be determined by the court should not be submitted to a jury, for under the practice most generally prevailing, a decision by them as to issues held properly submitted, is held final upon appellate tribunals and if an issue is wrongly given to a jury, instead of the court, in case of a wrong decision upon such issue, there is no redress. It is therefore equally as important for the court to determine the issues that ought to be determined by it, as to submit the issues properly submitted to the jury, for their decision, and, with a view of determining what issues should be thus withheld from the jury, in the trial of personal injury actions against railroads, the author presents the subject matter of this chapter.

§ 131. **Questions of law for the court.**— Since juries are not learned in the law, it would be manifestly improper to submit to them the determination of questions of law. Hence, it is very generally held that the duty of passing upon the facts belongs to the jury, while the duty of passing upon the law of the case being tried, belongs alone to the court.[1] It is error for the court to give to the jury instructions that refer to them determination of legal issues.[2]

[1] Coudy v. St. Louis, I. M. & S. Ry. Co., 85 Mo. 79; Housman v. Hope, 20 Mo. App. 193.

[2] Fugate v. Carter, 6 Mo. 267.

The court, in the first instance, should determine whether there is any evidence warranting the submission of any issue of fact to the jury and if there is not, then there is nothing for a jury to decide.[3] When there are no issues of fact for the jury, but the only controversies are over matters or issues of law, whether they refer to the application or interpretation of an ordinance,[4] or a foreign[5] or domestic law,[6] then all such issues of law should be determined by the court.

§ 132. **Mixed questions of law and fact for court.**— As courts, because learned in the law, are not, thereby necessarily rendered incompetent to pass upon issues of fact, but are nevertheless qualified to decide issues of fact as well as the average jury, but juries, although qualified to pass upon issues of fact, are incompetent to pass upon legal issues, because not learned in the law, it is generally held that the fact that an issue of fact is also involved with one of law, will not render the court incompetent to settle such mixed question of law and fact, but that the fact that a proposition of law is involved will render a jury incompetent to determine such mixed question. It is therefore quite generally held that when the proper solution of a proposition arising in the trial of a law suit, depends upon a mixed question of law and fact, it is a question for the court and not for the jury, to decide.[7]

§ 133. **When there is total absence of negligence.**— When

[3] Hillman v. Gray's Point Ter. Ry. Co., 99 Mo. App. 271; 73 S. W. Rep. 220.

[4] Barton v. Odessa, 82 S. W. Rep. 1119.

[5] Slaughter v. Met. St. Ry. Co., 116 Mo. 269; 23 S. W. Rep. 760.

[6] State, to use of Goddard v. Rayburn, 31 Mo. App. 385.

[7] Jordan v. Hannabal, 87 Mo. 673; Kansas City v. Ferd Heim, etc., Co., 98 Mo. App. 590; 73 S. W. Rep. 302.

the evidence for the plaintiff fails to show any negligence at all on the defendant's part, the court should nonsuit the plaintiff, or direct a verdict for the defendant.[8] Some of the cases hold that it is not enough for the plaintiff to show a mere scintilla of evidence going to establish the negligence of the plaintiff, but to enable him to have his cause submitted to the jury, he must introduce evidence of negligence amounting to more than a mere scintilla of proof.[9] This rule, of course, is very flexible in its application, for evidence that might seem to be a mere scintilla of proof, to one court, to another might seem as strong as proof of holy writ, hence, this rule is not generally adopted.[10] But it is very generally held that where no fair inference of negligence on the defendant's part, can be drawn from the evidence of the plaintiff, assuming that evidence to be true and placing a favorable interpretation thereon, then the cause should be withheld from the jury.[11]

[8] Baltimore, etc., R. Co. v. Jones, 95 U. S. 439; Weightman v. Washington, 66 U. S. 39; Ravenscraft v. Missouri Pacific Ry. Co., 27 Mo. App. 617.

[9] Pennsylvania R. Co. v. Horst, 110 Pa. St. 226; Carver v. Detroit, etc., R. Co., 61 Mich. 584; Central R. Co. v. Rouse, 77 Ga. 393; Mayo v. Boston, etc., R. Co., 104 Mass. 137.

[10] Central R. Co. v. Rouse, 77 Ga. 393.

[11] Hathaway v. East Tennessee, etc., R. Co., 29 Fed. Red. 489.

Where the evidence in a case is equally as consistent with an absence of negligence as with a presence of negligence, it is error to submit the issue to the jury. Bailey v. Rome, etc., R. Co., 19 N. Y. S. R. 656; 49 Hun. 377; 3 N. Y. Supp. 585; Downey v. Sawyer, 157 Mass. 418; 32 N. E. Rep. 654.

It is the duty of the jury to determine whether negligence exists in a given case, but it is the duty of the court to determine whether there is sufficient evidence to justify a submission to the jury and a mere scintilla of evidence will not justify such submission. Powers v. New York, etc., R. Co., 14 N. Y. Supp. 408; 60 Hun 19; 128 N. Y. 659; 29 N. E. Rep. 148; Union Pac. R. Co. v. Rollins, 5 Kansas 167; Quibell v. Union Pac. R. Co., 7 Utah 122; 25 Pac. Rep. 734; Latremouille v. Bennington, etc., R. Co., 63 Vt. 336; 48 Am. & Eng. R. Cas. 265; 22 Atl. Rep. 656.

§ 134. **Court to decide whether duty owing or not.**— Whether the relation of the parties plaintiff or defendant is such as to raise the duty on the part of the defendant upon which the plaintiff's action is based, where the evidence of that relation is undisputed, is a question of law for the court.[12]

It is not a question for the jury, as to what the plaintiff may have believed the defendant's duty toward him to have been, but a question of what it really was, that concerns the court, hence, it is incompetent to establish that when he accepted employment as a car inspector the plaintiff believed that he would be protected in the performance of his duty.[13] His judgment about the protection to which he was entitled might be governed by an entirely different standard than that erected by the law.

§ 135. **Failure to prove negligence alleged.**— The right of the plaintiff to recover in a personal injury action, depending upon the ability of the plaintiff to establish the specific ground of negligence alleged, instead of some other or different wrongful act, if the proof does not show the negligent act complained of, there can be no recovery. The defendant is only called upon to answer for the specific wrongful act set out in the petition and cannot be held liable on proof of some other wrongful act or neglect and if there is a failure to prove the specific ground of negligence alleged this will justify a peremptory charge to the jury to find the issues for the defendant.[14]

[12] Chicago, etc., R. Co. v. Bragonier, 119 Ill. 51; 7 N. E. Rep. 688.

[13] Howard v. Savannah, etc., R. Co., 84 Ga. 711; 11 S. E. Rep. 452.

[14] Watson v. Mound City, etc., Railroad, 133 Mo. 246; 34 S. W. Rep. 573; Waldhier v. Railroad, 71 Mo. 515; Schneider v. Railroad, 75 Mo. 295; Hite v. Railroad, 130 Mo. 132; 31 S. W. Rep. 262; Leslie v. Railroad, 88 Mo. 50; Ely v. Railroad, 77 Mo. 34; McManamee v. Railroad, 135 Mo. 447; 37 S. W. Rep. 119.

A recent Missouri decision [15] illustrates this rule of law. The negligence charged in the petition was that of the "gripman," in negligently operating the car, so as to cause it to jerk or lurch, throwing the plaintiff off. Of this direct allegation, the court said: "This is a specific charge of a specific act, on the part of the gripman, which was susceptible of positive and direct proof, and excludes any idea or intention of the pleader to rely upon general negligence, but on the contrary expressly limits the plaintiff to proof of the specific negligence alleged." And, the evidence establishing that the gripman had done nothing at all to make the car lurch, but that it was a customary jerk or lurch, in no way due to his act, as alleged, the court observed: "This was practically all the evidence adduced by the plaintiff, to sustain the issue of carelessness and negligence, on the part of the gripman, in operating the car. To state it is all that is necessary to conclusively demonstrate that the plaintiff utterly failed to make out a *prima facie* case, such as entitled him to go to the jury." [16]

§ 136. **Whether injury connected proximately with defendant's negligence.—** The court does not perform its full duty, even though the plaintiff's evidence shows that the defendant was guilty of negligence, or of the specific negligence in the petition alleged, unless it also ascertains, before submitting the cause to the jury, whether or not the evidence tends to show that such negligence was the proximate cause of the injury complained of. It is the primary duty of the court, in all jury trials, to ascertain if the evidence tends to estab-

[15] Bartley v. Metropolitan, etc., R. Co., 148 Mo. 140; 49 S. W. Rep. 840.

[16] Bartley v. Metropolitan, etc., R. Co., 148 Mo. 140; 49 S. W. Rep. 840. See, also, Kansas City, etc., S. R. Co. v. Allen, 67 Pac. Rep. 436; Hunt v. Kile, 98 Fed. Rep. 49; Moyer v. Ramsey-Brisbane Co., 119 Ga. 744; 46 S. E. Rep. 844.

lish the basic allegation of the petition, before submitting the case to the jury, for if it does not, there is properly no issue for the jury to decide and the cause should not be submitted.[17] It is therefore a question of law for the court to determine whether or not the evidence of the plaintiff tends to establish that the injury was caused by the negligence alleged in the petition [18] and if the evidence clearly shows that the negligence alleged was not the proximate cause of the injury,[19] or that the injury resulted from an independent intervening cause,[20] or if, from all the facts, the court is unable to determine whether or not the defendant's negligence caused the injury,[21] the court should withdraw the case from the jury. But if the evidence on the issue whether or not the negligence alleged was the cause of the injury, is conflicting, or if the question is one, in the opinion of the judge, that could be decided differently by different minds, then the cause on this issue should be submitted for the determination of the jury.[22]

§ 137. Court should determine demurrer to evidence.— It is the province of the court to determine whether the evidence

[17] Where there was a total absence of evidence that the defective condition of a spur track caused an injury, it was held error to submit to the jury the determination of the proximate cause thereof. Baltzer v. Chicago, etc., R. Co., 83 Wis. 459; 53 N. W. Rep. 885. See, also, 1 Thompson, on Neg. (2 ed.), § 162, p. 159.

[18] Cincinnati, etc., R. Co. v. Murray, 53 Ohio St. 570; 42 N. E. Rep. 596; 30 L. R. A. 508; O'Malley v. Missouri Pac. Ry. Co., 53 Am. & Eng. R. Cas. 280; Dowell v. Guthrie, 99 Mo. 653; Murray v. Railroad Co., 101 Mo. 236; Boland v. Railway Co., 36 Mo. 484.

[19] Louisville & Nashville R. Co. v. Johnson, 81 Fed. Rep. 679; 53 U. S. App. 381; 1 Thompson on Neg. (2 ed.), § 162, p. 159.

[20] South Side, etc., R. Co. v. Trich, 117 Pa. St. 390; Hoag v. Lake Shore, etc., R. Co., 85 Pa. St. 293.

[21] Safford v. Green Island, 74 Hun 306; 56 N. Y. S. R. 269; 26 N. Y. Supp. 669; 1 Thompson on Neg. (2 ed.), § 162, p. 159.

[22] Keane v. Waterford, 130 N. Y. 188; Dunn v. Cass Avenue, etc., R. Co., 21 Mo. App. 188.

of the plaintiff establishes a *prima facie* case against the defendant, or such a state of facts as to constitute any issue of fact sufficient to justify a submission of the cause to the jury.[23] Where the defendant demurs to the plaintiff's evidence, the court should apply the law to the facts and in making this application, the court has to decide what inferences are legitimate from the facts proven and whether or not the facts and legitimate inferences support the issues.[24] In passing on a demurrer, a court is not at liberty to make inferences of fact in favor of the defendant, to overthrow either presumptions of law or inferences of fact in favor of the plaintiff. But in passing upon a demurrer to the evidence, where the plaintiff's evidence excludes any fair inference warranting a recovery, the court should then sustain the demurrer and instruct the jury to find for the defendant.[25]

§ 138. **When undisputed evidence shows contributory negligence.**— When the evidence either for the plaintiff or for the defendant is such as to show that the plaintiff was guilty of contributory negligence, or when all the testimony in the case, with the most favorable inferences to be drawn therefrom, indicates the carelessness of the plaintiff, contributing to the injury, then the court should withdraw the issues from the jury.[26] If the facts introduced in evidence at the trial furnish conclusive proof of the plaintiff's negligence, contributing to the injury complained of, this presents a case where the conclusion of law attaches as a necessary legal inference from the facts established.[27] The plaintiff main-

[23] Nolan v. Shickle, 3 Mo. App. 300.

[24] Frick v. St. Louis, etc., R. Co., 75 Mo. 595.

[25] Morrow v. Pullman Palace Car Co., 98 Mo. App. 351; 73 S. W. Rep. 281; Holmes v. Leadbetter, 95 Mo. App. 419; 69 S. W. Rep. 23.

[26] Mynning v. Detroit, etc., R. Co., 67 Mich. 677.

[27] Steamship Belgenland v. Jansen, 114 U. S. 355.

taining his cause upon the sole theory of a wrongful act of the defendant producing the injury, he is clearly without a remedy when the facts proven establish an injury due to his own wrongful act. But where the evidence of the plaintiff's negligence is conflicting, or if the facts showing his negligence are undisputed and reasonable men would differ as to the wrongful character of his acts, this would present such an issue of fact as would make it proper to submit the question of plaintiff's negligence to the jury.[28]

§ 139. **Injury due to neglect of coemployee.**— In the absence of a statute changing the common law rule that an employee assumes the risk of injury from the negligence of his coemployees, by virtue of his contract of employment, where the evidence shows, without dispute, that the relation of coemployee exists between the plaintiff and the employee causing the injury, a peremptory instruction should be given for the defendant.[29] This is the general rule in all States where the common law rule of nonliability for the negligence of coemployees has not been abrogated by special statute.[30]

[28] Dougherty v. Missouri Pacific Ry. Co., 97 Mo. 647; Nugent v. Boston, etc., R. Co., 80 Me. 62.

[29] Priestley v. Fowler, 3 M. & W. 1; Neubauer v. New York, etc., R. Co., 101 N. Y. 607; 4 N. E. Rep. 125; Hanley v. Grand Trunk R. Co., 62 N. H. 274; Hard v. Vermont, etc., R. Co., 32 Vt. 473; Crispin v. Babbitt, 81 N. Y. 516; Duffy v. Kivilin, 98 Ill. App. 483; 63 N. E. Rep. 503; MacCarthy v. Whitcomb, 110 Wis. 113; 85 N. W. Rep. 707; Ashmore v. Charleston, etc., Co., 99 Ill. App. 262; Shaw v. Bambrick-Bates Co. (Mo. App.), 77 S. W. Rep. 96.

[30] Alabama, etc., R. Co. v. Carroll, 97 Ala. 126; 11 So. Rep. 803; St. Louis, etc., R. Co. v. Triplett, 54 Ark. 289; 15 S. W. Rep. 831; 48 Am. & Eng. R. Cas. 283; Long v. Coronado R. Co., 96 Cal. 269; 31 Pac. Rep. 170; Congrave v. Southern Pac. R. Co., 88 Cal. 360; 26 Pac. Rep. 175; 48 Am. & Eng. R. Cas. 337; Summerhays v. Kansas Pac. R. Co., 2 Colo. 484; 20 Am. Ry. Rep. 359; Herbert v. Northern Pac. R. Co., 3 Dak. 38; 13 N. W. Rep. 349; 8 Am. & Eng. R. Cas. 85; Stafford v. Chicago, etc., R. Co., 114 Ill. 244; 2 N. E. Rep. 185; Justice v. Pennsylvania R. Co., 130 Ind. 321; 30 N. E. Rep. 303; 53

Of course it would not be the negligence of the employee, but of the employer, himself, if incompetent employees had been knowingly engaged, and this rule would not obtain, but where due diligence has been used in the employment of the employee causing the injury and the accident results primarily from the negligence of such employee, there is no liability on the employer's part, for the good and sufficient reason that the employer is only responsible for the wrongful acts of his agents, or those of himself, and as between common employees, no one of them, as between himself and his coequals, is the employer's agent and he would not be liable to any one of them for injuries due to the acts or omissions of any other.[31]

§ 140. **Selecting more dangerous way to perform duty.**— There are numerous railroad accident cases, for injuries to

Am. & Eng. R. Cas. 604; Kansas Pac. R. Co. v. Salmon, 11 Kansas 83; McLeod v. Ginther, 80 Ky. 399; 8 Am. & Eng. R. Cas. 162; Cassidy v. Maine Cent. R. Co., 76 Me. 488; 17 Am. & Eng. R. Cas. 519; Cumberland, etc., I. R. Co. v. Scally, 27 Md. 589; Fitzgerald v. Boston, etc., R. Co., 156 Mass. 293; 31 N. E. Rep. 7; Hunn v. Michigan, etc., R. Co., 78 Mich. 513; 44 N. W. Rep. 502; 41 Am. & Eng. R. Cas. 452; 7 L. R. A. 500; Louisville, etc., R. Co. v. Petty, 67 Miss. 255; 7 So. Rep. 351; 41 Am. & Eng. R. Cas. 441; McDermott v. Pacific R. Co., 30 Mo. 115; Dixon v. Chicago, etc., R. Co., 109 Mo. 413; 19 S. W. Rep. 412; 53 Am. & Eng. R. Cas. 589; Harrison v. Central R. Co., 31 N. J. L. 293; Lutz v. Atlantic, etc., R. Co. (N. Mex.), 30 Pac. Rep. 912; 53 Am. & Eng. R. Cas. 478; Vick v. New York, etc., R. Co., 95 N. Y. 267; 17 Am. & Eng. R. Cas. 609; Donnely v. Brooklyn City R. Co., 109 N. Y. 16; 15 N. E. Rep. 733; 34 Am. & Eng. R. Cas. 103; Hobbs v. Atlantic, etc., R. Co., 107 N. Car. 1; 12 S. E. Rep. 124; Little Miami R. Co. v. Fitzpatrick, 42 Ohio St. 318; Mensch v. Pennsylvania R. Co., 150 Pa. St. 598; 25 Atl. Rep. 31; 53 Am. & Eng. R. Cas. 198; Gulf, etc., R. Co. v. Blohn, 73 Texas 637; 11 S. W. Rep. 867; 4 L. R. A. 764; Dwyer v. American Exp. Co., 82 Wis. 307; 52 N. W. Rep. 304; 53 Am. & Eng. R. Cas. 612.

[31] Ohio, etc., R. Co. v. Hammersley, 28 Ind. 371; Chicago, etc., R. Co. v. Hoyt, 16 Ill. App. 237; Chicago, etc., R. Co. v. Ross, 112 U. S. 377.

employees where the courts hold that it was the duty of the trial court to take the case from the jury, because the evidence showed that the employee had voluntarily selected the more dangerous of two or more ways to perform his work.[32]

In a recent Missouri case,[33] the plaintiff, a switchman, in a railroad yard, was engaged in coupling two freight cars, with drawheads of unequal height, with a straight link, instead of a crooked one, as should have been provided. His hand was crushed, as a result of the cars coming together, while making the coupling. He admitted that he could have propped up the lower drawhead and made the coupling without holding it in place with his hand, but did not have time to do this, as he thought. His selection of the more dangerous way to perform his duty was held to prevent his recovery, as a matter of law.

§ 141. **Jury cannot consider special standards for control of business.**— The proper standard which the legal experience of the ages has found best adapted as the test for determining the actionable negligence of an employer for a failure to discharge his implied duty owing to his employee, by which an injury is sustained, is that of ordinary or customary use of the business wherein the accident occurred. Any higher standard than this should not be placed upon the employer and no different test should be submitted to the trial jury to judge of his acts in a given case.

As observed by the Supreme Court of Pennsylvania, in a leading case: "No man is held to a higher degree of skill

[32] Nor is this rule confined to railroad cases only, but applies to other vocations as well. See White, Per. Inj. in Mines, § 138, p. 146; 1 Bailey, Mas. Liab. Inj. Serv., §§ 1121, 1123; Hulitt v. Railroad, 67 Mo. 241; Weber v. Kansas City, etc., R. Co., 100 Mo. 201; Buesching v. Gas Light Co., 73 Mo. 219; Yancey v. Railroad Co., 93 Mo. 433; Gribben v. Yellow Aster, etc., M. Co., 142 Cal. 248; 75 Pac. Rep. 839.

[33] Moore v. Kansas City, etc., R. Co., 146 Mo. 580; 48 S. W. Rep. 487.

than the fair average of his trade or profession and the standard of due care is the conduct of the average prudent man. The test of negligence, as to employers, is the same; and, however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way, for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set up a standard which shall, in effect, dictate the customs or control the business of the community." [34] Upon grounds of sound policy, this is a decision that should be followed, for it is based upon the most salutary legal principles.

§ 142. **When court should decide necessity for rule.**— In the absence of evidence of the general or customary use or adoption by other railroads of a given rule or method of business, or of the necessity of such a rule for the reasonable protection of its employees by a railroad company, it is generally held to be improper to submit the issue of the necessity of such rule to a jury, but the court should decide, as matter

[34] Titus v. Railway Co., 136 Pa. St. 618; 20 Atl. Rep. 517; Northern Cent. Ry. Co. v. Husson, 101 Pa. St. 1. See, also, Washington, etc., Ry. Co. v. McDade, 135 U. S. 554; Louisville, etc., Ry. Co. v. Allen, 78 Ala. 494.

The absurd consequences that would result from any other test than that of ordinary use, is thus presented by Judge Bailey: "If the party, according to his peculiar notion, should adopt a device not in common use, and injury should flow therefrom, he would be embarrassed in defending, upon the ground that he acted thus in the exercise of ordinary care." Bailey, Mas. Liab. Inj. Serv., p. 30. See, also, Tuttle v. Ry. Co., 122 U. S. 194; Randall v. Railway Co., 109 U. S. 482.

In the absence of proof by experts or others that a given method of railroading is safe or unsafe, it is error to let a jury speculate about it by a verdict. Herbert v. Delaware, etc., R. Co., 41 N. Y. S. R. 860; 62 Hun 618; 136 N. Y. 655; 32 N. E. Rep. 1016; 49 N. Y. S. R. 916; Larow v. New York, etc., R. Co., 61 Hun (N. Y.) 11.

of law, that the absence of such a rule is not a negligent act on the employer's part.

Where the rules of a company required car repairers to place a flag at the end of the disabled car and to inform themselves of the rules of the company and pursue the safe course when in doubt, it was held in New York that such company was not negligent in failing to provide additional rules for the information and government of its car repairers.[35] In the absence of evidence of the necessity of such a rule, or its adoption by railroads generally, it was held to be error, to submit to a jury the necessity of a rule preventing a switch engine from entering a switch when another car or engine was upon said switch, without notice to the crew of such engine or car;[36] it was also held to be error to submit to a jury the necessity of adopting a given method or rule as to movement of engines in railroad yards;[37] to submit the necessity of requiring lights in yards, on stationary cars, to prevent collisions,[38] or the necessity of rules preventing the improper opening of switches, by employees,[39] in the absence of evidence of the general adoption or necessity of such a rule.

§ 143. **Reasonableness of rule a judicial determination.—**

[35] Corcoran v. Delaware, etc., R. Co., 126 N. Y. 673; 27 N. E. Rep. 1022; 28 N. Y. S. R. 251; 4 Silv. App. 483.

[36] Larow v. New York, etc., R. Co., 40 N. Y. S. R. 26; 61 Hun 11; 15 N. Y. Supp. 384; Abel v. Delaware, etc., R. Co., 103 N. Y. 581; 4 N. Y. S. R. 269; Ford v. Lake Shore, etc., R. Co., 36 N. Y. S. R. 494; Doing v. New York, etc., R. Co., 73 Hun 270; 26 N. Y. Supp. 405; Berrigan v. New York, etc., R. Co., 131 N. Y. 582.

[37] Herbert v. Delaware, etc., R. Co., 136 N. Y. 655; 32 N. E. Rep. 1016; 49 N. Y. S. R. 916; 41 N. Y. S. R. 860; 62 Hun 618; 16 N. Y. Supp. 561.

[38] Shepard v. New York, etc., R. Co., 44 N. Y. S. R. 816; 63 Hun 634; 18 N. Y. Supp. 665; Houghkirk v. Delaware, etc., R. Co., 92 N. Y. 220.

[39] Burke v. Syracuse, etc., R. Co., 23 N. Y. Supp. 458; 69 Hun 21.

The issue, when raised in the trial of a personal injury action, of whether or not a duly promulgated rule of the employer is a reasonable rule, under all the circumstances, is so far dependent upon a correct understanding of the law and the legal rules by which such issues are determined, as to make it an issue for the court.[40] When judged according to legal precedents, the employer is not harassed by the conflicting decisions of juries as to whether his rules are to be enforced or not, nor is the employee embarrassed by the dubious character of the holding as to what his duties should be, but such rules may be reduced to a certainty, which is a fact cited by one eminent authority, to show why such issues should be determined by the court.[41]

In Illinois,[42] New York,[43] Iowa [44] and Tennessee,[45] the reasonableness of a given rule is held to be a question for the court; where the facts are undisputed it is held to be for the court, in Massachusetts; [46] it is held to be a jury question, in New Jersey [47] and Georgia [48] and a mixed question of law and fact in Wisconsin [49] and Michigan.[50]

§ 144. **Open, obvious risks assumed as matter of law.**— Where the undisputed evidence shows that the injury was caused by a risk of the service not resulting from the employer's negligence, but one that was perfectly open and obvious to the employee, then the employer has a right, in

[40] Chicago, etc., R. Co. v. McLarren, 84 Ill. 110; Wolsey v. Railroad Co., 33 Ohio St. 234.

[41] Bailey, Mas. Liab. Inj. Serv., p. 75.

[42] Chicago, etc., R. Co. v. McLarren, 84 Ill. 110.

[43] Vedder v. Fellows, 20 N. Y. 126.

[44] Hoffbauer v. Railway Co., 52 Iowa 342.

[45] Louisville, etc., R. Co. v. Fleming, 14 Lea. (Tenn.) 128.

[46] Old Colony R. Co. v. Tripp, 147 Mass. 35; 17 N. E. Rep. 89.

[47] State v. Overton, 24 N. J. Law 435.

[48] Prather v. Railway Co., 80 Ga. 427; 9 S. E. Rep. 530.

[49] Bass v. Ry. Co., 36 Wis. 459.

[50] Day v. Owen, 5 Mich. 520.

law, to conclude that he would notice that which was apparent to all men and if the employee is injured from coming in contact with a dangerous appliance or place that any one could perceive, by due perception or observation, there is no liability on the employer's part for such an injury.[51]

§ 145. **When safety of place a question of law.**— When the undisputed evidence, in an action for an injury due to working in an alleged unsafe place, shows that the place of work was such as was reasonably safe, or such as was customarily furnished by reasonably prudent men in the same business,[52]

Whether a rule adopted by a railroad company for the protection of its employees is a reasonable regulation, or not, is a question of law for the court and it should not be submitted to the jury. Memphis, etc., R. Co. v. Graham, 94 Ala. 545; 53 Am. & Eng. R. Cas. 396; 10 So. Rep. 283; Quick v. Indianapolis, etc., R. Co., 130 Ill. 334; 22 N. E. Rep. 709; Southerland v. Troy, etc., R. Co., 28 N. Y. S. R. 201; 54 Hun 639; 125 N. Y. 737.

[51] Nugent v. Milling Co., 131 Mo. 241; 33 S. W. Rep. 428; Glover v. Bolt & Nut Co., 153 Mo. 327; 55 S. W. Rep. 88; Demers v. Marshall, 172 Mass. 548; 52 N. E. Rep. 1066; 59 N. E. Rep. 454; Levey v. Bigelow, 6 Ind. App. 677; 34 N. E. Rep. 128; Gorman v. Des Moines Brick Co., 99 Iowa 257; 68 N. W. Rep. 674; Labatt, Mas. & Serv., §§ 339, 442; Richmond L. & R. Co. v. Weems, 12 So. Rep. 186; Gofrey v. Inman Co., 31 Atl. Rep. 6; Cahill v. Hilton, 13 N. E. Rep. 339; Stall v. Hoopes, 14 Atl. Rep. 658; Hoffman v. Foundry Co., 51 Pac. Rep. 385; Aiken v. Smith, 54 Fed. Rep. 896; Fleming v. Bushnell, 57 N. Y. Supp. 230; Cushman v. Cushman, 61 N. E. Rep. 262; Killilea v. Horseshoe Co., 74 Pac. Rep. 157; Russell v. Tillottson, 4 N. E. Rep. 231; Downey v. Sawyer, 32 N. E. Rep. 654; Smith v. Box Co., 92 S. W. Rep. 394.

Where an employee is injured by a defect in an appliance about which he worked several months, without complaint, he cannot recover. Skipp v. Eastern Co. Ry. Co., 9 Ex. 223; 23 L. J. Ex. 23; 3 C. L. R. 185.

Where the evidence shows that the injury was due to a risk of the business, the case should not be submitted to the jury. Steffen v. Chicago, etc., R. Co., 46 Wis. 259; 21 Am. Ry. Rep. 385; Ballou v. Chicago & N. W. Ry. Co., 54 Wis. 257; 41 Am. Rep. 31; 5 Am. & Eng. R. Cas. 480.

[52] Nowakowski v. Detroit, etc., Co., 89 N. W. Rep. 956; 9 Det. Leg. N. 25; White, Per. Inj. in Mines and cases cited, § 145, p. 150.

or that the plaintiff, at the time of his injury, was engaged in making an unsafe place safe, or in changing the place of work, by the very nature of his work,[53] and that the continuance of his work occasioned the injury, it is the duty of the court to take the case from the jury. An illustration of this rule of law is the case where the employee is engaged in excavating a bank of earth or gravel and his work of excavation itself breaks up the particles of earth or gravel and sets in force the law of gravitation. In such case there can be no recovery.[54]

§ 146. **When competency of employee a question of law.**— Where the evidence of the precautions taken by an employer in the employment of his employees is all one way, or is not disputed, the court should give such evidence the same legal effect as that establishing any other fact and if the evidence is such as to show a total absence of negligence on the employer's part, in the employment of the alleged incompetent employee, the jury should be so instructed. In a Michigan case, an employer was held to have exercised due care in the employment of a brakeman, where, before employment, he made inquiry of one competent to judge of the applicant's knowledge and experience and after his employment he had him watched by a competent engineer and instructed, if he required instruction.[55]

[53] Watson v. Coal & Coke Co., 52 Mo. App. 366; Olsen v. Maple Grove, etc., M. Co. (Iowa), 87 N. W. Rep. 736; Moon Anchor Con., etc., Co. v. Hopkins, 111 Fed. Rep. 298; 49 C. C. A. 347.

[54] Bradley v. Chicago, etc., R. Co., 138 Mo. 293; 39 S. W. Rep. 763; Brown v. Chattanooga Co., 101 Tenn. 252; 47 S. W. Rep. 415; Olsen v. McMullen, 34 Minn. 95; Aldrich v. Furnace Co., 78 Mo. 559; Peterson v. Rushford, 41 Minn. 290; Swanson v. Great Northern R. Co., 68 Minn. 184; 70 N. W. Rep. 978; Hughes v. Malden, etc., R. Co., 168 Mass. 396.

[55] Walkowski v. Penokee, etc., Con. Mines, 115 Mich. 629; 73 N. W. Rep. 895; 41 L. R. A. 33; Acme Coal Min. Co. v. McIver, 5 Colo. 267.

§ 147. **When injury from collision a question for the court.** — Under the rule of demonstrative evidence, heretofore discussed in a separate chapter,[56] it is frequently a question for the court to tell the jury that a derailment or collision is or is not negligence, as matter of law, according to the relation of the party plaintiff toward the defendant and the duty springing from that relation.

In an injury to an employee from a collision, the duty may or may not, devolve upon the court to decide the question of the defendant's negligence or want of responsibility for the collision, according to the cause thereof. In a Washington case,[57] it was held to be a question properly for the court, where the evidence showed that plaintiff and others were engaged in surfacing the defendant's roadbed and while being conducted to their place of work on a gravel train, a collision with a wild train occurred, which resulted in injury to the plaintiff. The gravel train was on time and the wild train had orders to flag it, but instead of the flagman going three-quarters of a mile ahead to flag it, as the rules required, he was only four hundred feet ahead and could not see the gravel train until it was upon them.

§ 148. **Where evidence disputes physical facts.**— Although there may be evidence that would ordinarily entitle a plaintiff in a personal injury action to have his cause submitted to a jury, upon the different issues in the case, tending to establish the negligence of the defendant and its accountability for the injury sued for, where such evidence is directly in

The fact that on some occasions an alleged incompetent employee might have been negligent, would not charge an employer, where no injury had resulted from said acts of negligence and there was nothing to show notice thereof, on the employer's part. Wabash & C. R. Co. v. McDaniels, 107 U. S. 454; 27 L. Ed. 905; Molaskee v. Ohio, etc., Co., 86 Wis. 22; Kansas & Texas Co. v. Brownlie, 60 Ark. 582.

[56] See Chapter VI.

[57] Northern Pacific R. Co. v. O'Brien, 1 Wash. 599; 21 Pac. Rep. 32.

conflict with physical facts, which preclude any liability on the defendant's part, some courts hold that it is the duty of the trial court to take the case from the jury.

In a New York case,[58] the plaintiff was injured by the falling of a scaffold, on which he was at work, just as an engine passed. He testified that the engine struck the scaffold and caused it to fall, but other witnesses had worked on the same scaffold when the same engine passed, without striking it and it was held, in the absence of proof of the width of the engine or tender and the distance of such scaffold from the track, it was error to submit the issues to the jury.

In a Missouri case,[59] where a plaintiff, in a crossing accident, testified that her vision was good and although there were no obstructions, that she could not see an approaching train, while looking in that direction, the Supreme Court held that such evidence should not be held to make a *prima facie* case on her part because inconsistent with the physical facts, and in another case,[60] in the same State, where the explanation by plaintiff of an injury by having his hand crushed by visible rollers, was inconsistent with the physical facts in the case, the court disregarded this testimony and, speaking through Robinson, J., the Supreme Court said: "The statements by a witness of the existence or nonexistence, the occurrence or nonoccurrence of a given thing as a fact that contravenes all laws of mechanics and philosophy that are so generally recognized that courts cannot ignore them, cannot be said to be matters of fact that must go to a jury for their consideration as to their credibility, on the

[58] Hayden v. Brooklyn Electric R. Co., 44 N. Y. S. R. 377; 17 N. Y. Supp. 352, distinguishing German v. Suburban Tr. Co., 37 N. Y. S. R. 360.

[59] Macfarlane, J., in Kelsay v. Railroad, 129 Mo. 376; 30 S. W. Rep. 239.

[60] Nugent v. Milling Co., 131 Mo. 253; 33 S. W. Rep. 428.

proposition that the jury are the triers of all facts in a suit at law."

§ 149. **Questions of variance for the court.**— As it is the province of the court to determine whether, in the first instance, there is any evidence sufficient to warrant the submission of any issues of fact to the jury, for their determination,[61] the determination of the legal question whether or not the evidence adduced by the plaintiff tends to establish, or is sufficient, as matter of law, to establish the particular grounds of negligence alleged, is also an issue properly for the court. It is therefore an issue for the court to determine whether or not there is a fatal variance between the pleading and the proof.[62]

[61] Hillman v. Gray's Point Ter. Ry. Co., 99 Mo. App. 271; 73 S. W. Rep. 220.

[62] Birch v. Benton, 26 Mo. 153; Roundtree v. Charleston, etc., R. Co., 72 S. C. 474; 52 S. E. Rep. 231.

CHAPTER VIII.

JURY ISSUES IN RAILROAD ACCIDENTS.

§ 150. Should pass upon disputed issues of fact.
151. Weight of evidence determined by.
152. Question of defendant's negligence.
153. Specific issues in determining defendant's negligence.
154. Nature and cause of injury.
155. As to reasonable safety of appliances.
156. Reasonable safety of place.
157. When plaintiff's negligence a jury issue.
158. Whether injury due to negligence of vice-principal.
159. Capacity in which vice-principal acted.
160. Issue as to agent's competency.
161. Issues as to who are coemployees.
162. Assumption of risk jury issue, when.
163. Promulgation and enforcement of rule.
164. Discretion in assessing damages.
165. Conclusiveness of verdict.

§ 150. **Should pass upon disputed issues of fact.**— In the trial of personal injury actions, whenever the evidence is conflicting upon any of the material issues, to be determined in connection with the liability of the defendant, then such issues should be submitted to the jury, as the triers of the facts, where the case is tried with a jury.[1]

Wherever the material issues, upon which the liability of the defendant rests, are affirmed and disaffirmed, by disputed

[1] Tennessee, etc., Co. v. Currier, 108 Fed. Rep. 19; 47 C. C. A. 161; Roddy v. Missouri Pac. R. Co., 104 Mo. 234; 15 S. W. Rep. 1112; 12 L. R. A. 746; 24 Am. St. Rep. 333; Miller v. Chicago & A. R. Co., 62 Mo. App. 252; Cook v. Hannibal, etc., R. Co., 63 Mo. 397; Schultz v. Missouri Pac. R. Co., 32 Mo. App. 438; Bender v. St. Louis, etc., R. Co., 137 Mo. 240; 37 S. W. Rep. 132; Baird v. Citizens Ry. Co., 146 Mo. 265; 48 S. W. Rep. 78.

evidence, then it is ordinarily held to be error to refuse to submit the determination of such issues to the jury, since it is their peculiar province to settle all such disputed issues of fact.[2] For this reason all disputed questions of fact are submitted to the jury for determination and their finding thereon, if in accord with the law, as given to them by the court, is generally held to be conclusive upon the trial and appellate courts,[3] subject to the supervisory power of the former to set aside such verdicts as may be against the weight of the evidence.[4]

§ 151. **Weight of evidence determined by.**— Where the testimony of witnesses is conflicting as to the cause of a given injury, and the issue is submitted to the jury for their determination, as to whether or not the negligence of the defendant occasioned the injury, or some cause for which it would not be responsible, the weight of the testimony is usually held to be for the determination of the jury.[5]

§ 152. **Question of defendant's negligence.**— Where the evidence of the acts on the defendant's part, alleged to constitute the wrongful act or omission sued for, is such as to admit of more than one construction and reasonable minds would differ as to whether or not such acts would constitute negligence, the decision of the issue ought to be submitted to

[2] Annas v. Milwaukee, etc., R. Co., 67 Wis. 46; Wood v. Georgia, etc., R. Co., 84 Ga. 363; 10 S. E. Rep. 967; Central, etc., R. Co. v. Bateman, 75 Fed. Rep. 1021.

[3] Coudy v. St. Louis, etc., R. Co., 85 Mo. 79; Hunt v. Missouri R. Co., 14 Mo. App. 160; Roddy v. Missouri Pac. R. Co., 104 Mo. 234; 15 S. W. Rep. 1112; 12 L. R. A. 746.

[4] Fitzjohn v. St. Louis Tr. Co., 183 Mo. 74; 81 S. W. Rep. 907; Payne v. Chicago, etc., R. Co., 129 Mo. 405; 31 S. W. Rep. 885; Roman v. Boston, etc., Co., 87 Mo. App. 186.

[5] McDade v. Washington, etc., R. Co., 5 Mackey (D. C.), 144; 26 Am. & Eng. R. Cas. 325; Cleveland, etc., R. Co. v. Wynant, 134 Ind. 681; 55 Am. & Eng. R. Cas. 80; 34 N. E. Rep. 569.

the jury for their verdict.[6] This is the general rule wherever the conclusion from the facts shown by the parties to the cause is left in doubt, or whenever it does not clearly appear, from the evidence, that this or that act did or did not constitute actionable negligence.

It is not for the court to charge that this or that state of facts raises an inference of negligence, against defendant, but it is an issue for the jury to determine whether the circumstances all taken together show such an unusual occurrence as that negligence could be inferred therefrom, in the face of the legal presumption that the employer had furnishd proper tools and appliances and competent employees.[7]

The existence of negligence is a mixed question of law and fact and depends upon the proper solution of the issues, whether a particular act has been performed or omitted, and whether the performance or omission to perform such act was the violation of legal duty. The first question is purely one of fact, for the jury, while the second is one of law, for the court.[8]

[6] Leduc v. Northern Pac. R. Co. (Minn.), 100 N. W. Rep. 108; Cecil v. American Steel Co., 129 Fed. Rep. 542; Sloss-Sheffield Co. v. Mobley, 139 Ala. 425; 36 So. Rep. 181.

[7] Palmer Brick Co. v. Chenall (Ga.), 47 S. E. Rep. 329.

[8] Baltimore & Ohio R. Co. v. McKenzie, 81 Va. 71; 24 Am. & Eng. R. Cas. 395; Chicago & Alton R. Co. v. Dillon, 17 Ill. App. 355.

Where the facts are disputed, or, if not disputed, if the existence of negligence is an inference which, as mere matter of discretion and judgment, may, or may not, be drawn from them, the issue should be submitted to the jury. Alabama, etc., R. Co. v. Jones, 71 Ala. 487; 15 Am. & Eng. R. Cas. 549; Wilson v. Louisville & N. R. Co., 85 Ala. 269; 4 So. Rep. 701; Nolan v. New York, etc., R. Co., 53 Conn. 461; 4 Atl. Rep. 106; 25 Am. & Eng. R. Cas. 342; Chicago, etc., R. Co. v. Ostrander, 116 Ind. 259; 32 Am. & Eng. R. Cas. 361; 15 N. E. Rep. 227; Greenleaf v. Illinois C. R. Co., 29 Iowa 14; Needham v. Louisville & N. R. Co., 85 Ky. 423; 3 S. W. Rep. 797; Newport, etc., Co. v. Dentzel, 91 Ky. 42; 14 S. W. Rep. 958; Lake Shore, etc., R. Co. v. Miller, 25 Mich. 274; 5 Am. Ry. Rep. 478; Dunn v. Saeboard, etc., R. Co., 78 Va. 645; 16 Am. & Eng. R. Cas. 363; Nash v. Richmond,

§ 153. **Same — Specific issues determining defendant's negligence.**— Upon the ultimate issue of the defendant's negligence, or freedom from blame for the consequences of a given accident, resulting in a personal injury, the following have been held proper issues to submit to the determination of the jury, i. e., whether particular means or measures employed to prevent the accident, were appropriate for the purpose;[9] whether it was negligence for the defendant to back a locomotive at night, across a public street, without a light;[10] whether a plan adopted for the movement of a train was a proper plan for the purpose;[11] whether there were lights, and, if so, if they were in a proper place to be seen, after night;[12] whether a platform was kept in proper repair to prevent injury to passengers;[13] to determine whether or not due care was used in the stopping of a train;[14] whether or not an employee causing the injury, acted within the scope of his authority, in so doing;[15] whether an act was intentionally or willfully and maliciously done;[16] whether the excessive speed of a train was the proximate cause of an injury;[17] whether the plaintiff was a passenger or a trespasser;[18] whether an appliance is a proper one;[19] whether it

etc., R. Co., 82 Va. 55; Pool v. Chicago, etc., R. Co., 56 Wis. 227; 8 Am. & Eng. R. Cas. 360; 14 N. W. Rep. 46; Hogan v. Chicago, etc., R. Co., 59 Wis. 139; 15 Am. & Eng. R. Cas. 439; 17 N. W. Rep. 632.

[9] Smith v. Savannah, etc., R. Co., 84 Ga. 698; 42 Am. & Eng. R. Cas. 105; 11 S. E. Rep. 455.

[10] Chicago, etc., R. Co. v. Stube, 15 Ill. App. 39.

[11] Illinois Central R. Co. v. Neer, 31 Ill. App. 126.

[12] Powers v. Boston, 154 Mass. 60; 27 N. E. Rep. 995.

[13] Bateman v. New York, etc., R. Co., 47 Hun 429; 14 N. Y. S. R. 454.

[14] Clark v. Wilmington, etc., R. Co., 109 N. Car. 430; 14 S. E. Rep. 43; 48 Am. & Eng. R. Cas. 546.

[15] Redding v. South Carolina R. Co., 3 So. Car. 1.

[16] Rounds v. Delaware, etc., R. Co., 64 N. Y. 129; 21 Am. Rep. 597.

[17] Tobin v. Missouri Pac. R. Co., 18 S. W. Rep. 996.

[18] Meyer v. Second Ave. R. Co., 8 Bosw. (N. Y.) 305.

[19] Richmond, etc., R. Co. v. Weems, 97 Ala. 270; 12 So. Rep. 186.

had been duly and properly inspected;[20] these are all held proper issues for the jury, as well as the ultimate fact whether or not the defendant was negligent, from all the facts and circumstances in evidence.[21]

§ 154. Nature and cause of injury.— The nature and cause of the injury to the plaintiff, where the evidence thereof is not all one way, or undisputed, and the bearing and effect of the negligence of the defendant, if any, and whether or not it was the direct cause of the injury, are, primarily, jury issues.[22]

When the facts as to the exact cause of the injury are in dispute and the court could not say, as matter of law, that the negligence of the plaintiff or that of defendant was responsible for the injury, the question of the proximate cause thereof is properly submitted to the jury.[23] And where the evidence of plaintiff furnishes one cause for the injury, due to the negligence of defendant, and the defendant's evidence shows another cause, for which it is not responsible, this will not justify a peremptory instruction for the defendant, under

[20] Moon v. Northern Pac. R. Co., 46 Minn. 106; 48 N. W. Rep. 679; 48 Am. & Eng. R. Cas. 195.

[21] Paducah, etc., R. Co. v. Letcher (Ky.), 12 Am. & Eng. R. Cas. 61. Where the evidence shows that a turntable was too small to use conveniently to turn large engines, the question of the defendant's negligence in furnishing an unsafe track or turntable, as well as plaintiff's negligence in using same, are for the jury. Lake Shore, etc., R. Co. v. Fitzpatrick, 31 Ohio St. 479.

[22] Franklin v. Missouri, K. & T. R. Co., 97 Mo. App. 473; 71 S. W. Rep. 540; Schultz v. Chicago, etc., R. Co. (Wis.), 92 N. W. Rep. 377; Roberts v. Port Blakely, etc., Co., 30 Wash. 25; 70 Pac. Rep. 111; Allison v. Tap Rock, etc., Co., 78 N. Y. S. 69; 75 App. Div. 267; Olson v. Boston, etc., R. Co., 71 N. H. 427; 52 Atl. Rep. 1097; Parsons v. Hammond Co., 96 Mo. App. 372; 70 S. W. Rep. 519; Sinclair, etc., Co. v. Waddle, 200 Ill. 17; 65 N. E. Rep. 437; Chenall v. Palmer Brick Co., 117 Ga. 106; 43 S. E. Rep. 443; Houston, etc., R. Co. v. Dial, 135 Ala. 168; 33 So. Rep. 268.

[23] Gila Valley, etc., R. Co. v. Lyon (Ariz.), 71 Pac. Rep. 957.

the rule that where the undisputed evidence shows a case where the injury may have resulted from one of two or more causes, for one of which the defendant would be liable and for the others not, there can be no recovery, as the testimony, in the case referred to, would present a mere conflict in the evidence and it would remain a jury question as to which of the causes named occasioned the injury.[24]

§ 155. **As to reasonable safety of appliances.**— Whenever there is substantial evidence of a dangerous or defective appliance, or tool, causing an injury to an employee, it is always a jury question, not only as to the cause of the injury, but also as to the dangerous or defective condition of the appliance.[25]

The dangerous or defective condition of the appliance may always be shown, either by direct or circumstantial evidence, or inferred from other facts given in evidence; and, when once it is shown, by substantial testimony, the weight and sufficiency of such evidence is for the jury.[26]

§ 156. **Reasonable safety of place.**— In an action for an injury from a failure to provide a reasonably safe place in which to work, the issue is for the jury, where the evidence is conflicting as to the reasonable safety of the place where the work was being done.[27]

But if the facts in regard to the place where the employee was injured are not in conflict, then there would be no issue in regard to the place of work, to submit to the jury,

[24] Peters v. McKay & Co., 136 Cal. 73; 68 Pac. Rep. 478; Donk Bros., etc., Co. v. Peters, 95 Ill. App. 193; 61 N. E. Rep. 830.

[25] Robbins v. Big Circle Co. (Mo.), 79 S. W. Rep. 480.

[26] Towle v. Stimson Co. (Wash.), 74 Pac. Rep. 471.

[27] Hamilton v. Mendota, etc., Co. (Iowa), 94 N. W. Rep. 282.

and the court, as matter of law, should pass upon the reasonable safety of the place of work.[28]

§ 157. **When plaintiff's negligence a jury issue.**— Unless the plaintiff's contributory negligence is shown by undisputed evidence, or is so clearly established that reasonable minds would not differ as to the conclusion to be drawn therefrom, the question should be submitted to the jury, as an issue of fact.[29] If, from the evidence of his negligence, it cannot be said, without doubt, that his own negligence contributed to produce the plaintiff's injury, but reasonable men would be inclined to differ as to whether the injury was caused by the plaintiff's negligence or that of defendant, then the court should submit this issue to the jury.

But if the facts are not disputed and all reasonable men would reach the same conclusion, then the court should decide the question as a matter of law and withhold the case from the jury where the facts show that plaintiff's injury was due to his own neglect.[30]

§ 158. **Whether injury due to negligence of vice-principal.** —Where the ground of recovery is the negligent order or omission of a vice-principal, or other representative of the employer and the evidence of his authority and supervision as well as of his neglect is conflicting, the issue as to the

[28] Wendall v. Chicago & Alton R. Co., 100 Mo. App. 556; 75 S. W. Rep. 689.

[29] Olsen v. Cook Inlet, etc., Co., 121 Fed. Rep. 726; 58 C. C. A. 146; Hempstock v. Lackawanna, etc., Co., 90 N. Y. S. 663; 98 App. Div. 332; Hamilton v. Mendota, etc., Co. (Iowa), 94 N. W. Rep. 282; Jancko v. West Coast, etc., Co. (Wash.), 76 Pac. Rep. 78; Currans v. Seattle & S. F. Ry. Co., 76 Pac. Rep. 87; Curtis v. McNair, 173 Mo. 270; 73 S. W. Rep. 167.

[30] Neal v. Railroad Co., 57 Minn. 365; 59 N. W. Rep. 312; Illinois, etc., Co. v. Coffee, 205 Ill. 206; 63 N. E. Rep. 751.

responsibility of the employer, because of his act or omission, is a jury issue.[31]

Where the ground of recovery is a negligent act of the vice-principal, done in his capacity of a workman, whether or not the issue should be submitted to the jury, depends upon the doctrine of the jurisdiction where the cause of action is tried. In a recent Texas case, the issue was held to be properly submitted to the jury where the facts were disputed,[32] but in Missouri, and other States where the dual capacity doctrine obtains, if the evidence shows that the injury was due to an act of the vice-principal, as distinguished from an order made while acting within the scope of his capacity as a representative of the employer, and the act is performed while acting as a coemployee of the injured employee, there is no resulting liability and the cause should not be submitted to the jury.[33]

§ 159. **Capacity in which vice-principal acted.**— Where the evidence is conflicting as to the capacity of an alleged vice-

[31] Foster v. Missouri Pac. R. Co., 115 Mo. 165; 21 S. W. Rep. 916; Schroeder v. Chicago, etc., R. Co., 108 Mo. 322; 18 S. W. Rep. 1094; 18 L. R. A. 827; York v. Kansas City, etc., R. Co., 117 Mo. 405; 22 S. W. Rep. 1081; Dayharsh v. Hannibal, etc., R. Co., 103 Mo. 570; 15 S. W. Rep. 554; 23 Am. St. Rep. 900.

[32] Roberts v. Fielder Salt Works, 72 S. W. Rep. 618.

[33] Fogerty v. St. Louis Tr. Co., 180 Mo. 490; 79 S. W. Rep. 664; Railroad Co. v. May, 108 Ill. 298; Gall v. Beckstein, 173 Ill. 187; Harper v. Indianapolis, etc., R. Co., 47 Mo. 580; Lee v. Detroit, etc., Co., 62 Mo. 565; Moore v. Wabash, etc., R. Co., 85 Mo. 580; Miller v. Missouri Pac. R. Co., 109 Mo. 356; 19 S. W. Rep. 58; 32 Am. St. Rep. 673; Grattis v. Kansas City, etc., R. Co., 153 Mo. 380; 55 S. W. Rep. 108; 48 L. R. A. 399; 77 Am. St. Rep. 721.

The nonliability of the employer for the act of the vice-principal, where he was acting as a coemployee of the injured one, is recognized in the following cases: Hanna v. Granger, 18 R. I. 507; Gann v. Railroad, 101 Tenn. 380; Northern Pac. R. Co. v. Charless, 162 U. S. 359; 40 L. Ed. 999; Barnical v. Connor, 110 Iowa 240; Crispin v. Babbitt, 81 N. Y. 516; Reed v. Stockmeyer, 74 Fed. Rep. 186; Railroad v. Torrey, 58 Ark. 217; Clay v. Railroad, 56 Ill. App. 235; Soutar v.

principal, in the performance of a given act, as such, the issue as to whether or not the act was done in the capacity of a vice-principal or that of a coemployee, is usually for the jury.[34]

But where there is no dispute in the evidence as to the character in which the given act was performed, then the question of the capacity of the vice-principal to do such an act as would bind the employer, is a question of law for the court, and a peremptory instruction is proper in all cases where the evidence is not conflicting.[35]

§ 160. **Issue as to agent's competency.**— Where the action is for damages resulting from the retention in its employ of a known incompetent employee, whose act caused the injury sued for, if the evidence upon this issue is conflicting, it would be an issue for the jury to determine whether or not the given employee was competent or incompetent, and, if found to be incompetent, they should also find whether the company used reasonable care to discover his incompetency, and was deceived by his fraudulent practices, or whether it was negligent in failing to discover the same.[36]

§ 161. **Issues as to who are co-employees.**— The existence of the relation of coemployees, where the evidence is conflicting, is a question of fact for the jury,[37] but where the

Electric R. Co., 68 Minn. 18; Holtz v. Railroad Co., 69 Minn. 524; Dwyer v. Express Co., 82 Wis. 312.

[34] Renlund v. Commodore, etc., Co., 89 Minn. 41; 93 N. W. Rep. 1057; Maxwell v. Zdariski, 93 Ill. App. 334.

[35] Fogerty v. St. Louis, etc., Tr. Co., 180 Mo. 490; 79 S. W. Rep. 664; Miller v. Missouri Pac. R. Co., 109 Mo. 356; 19 S. W. Rep. 58; 32 Am. St. Rep. 673; Grattis v. Kansas City, etc., R. Co., 153 Mo. 380; 55 S. W. Rep. 108; 48 L. R. A. 399; 77 Am. St. Rep. 721.

[36] Taylor v. Western Pac. R. Co., 45 Cal. 323.

[37] Chicago & Alton R. Co. v. Wise, 106 Ill. App. 174; 206 Ill. 453; 69 N. E. Rep. 500; Consolidated C. Co. v. Fleishbein, 109 Ill. App.

essential facts for determining who are coemployees are not controverted, the issue as to whether or not the injured employee is, or is not, a coemployee with the person causing the injury, is one of law for the court.[38]

Where the employee causing the injury occupies the dual position of vice-principal and coemployee, it is generally held to be a question for the jury to determine whether the act which occasioned the injury was an act done in the relation of vice-principal or that of coemployee.[39] In some States the existence of the relation of coemployees is held to be a mixed question of law and fact, the declaration of what constitutes the relation being a question of law for the court, and the ascertainment of the conclusion, from the facts, whether that relation, as defined, exists, being an issue for the jury.[40]

§ 162. Assumption of risk jury issue, when.— In some of the States the rule is announced that the question of assumed risk is usually one of fact for the jury, and to authorize the court to hold, as a matter of law, that the risk was assumed, the evidence must be all one way and to the effect that the danger was so glaring that it could not have escaped the observation of an ordinarily prudent man of the skill or ex-

509; 207 Ill. 593; 69 N. E. Rep. 963; Supple v. Agnew, 191 Ill. 439; 61 N. E. Rep. 392; Pagels v. Myers, 193 Ill. 172; 61 N. E. Rep. 1111; Spring Valley Co. v. Robias, 207 Ill. 226; 69 N. E. Rep. 925; Gayle v. Missouri, etc., Co., 177 Mo. 427; 76 S. W. Rep. 987.

[38] Shaw v. Bambrick Bates Co., 102 Mo. App. 666; 77 S. W. Rep. 96; Neal v. Railroad, 57 Minn. 365; 59 N. W. Rep. 312; O'Leary v. Railroad, 52 Ill. App. 641; Illinois Steel Co. v. Coffee, 205 Ill. 206; 63 N. E. Rep. 751.

[39] Chicago, etc., R. Co. v. Driscoll, 107 Ill. App. 615; 207 Ill. 432; 69 N. E. Rep. 620; Gayle v. Missouri, etc., Co., 177 Mo. 427; 76 S. W. Rep. 987.

[40] Gruendahl v. Consolidated, etc., Co., 108 Ill. App. 644; Missouri, etc., Co. v. Dillon, 206 Ill. 145; 69 N. E. Rep. 12.

perience of the injured employee.[41] This is the rule announced by many cases in Missouri,[42] as well as other States,[43] but the Supreme Court of Missouri, in a recent case, refused to approve an instruction which told the jury that only dangers that threatened "immediate injury" were assumed, holding that such a limitation of the doctrine was a denial of the common-law rule, which included not only perils that threatened immediate injury, but also those which are not so glaring, if ordinarily incidental to the employment.[44]

The author has elsewhere[45] noted the objections to such qualifications of the doctrine of assumed risk, as those which limit the risks assumed to those which threaten "immediate injury," or those only which an ordinarily prudent man would avoid, if he could readily have appreciated the danger, as improper standards to submit the issue on, to a jury. Such qualifications of the common-law rule practically deny to the employer the benefit of the doctrine.

The better rule is that which holds that when the evidence is without conflict in establishing a state of facts from which the law would charge the employee with an assumption of the risk, then the issue should not be submitted to the jury;[46] but if the evidence is conflicting as to whether or not the danger was one incidental to the work, or whether it threatened immediate injury, or was such a peril as ought to have been appreciated and understood by a reasonably prudent man

[41] Carter v. Baldwin (Mo. App.), 81 S. W. Rep. 204; Sinberg v. Falk Co., 98 Mo. App. 546; 72 S. W. Rep. 947; Hamman v. Coal, etc., Co., 156 Mo. 232; 56 S. W. Rep. 1091.

[42] Dean v. Woodenware Co., 107 Mo. App. 167.

[43] Harwich v. Hawes, 202 Ill. 334; 67 N. E. Rep. 13.

[44] Minnier v. Sedalia, etc., R. Co., 167 Mo. 94; 66 S. W. Rep. 1092.

[45] White, Per. Inj. in Mines, § 108, p. 114.

[46] Minnier v. Sedalia, etc., R. Co., 167 Mo. 99; 66 S. W. Rep. 1092.

and the employer's negligence was not the occasion thereof, then the issue should be submitted to the jury.[47]

§ 163. **Promulgation and enforcement of rule.**— While the reasonableness of a given rule is usually held to be a question of law for the court, where the evidence is conflicting as to the promulgation and enforcement of a rule, the question is properly submitted to the jury, under appropriate instructions as to what would constitute a proper promulgation and enforcement of the rule.[48]

But if the evidence on the issue was not disputed, as where there was no evidence on the negative to dispute the due promulgation and enforcement of the rule, there would be no error in the court assuming that the rule was duly promulgated or enforced, or in instructing the jury that the rule was in effect at the time of the occurrence of the injury.[49]

§ 164. **Discretion in assessing damages.**— Necessarily the estimate of damages for personal injury and physical suffering must depend upon the judgment of the jury. There can be no direct proof in regard to it and no witness can be allowed to express his opinion upon the point.[50] There is no measure of sums or value fixed by custom, market or law and so the law makes it the exclusive province of the jury, within

[47] Hamman v. Coal & Coke Co., 156 Mo. 232; 56 S. W. Rep. 1091.

[48] Memphis R. Co. v. Graham, 94 Ala. 545; 10 So. Rep. 283; 53 Am. & Eng. R. Cas. 396.

[49] Quick v. Indianapolis, etc., R. Co., 130 Ill. 334; 22 N. E. Rep. 709.

[50] Colorado Midland R. Co. v. O'Brien, 16 Colo. 219; 48 Am. & Eng. R. Cas. 235; 27 Pac. Rep. 701; Hawes v. Kansas City, etc., R. Co., 103 Mo. 60; 15 S. W. Rep. 751; Choppin v. New Orleans, etc., R. Co., 17 La. Ann. 19; Waldhier v. Hannibal, etc., R. Co., 87 Mo. 37; Chicago, etc., R. Co. v. Warner, 108 Ill. 538; 18 Am. & Eng. R. Cas. 100; Reading v. Pennsylvania R. Co., 52 N. J. L. 264; 19 Atl. Rep. 321; St. Louis, etc., R. Co. v. Mackie, 71 Texas 491; 9 S. W. Rep. 451; 37 Am. & Eng. R. Cas. 94; 1 L. R. A. 667.

reasonable bounds, in their discretion, to name the amount.[51]

As to damages due for permanent injury and future pain and anguish, the judgment of the jury, within reasonable bounds, is the only standard of measurement, for while the court should advise the jury of the different items to be considered in their verdict, the fixing of the amount is peculiarly within their sound discretion.[52]

But the discretion of the jury as to damages due for physical pain and suffering does not apply to special damages, such as nursing, physician's bill, for medicines, and such matters, for these items have a fixed, ascertainable value and no more than a reasonable value therefor can be allowed and the rule of assessment according to the enlightened consciences of impartial jurors is not applicable.[53]

§ 165. **Conclusiveness of verdict.**— Where there is no fixed rule by which damages may be computed, as in the case of physical injury, the court should instruct the jury as to the proper subject-matter and leave the question to them, and their verdict will not, ordinarily, be disturbed, unless so excessive as to demand interference by the court.[54] Unless

[51] Brown v. Union R. Co., 51 Mo. App. 192.

[52] Bigelow v. Metropolitan, etc., R. Co., 48 Mo. App. 367.

[53] Augusta, etc., R. Co. v. Randall, 85 Ga. 297; 11 S. E. Rep. 706.

There is no fixed rule for determining the compensation due for death where no rule for the computation thereof is fixed by statute. Each case must stand on its own peculiar facts and the jury may give such damages for the death as they may think are fairly proportionate to the injury resulting therefrom. Missouri Pacific Ry. Co. v. Peregoy, 36 Kansas 424; 14 Pac. Rep. 7; Houston & G. N. R. Co. v. Randall, 50 Texas 261.

A jury cannot be left with a roaming commission, but are confined to damages, capable of being measured by a pecuniary standard. Balch v. Railroad, 67 Mich. 394; 34 N. W. Rep. 884.

[54] International & G. N. R. Co. v. Gilbert, 64 Texas 536; 22 Am. & Eng. R. Cas. 405; International & G. N. R. Co. v. Wilkes, 68 Texas 617; 34 Am. & Eng. R. Cas. 331; Nashville, etc., R. Co. v. Stevens, 9 Heisk. (Tenn.) 12; 19 Am. Ry. Rep. 363; Brown v. Memphis, etc.,

outside influences have excited their passion or prejudice, or the verdict is so excessive as to be disproportionate to the injury established, the judgment will not, on appeal, be set aside.[55]

The jury, however, are not at liberty to give a verdict for any sum they please, regardless of the items that should affect their verdict, and where the verdict is disproportionate to the injury established, or the court is satisfied that the verdict is the result of passion or prejudice, it should be set aside.[56]

R. Co., 7 Fed. Rep. 51; 1 Am. & Eng. R. Cas. 247; Savannah, etc., R. Co. v. Harper, 70 Ga. 119.

[55] Central R. Co. v. Crosby, 74 Ga. 737.

[56] Norton v. St. Louis, etc., R. Co., 40 Mo. App. 642.

CHAPTER IX.

ELEMENTS AND COMPUTATION OF DAMAGES.

§ 166. Right to damages, generally.
167. Province of court and jury in assessing.
168. Duty to prevent or keep damages down.
169. Only damages proximately resulting are recoverable.
170. What damages are proximate.
171. Mental anguish alone not basis for damages.
172. When nominal and substantial damages recoverable.
173. Compensatory damages only allowed, when.
174. Elements included in compensatory damages.
175. Expenses resulting from injury.
176. Exemplary or punitive damages.
177. When exemplary damages are recoverable.
178. When punitive damages should not be allowed.
179. Pleading exemplary damages.
180. Evidence to establish exemplary damages.
181. Prospective damages for permanent injuries.
182. Permanent disability must be reasonably certain.
183. Damages for future pain and suffering.
184. Loss of earnings in the future.
185. Special damages must be specially pleaded.
186. Evidence of plaintiff's condition, circumstances and pursuit proper, when.
187. Evidence in mitigation of damages.
188. Damages for pecuniary loss to beneficiaries.
189. What evidence of pecuniary loss competent.
190. Necessity of dependence upon deceased, for support.
191. Competent to show habits, character and capacity of deceased.
192. Competency of mortality tables to show expectancy of life.
193. Ill health and habits competent in mitigation of damages.
194. Nothing allowed as a solatium.
195. Damages for death of parent.
196. Recovery for death of husband.
197. For death of wife.
198. For death of child.
199. Medical and funeral expenses.

§ 200. Exemplary damages for death.
201. When nominal damages only recovered for death.
202. Excessive damages in death actions.
203. Same — For death of father.
204. Same — Death of husband.
205. Same — For death of wife.
206. Same — For death of child.

§ 166. **Right to damages, generally.**— The damages for which compensation can be allowed are settled by jurisprudence. Courts of justice are not institutions for the distribution of charity and unless damages are proved, by competent evidence, they cannot be allowed.[1] The basis of the right to damages is the breach of a legal duty, or some negligent act, by the party against whom such damages are claimed. The rightful exercise of a lawful power or authority can never afford the basis of an action for damages, but if the power or right is exercised carelessly, negligently, wrongfully, improperly, or maliciously, the party or corporation so exercising the power is liable to respond in damages for an injury directly resulting to another from such an exercise of the authority so wrongfully exerted. The liability to damages does not depend upon the doing of the act, itself, causing the injury, but such liability can only arise upon and for the manner of doing the act causing the damage.[2]

And the right to damages, being dependent upon the wrongful act of the party causing the injury, in the absence of a statute giving the right to another person, only the one sustaining the injury can sue for the result of such wrongful act,[3] but unlike an action for damages on contract — wherein only such damages as may reasonably be supposed to have been contemplated as likely to result from the breach can be

[1] Hamilton v. Morgan's L. R. & S. Co., 42 La. Ann. 824; 8 So. Rep. 586.

[2] Slatten v. Des Moines, etc., R. Co., 29 Iowa 148; Mexican, etc., Con. Co. v. Meddlegge, 75 Texas 634; 13 S. W. Rep. 257.

[3] Gulf, etc., R. Co. v. Levy, 59 Texas 563.

recovered — in an action for damages for a tort, by the person sustaining the injury, all damages resulting directly from the wrongful act, whether they could, or could not, have been foreseen or contemplated by the wrongdoer, as the probable result of his act, can be recovered.[4] The award of damages, however, must be founded upon a fair and reasonable construction of the evidence, in view of all the facts and circumstances disclosed at the trial,[5] and since the right to damages, in all cases, depends upon the existence of a wrongful act, if the injury complained of is the result of an inevitable accident, no compensation can be legally allowed.[6]

§ 167. **Province of court and jury in assessing.**— In a suit for personal injuries, it is the province of the court to determine the proper elements of damages,[7] but it is the peculiar function of the jury to estimate and determine the amount of such damages as shall be assessed.[8]

In suits instituted in the courts of the United States, the assessment of damages being a matter of practice, is usually made according to the practice of the courts of the State

[4] Brown v. Chicago, etc., R. Co., 54 Wis. 342; 11 N. W. Rep. 356, 911; 41 Am. Rep. 41; 3 Am. & Eng. R. Cas. 444; Shumaker v. St. Paul, etc., R. Co., 46 Minn. 39; 48 N. W. Rep. 559.

[5] Cooper v. Lake Shore, etc., R. Co., 66 Mich. 261; 33 N. W. Rep. 306; Siefke v. Manhattan R. Co., 27 J. & S. (N. Y.) 444; 14 N. Y. Supp. 763; 39 N. Y. S. R. 355; Balch v. Grand Rapids, etc., R. Co., 67 Mich. 394; 34 N. W. Rep. 884.

[6] Lewis v. Flint, etc., R. Co., 54 Mich. 55; 19 N. W. Rep. 744; 52 Am. Rep. 790; 18 Am. & Eng. R. Cas. 263; Tucker v. Duncan, 9 Fed. Rep. 867; 6 Am. & Eng. R. Cas. 268.

Damages is the legal term used to signify the indemnity recoverable by a person sustaining an injury to either his personal or property rights, through the act or default of another. Collins v. East Tenn., etc., R. Co., 9 Heisk. (Tenn.) 841; 20 Am. Ry. Rep. 46.

[7] Hawes v. Kansas City Stockyards Co., 103 Mo. 60; 15 S. W. Rep. 751.

[8] Chicago, etc., R. Co. v. Watkins, 43 Kansas 50; 22 Pac. Rep. 985; Bradwell v. Pittsburg, etc., R. Co., 139 Pa. St. 404; 20 Atl. Rep. 1046.

where the federal court is held.[9] In the federal, as in the State courts, the amount of damages recoverable is provable as an issue of fact for the jury, but the rule for ascertaining the damages is a question of law for the court.[10] It is the duty of the court to give definite instructions to the jury as to the true measure of damages which they are called upon to ascertain,[11] and with this measure before them it is the prerogative of the jury to assess damages in any personal injury action, other than where the damages are fixed by statute, at such a reasonable sum as their judgment and discretion shall dictate,[12] subject to the power of the court to cut down or set aside their verdict, if it is so excessive as to show that it was based on passion or prejudice, or that it was out of all proportion to the injuries sustained.[13]

§ 168. **Duty to prevent or keep damages down.**— Where one is injured by the wrongful act of another he is bound to use ordinary care and reasonable exertion and expense to keep the damages down and to render the injury as light as possible.[14] After the injury is received, the injured person must act as a prudent man would under all the circumstances

[9] Raymond v. Danbury, etc., R. Co., 14 Blatchf. (U. S.) 133.

[10] Chicago, etc., R. Co. v. Sullivan (Ill.), 17 N. E. Rep. 460; Galveston, etc., R. Co. v. Gierse, 51 Texas 189; Wabash, etc., R. Co. v. Peyton, 106 Ill. 534; 46 Am. Rep. 705; 18 Am. & Eng. R. Cas. 1.

[11] Texas, etc., R. Co. v. Moran, 66 Texas 133; 25 Am. & Eng. R. Cas. 539.

[12] Colorado, etc., R. Co. v. O'Brien, 16 Colo. 219; 48 Am. & Eng. R. Cas. 235; 27 Pac. Rep. 701; Brown v. Union R. Co., 51 Mo. App. 192.

[13] Waldhier v. Hannibal, etc., R. Co., 87 Mo. 37.

"In a personal injury case, an instruction authorizing recovery on the basis of what the jurors would 'want,' if standing in plaintiff's place, was erroneous," Greer v. Union Ry Co., 103 N. Y. S. 88.

"Where plaintiff, in an action for personal injuries, presents himself and such evidence as he had before a jury, it is their province, under proper instructions, to say what sum would compensate plaintiff." Cleaver v. Louisville & N. R. Co. (Ky. 1907), 100 S. W. Rep. 223.

[14] Austin, etc., R. Co. v. Anderson, 85 Texas 88; 19 S. W. Rep. 1025.

and he must use due diligence to know whether medical aid is required and to use reasonable effort to cure himself.[15] If he fails to do this, he forfeits his right to recover damages that might have been saved, which resulted from his own negligence in failing to adopt means to be cured.[16] But the injured person is only bound to use reasonable diligence to procure medical aid,[17] and if, while suffering with pain, caused by his injuries, he neglects to do that which is most prudent for his recovery, he will not be held negligent, so as to prevent a recovery, if he was constrained to such neglect to alleviate his suffering.[18] It may be stated that one is not unqualifiedly bound to engage medical attention for such length of time as his injuries makes it necessary, but his neglect to do all in this regard, that a man of ordinary prudence would under like circumstances, have done, may be taken into consideration by the court or jury, and no compensation should be allowed for any damages that might have been averted by engaging medical aid more promptly.[19]

[15] Toledo, etc., R. Co. v. Eddy, 72 Ill. 138.

[16] Gulf, etc., R. Co. v. Coon, 69 Texas 730; 7 S. W. Rep. 492; Gulf, etc., R. Co. v. McMannewitz, 70 Texas 73; 8 S. W. Rep. 66; 34 Am. & Eng. R. Cas. 428.

[17] Louisville, etc., R. Co. v. Falvey, 104 Ind. 409; 3 N. E. Rep. 389; 4 *id.* 908; 23 Am. & Eng. R. Cas. 522.

[18] Gulf, etc., R. Co. v. McMannewitz, 70 Texas 73; 8 S. W. Rep. 66; 34 Am. & Eng. R. Cas. 428.

[19] Vallo v. United States Express Co., 147 Pa. St. 404; 23 Atl. Rep. 594.

While unskilled medical treatment should be considered as affecting the recovery of damages, or as aggravating the injuries, it is not a complete defense where the injuries originally were due to the negligence of the defendant. Nagle v. Missouri Pacific Ry. Co., 75 Mo. 653; 42 Am. Rep. 418; 10 Am. Eng. R. Cas. 702; Goshen v. England, 119 Ind. 368; 21 N. E. Rep. 977.

"Unskillful treatment of an ailment is regarded as a direct result of the injury complained of, if ordinary care was employed in selecting the physician who so unskillfully treated such ailment." Village of Bethany v. Lee, 124 Ill. App. 397.

"In an action for personal injuries, the court properly instructed

§ 169. **Only damages proximately resulting are recoverable.** — The law refuses to take into consideration the damages remotely resulting from the breach of duty or wrongful act, on the part of the one occasioning the injury. The maxim is, *Causa proxima, non remota spectatur.*[20] A party guilty of negligence, by which another sustains injury, is only liable for the proximate consequences of his act, not for remote, speculative and contingent results, which might have been avoided by the injured party.[21] Proximate, in this connection, means closeness of casual connection, and not nearness in time or distance, and, as held by the New Jersey court, the term is intended to qualify the generality of the idea, expressed by the word "natural." [22]

Damages traceable to the act of negligence, but not to its *legal or natural* consequences, are too remote and contingent.[23] But lawful damages must be both the natural and proximate consequence arising from the wrong complained

that plaintiff must do all that a reasonable person would do to reduce her injuries, and, if she has failed or refused to do this, defendant would not be liable for the increase of injury due to her negligence, but, if she puts herself into the hands of the physicians and follows their advice, defendant would be liable, even though the physicians lack in skill or err in judgment." O'Donnell v. Rhode Island Co., 66 Atl. Rep. 578; 28 R. I., 245.

In case the neglect of the injured party to employ competent medical aid, or use proper care to cure the injury, has aggravated it, no recovery for the aggravated condition of the injury can be had. Glasgow v. Metropolitan Ry. Co., 191 Mo. 374; 89 S. W. Rep. 915.

[20] Milwaukee, etc., R. Co. v. Kellogg, a leading case, 94 U. S. 475; Pullman Car Co. v. Barker, 4 Colo. 344. But see for criticism of this doctrine, Brown v. Chicago, etc., R. Co., 54 Wis. 342; 41 Am. Rep. 41; 3 Am. & Eng. R. Cas. 444; Terre Haute, etc., R. Co. v. Buck, 96 Ind. 346; 49 Am. Rep. 168; 18 Am. & Eng. R. Cas. 234.

[21] Perry v. Central R. Co., 66 Ga. 746; Corrister v. Kansas City, etc., R. Co., 25 Mo. App. 619; Kankakee, etc., R. Co. v. Fitzgerald, 17 Ill. App. 525.

[22] Kuhn v. Jewett, N. J. Eq. 647.

[23] Montgomery, etc., R. Co. v. Boring, 51 Ga. 582.

of and not from the wrongful act of a third party, remotely induced thereby. The intervention of the independent act of a third party, between the negligence complained of and the injury sustained, which was the proximate cause of the injury, is regarded as the proper test of that remoteness of damages which the law forbids.[24]

§ 170. **What damages are proximate.**— Proximate damages are said to be such as ordinarily and naturally result from the particular negligence charged to have caused the injury and therefore such as might have been expected.[25] The proximate consequences of a negligent act are necessarily those which occur without any intervening cause, and if an "efficient, adequate cause" for the injury has been found, it will generally be considered as the true cause thereof, unless it appears that there is another cause, not incident to the original wrongful act, but independent of it, which has intervened to occasion the injury. This is practically the language of the court, in a well-considered Minnesota case.[26]

If a disease causing suffering or permanent injury results proximately from injuries inflicted by the negligence of a railroad company, such suffering is a proper element of damages to be taken into consideration, regardless of the fact that such a disease would not ordinarily result from the

[24] Cuff v. Newark, etc., R. Co., 35 N. J. L. 17, 574.

"In an action for injuries, an instruction stating that plaintiff's measure of damages is compensation for all the injuries, temporary and permanent, sustained by him, is erroneous, in authorizing a verdict, based in part on mental suffering, not the direct result of physical pain, but caused by bodily defects which are the result of the accident." Chicago City Ry. Co. v. Schaefer, 121 Ill. App. 334.

[25] Louisville, etc., R. Co. v. Fleming, 14 Lea. (Tenn.) 128; 18 Am. & Eng. R. Cas. 347; Billman v. Indianapolis, etc., R. Co., 76 Ind. 166; 40 Am. Rep. 230; 6 Am. & Eng. R. Cas. 41.

[26] Shumaker v. St. Paul, etc., R. Co., 46 Minn. 39; 48 N. W. Rep. 559.

character of injury inflicted.[27] If an injury is the direct cause of a diseased condition which results in paralysis, such paralysis may be ascribed to the injury, as the proximate cause;[28] if the injury received superinduced the development of a cancer, the party whose negligence caused the injury would be responsible therefor and the cancer would not be treated as an independent cause of the ultimate disease or suffering.[29] But if the independent act of a third party intervened between the wrong complained of and the injury sustained, and the injury was caused by such independent act, rather than by the original wrongful act of the defendant, then the damages resulting from such injury would be too remote to connect with such original wrongful act.[30] Hence, although the negligence of the defendant may have caused the derailment of an engine, from its track, if the injury sued for resulted from the acts of a crowd that gathered around the derailed engine, damages therefor could not be recovered, in an action for the negligence causing the derailment of the engine.[31]

[27] Houston, etc., R. Co. v. Leslie, 57 Texas 83; 9 Am. & Eng. R. Cas. 407.

[28] Bishop v. St. Paul, etc., R. Co., 48 Minn. 26; 50 N. W. Rep. 927.

[29] Baltimore, etc., R. Co. v. Kemp, 61 Md. 619; 48 Am. Rep. 134.

[30] Cuff v. Newark, etc., R. Co., 35 N. J. L. 17, 574.

[31] Scholes v. North London R. Co., 21 L. T. 835.

"In an action for injuries caused by being thrown from a street car, evidence that plaintiff's suffering from rheumatism was occasioned by the injury examined, and *held* sufficient to go to the jury on the question of damages." Detrich v. Metropolitan St. Ry. Co. (Mo. App. 1907), 102 S. W. Rep. 1044.

"A person injured by the negligence of another may recover the resulting damages, though it would not have resulted, or would have been much less, but for his diseased condition at the time of the accident." Ross v. Great Northern Ry. Co. (Minn. 1907), 111 N. W. Rep. 951.

"Plaintiff's deafness, resulting from a nervous shock received when injured, is a proper element of damages." Dreyfus v. St. Louis & S. Ry. Co. (Mo. App. 1907), 102 S. W. Rep. 53.

§ 171. **Mental anguish alone not basis for damages.**— As a general rule mental anguish must be accompanied by some physical injury before it can be admitted as part of the measure of damages, and, in the absence of willful or malicious conduct on the defendant's part, unless some physical injury resulted from the wrongful act, damages cannot be assessed for nervous shock, or mental anguish alone.[32]

Mere fright occasioned by a collision, producing permanent injury to the nervous system, is held to be a result too remote to be actionable.[33] No well-considered case has held that fright alone, not resulting from, or accompanied by some physical injury to the person, will sustain an action for the wrongful act, alleged to have caused the nervous shock. In one case,[34] where the defendant's gatekeeper had negligently invited the plaintiff to cross a railroad track on a grade crossing and an approaching train frightened the plaintiff and his horses, but occasioned no other injuries, a verdict for both physical and mental pain was held not to be supported by the evidence and the judgment was reversed in the higher court. This is in accord with the weight of authority, and damages resulting from nervous shock alone, unaccompanied by any physical injury, are held too remote to enter into the estimate in assessing damages.[35] But if the act producing the mental anguish is accompanied by willful, malicious or insulting conduct, mental anguish or nervous

[32] Smith v. Atchison, etc., R. Co., 122 Mo. App. 85.

"In an action for personal injuries, the mental anguish which can be proved is such only as is endured by the plaintiff as the direct consequence of the injury to himself." Bahr v. Northern Pac. Ry. Co. (Minn. 1907), 112 N. W. Rep. 267.

[33] Ewing v. Pittsburg, etc., R. Co., 147 Pa. St. 40; 23 Atl. Rep. 340; 48 Am. & Eng. R. Cas. 506.

[34] Victorian Ry. Co. v. Coultas, 13 App. Cas. 222; 6 Ry. & C. T. Cas. 68.

[35] Gereke v. Grand Rapids, etc., R. Co., 57 Mich. 589; 24 N. W. Rep. 675; 22 Am. & Eng. R. Cas. 551; Grand Trunk R. Co. v. Sibbald, 20 Can. Sup. Ct. 259.

shock may then enter into the assessment of damages, for the malicious or insulting conduct, in such case, is held to be an equivalent for actual physical injury, resulting from the wrongful act.[36]

§ 172. **When nominal and substantial damages recoverable.** — The law places the burden upon the party claiming damages from another as a compensation for pecuniary loss, to establish facts sufficient to ascertain, with reasonable certainty, the extent of his loss and if he fails to show the amount of damages to which he is entitled, then he is given only nominal damages.[37]

Where loss of time is claimed as an element of damages, in an action for personal injury, due to the negligence of the defendant, only nominal damages for this item can be

[36] Smith v. Atchison, etc., R. Co., 122 Mo. App. 85; Dawson v. Louisville, etc., R. Co. (Ky.), 11 Am. & Eng. R. Cas. 134.

"It is not error to submit to the jury the issue of mental suffering, on evidence that plaintiff's injuries were serious and permanent, that three ribs were broken, and that he had lost greatly in flesh, had a cough, suffered from a rapid heart, and could not do the ordinary labor of a working man; the injuries being of such a nature that mental pain can be inferred therefrom." Galveston, H. & S. A. R. Co. v. Garcia (Tex. Civ. App. 1907), 100 S. W. Rep. 198.

"In a personal injury action, where the evidence proved serious injury, great pain, and the fear of death for many days, also that plaintiff was disfigured in the face for a time, and that two years afterwards he still suffered pain, there was no error in including the element of mental pain in an instruction on the subject of damages." St. Louis, I. M. & S. Ry. Co. v. Leamons (Ark. 1907), 102 S. W. Rep. 363.

Fright from nervous shock, distinct from a physical injury, is not a proper element of damages, in New York. Newton v. New York, etc., R. Co., 94 N. Y. S. R. 825; 106 App. Div. 415.

Mental suffering, when connected with physical injury, is a proper element of damage. Southern Pac. R. Co. v. Heter, 135 Fed. Rep. 272; 68 C. C. A. 26; Waechter v. St. Louis, etc., R. Co. (Mo.), 88 S. W. Rep. 147; Haxton v. Kansas City, 190 Mo. 53; 88 S. W. Rep. 714.

[37] Kansas City, etc., R. Co. v. Fite, 67 Miss. 373; 7 So. Rep. 223; Seaboard, etc., Co. v. Woodson, 98 Ala. 378; 11 So. Rep. 733.

given, if the plaintiff fails to prove the value of the time lost, or facts from which the value thereof can be ascertained, with reasonable certainty;[38] nominal damages only can be given for loss of salary, where the salary is not established by the evidence[39] nor can more than nominal damages be allowed, for medical attention and treatment, on the mere proof of the fact that medical services were rendered, without evidence going to show the amount paid therefor.[40]

But it is held sufficient to justify the recovery of substantial damages, if the plaintiff establishes the nature, extent and probable duration of his injury, without other proof going to show the exact amount of damages sustained.[41] Where the evidence showed that prior to sustaining an injury, the plaintiff had received a salary of one hundred dollars per month and that since the injury he had been unable to do any work at all, he is entitled to recover substantial damages for the loss of time resulting from the injury[42] and even if the exact salary lost is not shown by the evidence, if sufficient facts are established, from which it can be reasonably ascertained that the time lost is worth more than mere nominal damages, then substantial damages may be recovered.[43]

§ 173. **Compensatory damages only allowed, when.**— Actual compensation is the measure of recovery allowed in

[38] Staal v. Grand Street, etc., R. Co., 107 N. Y. 625; 13 N. E. Rep. 624; 31 Am. & Eng. R. Cas. 21.

[39] Baker v. Manhattan, etc., R. Co., 118 N. Y. 533; 23 N. E. Rep. 885; 29 N. Y. S. R. 936.

[40] Feeney v. Long Island, etc., R. Co., 116 N. Y. 375; 22 N. E. Rep. 402; 26 N. Y. S. R. 729; 42 Hun 657; 5 L. R. A. 544; 39 Am. & Eng. R. Cas. 639.

[41] Winkler v. St. Louis, I. M. & S. Ry. Co., 21 Mo. App. 99.

[42] Kansas City, etc., R. Co. v. Phillips, 98 Ala. 159; 13 So. Rep. 65.

[43] Lincoln v. Saratoga, etc., R. Co., 23 Wend. 425; Looram v. Second Avenue, etc., R. Co., 11 N. Y. S. R. 652.

every instance where the nature of the case will admit such a rule [44] and the damages to one who has been injured by the negligence of a railroad company are generally restricted to those that are actual.[45] Punitive damages cannot be given for mere negligent injuries,[46] and where there is no testimony showing that the negligence is so gross as to amount to wantonness, and no willful or malicious acts are proven, actual or compensatory damages alone are recoverable.[47]

The mere failure to light depot grounds, as a result of which an injury occurs, gives the injured person a right to mere compensatory damages; [48] punitive damages cannot be recovered for negligent injuries resulting from the negligence of an employee, unaccompanied by the negligence of the employer; [49] nor can other than compensatory damages be re-

[44] Louisville, etc., R. Co. v. Guinan, 11 Lea. (Tenn.) 98; 13 Am. & Eng. R. Cas. 37; Nashville, etc., R. Co. v. Smith, 6 Heisk. (Tenn.) 174.

[45] Troy v. Cape Fear, etc., R. Co., 99 N. Car. 298; 6 S. E. Rep. 77; 6 Am. St. Rep. 521; 34 Am. & Eng. R. Cas. 13.

[46] Louisville, etc., R. Co. v. Shanks, 94 Ind. 598; 19 Am. & Eng. R. Cas. 28; Richmond, etc., R. Co. v. Vance, 93 Ala. 144; 9 So. Rep. 574; Purcell v. Richmond, etc., R. Co., 108 N. Car. 414; 12 S. E. Rep. 954; Patterson v. South & N. Ala. R. Co., 89 Ala. 318; 7 So. Rep. 437; Philadelphia Tr. Co. v. Orbann, 119 Pa. St. 37; 12 Atl. Rep. 816; 34 Am. & Eng. R. Cas. 432; Columbus, etc., R. Co. v. Bridges, 86 Ala. 448; 5 So. Rep. 864; 38 Am. & Eng. R. Cas. 136; Batterson v. Chicago, etc., R. Co., 49 Mich. 184; 13 N. W. Rep. 508; 8 Am. & Eng. R. Cas. 123; Keep v. Indianapolis, etc., R. Co., 3 McCrary (U. S.) 208; 9 Fed. Rep. 625; Atchison, etc., R. Co. v. McGinnis, 46 Kansas 109; 26 Pac. Rep. 453; Kansas City, etc., R. Co. v. Kier, 41 Kansas 671; 21 Pac. Rep. 770; Belknap v. Boston, etc., R. Co., 49 N. H. 358; Hurt v. St. Louis, I. M. & S. Ry. Co., 94 Mo. 255; 7 S. W. Rep. 1; 34 Am. & Eng. R. Cas. 422.

[47] Atchison, etc., R. Co. v. McGinnis, 46 Kansas 109; 26 Pac. Rep. 453.

[48] Alabama, etc., R. Co. v. Arnold, 84 Ala. 159; 4 So. Rep. 359; 5 Am. St. Rep. 354; 35 Am. & Eng. R. Cas. 466.

[49] McKeon v. Citizens R. Co., 42 Mo. 79. But see, Perkins v. Citizens R. Co., 55 Mo. 201; Potts v. Chicago, etc., R. Co., 33 Fed. Rep. 610; Louisville, etc., R. Co. v. Fleming, 14 Lea (Tenn.) 128; 18 Am. &

covered for an injury unintentionally inflicted;[50] or one resulting solely from an error in judgment.[51]

§ 174. **Elements included in compensatory damages.**— No fixed rule exists for estimating the amount of damages that are recoverable for personal injuries, resulting in permanent disability. The amount should be reasonable and just to both parties and should include reasonable compensation for the bodily pain and suffering attendant upon the injury complained of, together with a repayment for the loss of money which the injured person would have earned, had the injury not occurred.[52] Compensatory damages are generally confined to the expenses incurred, the value of time lost, a fair compensation for the physical and mental suffering caused by the injury and damages for any permanent reduction of the power to earn money.[53]

Where a disease exists at the time of the injury and is aggravated by it, the injured person is entitled to full compensatory damages, for the measure of damages is based

Eng. R. Cas. 347; Illinois, etc., R. Co. v. Hammer, 72 Ill. 353; Cleghorn v. New York, etc., R. Co., 56 N. Y. 44.

[50] Louisville, etc., R. Co. v. Sickings, 5 Bush. (Ky.) 1; Griffith v. Baltimore, etc., R. Co., 44 Fed. Rep. 574; Green v. Pennsylvania R. Co., 36 Fed. Rep. 66.

[51] Kansas Pac. R. Co. v. Miller, 2 Colo. 442; 20 Am. Ry. Rep. 245.

"Where there is no evidence in an action for wrongful death, of pecuniary loss, it is not error to instruct the jury to that effect, and that they should consider all the elements of compensatory damages, except that based on pecuniary loss." Barksdale v. Seaboard Air Line Ry. (S. C. 1907), 56 S. E. Rep. 906.

Compensation is made the basis of damages for negligence in Missouri. Waechter v. St. Louis, etc., R. Co., 88 S. W. Rep. 147.

[52] Richmond, etc., R. Co. v. Allison, 86 Ga. 145; 12 S. E. Rep. 352; 48 Am. & Eng. R. Cas. 101; Vicksburg, etc., R. Co. v. Putnam, 118 U. S. 554; Ohio, etc., R. Co. v. Dickerson, 59 Ind. 317.

[53] Kentucky, etc., R. Co. v. Ackley, 87 Ky. 278; 8 S. W. Rep. 691; 12 Am. St. Rep. 480.

upon the plaintiff's condition, without regard to whether he already had a predisposition to disease or not.[54]

Mental suffering is proper to be taken into consideration when it is connected with physical pain or when it is accompanied by malice, insult, inhumanity or oppression, on the part of the defendant,[55] but otherwise not.[56] And where only the fact of an injury and a resulting death, are shown, together with the age of the deceased, without any showing of the habits, earning power, probable duration of the life, or other facts, to base a verdict upon, no compensatory damages could be allowed, but only a judgment for nominal damages.[57]

§ 175. **Expenses resulting from injury.**— In a personal injury action against a railroad company, the plaintiff is entitled to recover, as a part of his damages, his reasonable and necessary outlays in an attempt to be cured of the injuries due to the defendant's negligence.[58] And expenses for medical attention, [59] such as would be reasonable and necessary, considering the situation of the injured person and medi-

[54] Louisville, etc., R. Co. v. Miller (Ind.), 37 N. E. Rep. 343; 58 Am. & Eng. R. Cas. 304; Ohio, etc., R. Co. v. Hecht, 115 Ind. 443; 17 N. E. Rep. 297; 34 Am. & Eng. R. Cas. 447; Louisville, etc., R. Co. v. Snyder, 117 Ind. 435; 20 N. E. Rep. 284; 3 L. R. A. 434; 37 Am. & Eng. R. Cas. 137; Louisville, etc., R. Co. v. Falvey, 104 Ind. 409; 3 N. E. Rep. 389; 23 Am. & Eng. R. Cas. 522.

[55] Dawson v. Louisville, etc., R. Co. (Ky.), 11 Am. & Eng. R. Cas. 134.

[56] Smith v. Atchison, etc., R. Co., 122 Mo. App. 85.

[57] Louisville, etc., R. Co. v. Orr, 91 Ala. 548; 8 So. Rep. 360.

[58] Sherwood v. Chicago, etc., R. Co., 82 Mich. 374; 46 N. W. Rep. 773; 44 Am. & Eng. R. Cas. 337; Louisville, etc., R. Co. v. Falvey, 104 Ind. 409; 3 N. E. Rep. 389; 23 Am. & Eng. R. Cas. 522; Stephens v. Hannibal, etc., R. Co., 96 Mo. 207; 9 S. W. Rep. 589; 38 Am. & Eng. R. Cas. 110; Baker v. Pennsylvania R. Co., 142 Pa. St. 503; 21 Atl. Rep. 979; Davidson v. Southern Pac. R. Co., 44 Fed. Rep. 476.

[59] Hulehan v. Green Bay, etc., R. Co., 68 Wis. 520; 32 N. W. Rep. 529; 31 Am. & Eng. R. Cas. 322; Chicago, etc., R. Co. v. Holland, 122 Ill. 461; 13 N. E. Rep. 145; 30 Am. & Eng. R. Cas. 590; Indiana

cines [60] and nurse hire,[61] are all proper elements of damage to be submitted to the jury, as well as the probable cost of future treatment and nursing, when the injury is shown to have been permanent.[62]

But one cannot, in an action for personal injuries, recover for expenses incurred for professional services of physicians, and for nurse hire and drugs, in the absence of evidence showing the amount of such expenses, or that any were ever paid, or any liability therefor actually incurred.[63] To justify an instruction to the jury allowing damages by way of expenses for medical attention or treatment, there must be some evidence of a payment or a liability therefor, on the plaintiff's part,[64] and where there is no evidence of the amount of medicines used or the value of the medical attention rendered, it is error to instruct the jury that they may allow for medicines and medical treatment reasonably and necessarily employed.[65]

Car Co. v. Parker, 100 Ind. 181; Wallace v. Western, etc., R. Co., 104 N. Car. 442; 41 Am. & Eng. R. Cas. 212; 10 S. E. Rep. 552.

[60] Trotten v. Pennsylvania R. Co., 11 Fed. Rep. 564; Central R. Co. v. Wood, 51 Ga. 515; 8 Am. Ry. Rep. 9.

[61] Chicago, etc., R. Co. v. Holland, 122 Ill. 461; 13 N. E. Rep. 145; 30 Am. & Eng. R. Cas. 590; Wallace v. Western R. Co., 104 N. Car. 442; 10 S. E. Rep. 552; 41 Am. & Eng. R. Cas. 212.

[62] South & N. R. Co. v. McLendon, 63 Ala. 266.

[63] Duke v. Missouri Pacific R. Co., 99 Mo. 347; 12 S. W. Rep. 636; 41 Am. & Eng. R. Cas. 221; Reed v. Chicago, etc., R. Co., 57 Iowa 23; 10 N. W. Rep. 285; 8 Am. & Eng. R. Cas. 180; Smith v. Chicago, etc., R. Co., 108 Mo. 243; 18 S. W. Rep. 971; 52 Am. & Eng. R. Cas. 483; Madden v. Missouri Pacific R. Co., 50 Mo. App. 666.

[64] Minster v. Citizens R. Co., 53 Mo. App. 276.

[65] Eckard v. Chicago, etc., R. Co., 70 Iowa 353; 30 N. W. Rep. 615; 27 Am. & Eng. R. Cas. 114; Fordyce v. Beecher, 2 Texas Civ. App. 29; 21 S. W. Rep. 179.

"In an action for personal injuries, it is error to authorize a recovery for the expenses of medical treatment where there is no evidence of the amount of such expenses." St. Louis, I. M. & S. Ry. Co. v. Leamons (Ark. 1907), 102 S. W. Rep. 363.

"In an action for personal injuries, where plaintiff was nursed

§ 176. **Exemplary or punitive damages.**— In an action for personal injuries from accidents on railroads, exemplary or vindictive damages should not be allowed, except in extreme cases.[66] To justify exemplary damages for a personal injury, the negligence of the defendant must have been such as to have amounted to wantonness, willfulness or maliciousness.[67] If the tort was willful, or committed under such circumstances as to show gross negligence, then punitive damages may be given.[68] When torts are committed with fraud, actual malice, or deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others, then

only by members of her family, and there was no express contract to pay them, expenses incurred for nursing was not a proper element of damages." Gibney v. St. Louis Transit Co. (Mo. 1907), 103 S. W. Rep. 43.

"Where, in an action by a husband for expenses for medical attendance for his wife and for loss of services in consequence of a personal injury sustained by the wife, there was no evidence of the value of the loss of services, and the testimony showed the value of the medical attendance at a specified sum, the verdict should be limited to the specified sum." Friedman v. Horn (N. Y. Sup. 1907), 104 N. Y. S. 745.

Expenses for medical services cannot be recovered, in the absence of proof of the reasonableness of the charges therefor. Dallas, etc., Ry. Co. v. McAlister (Texas Civ.. App.), 90 S. W. Rep. 933.

The reasonable value of physicians' services is alone recoverable, unless the amount is less than a reasonable sum, when this is the limit of the recovery, in such case. Nelson v. Metropolitan Ry. Co., 88 S. W. Rep. 781.

And expenses for medical bills and nurse hire must be specially pleaded always. Stowe v. LeConnor Trans. Co., 39 Wash. 27; 80 Pac. Rep. 856.

Recovery for medical bills are not proper, on mere proof of an indebtedness therefor, unless the bills were actually paid. Stanley v. Chicago, etc., Ry. Co., 112 Mo. App. 601; 87 S. W. Rep. 112.

[66] Union Pacific R. Co. v. Hause, 1 Wyo. 27.

[67] Kansas City, etc., R. Co. v. Kier, 41 Kansas 671; 21 Pac. Rep. 770.

[68] Purcell v. Richmond, etc., R. Co., 108 N. Car. 414; 12 S. E. Rep. 954; New Orleans, etc., R. Co. v. Hurst, 36 Miss. 660.

exemplary damages are allowed, not only to compensate the injured person, but to punish the wrongdoer, as well.[69]

But the negligence established must be wanton, willful, or malicious, to justify punitive damages.[70] Mere neglect is never considered willfulness, but the intention with which the act is done is always essential.[71] The mere fact that an act was wrongful and injurious does not justify exemplary damages, in the absence of actual malice, an evil intent, or such oppression as to indicate wanton indifference as to the rights invaded.[72] Such damages are imposed, not simply for every wrongful act, but for the willfulness or wantonness which characterizes the conduct of the wrongdoer, and therefore such damages cannot be inflicted regardless of the intent, whether good or bad.[73] The turpitude of the defendant's conduct is alone considered and there must be a wrong intent on his part, or the wrongful execution of a *bona fide* intent. If the wrongful act is not characterized by a bad motive, or there is no recklessness such as to imply a disregard of social obligations or no negligence so gross as to amount to positive misconduct, then exemplary damages cannot be allowed.[74]

[69] Samuels v. Richmond, etc., R. Co., 35 So. Car. 493; 14 S. E. Rep. 943; 52 Am. & Eng. R. Cas. 315; Consolidated, etc., Co. v. Hannei, 146 Ill. 614; 35 N. E. Rep. 162.

[70] Atchison, etc., R. Co. v. McGinnis, 46 Kansas 109; 26 Pac. Rep. 453.

[71] Peoria, etc., Association v. Loomis, 20 Ill. 235.

[72] Hoffman v. Northern Pac. R. Co., 45 Minn. 53; 47 N. W. Rep. 312; Edmunds v. St. Louis, etc., R. Co., 3 Mo. App. 603; McFee v. Vicksburg, etc., R. Co., 42 L . Ann. 790; 7 So. Rep. 720.

[73] Donovan v. Manhattan R. Co., 1 Misc. 368; 49 N. Y. S. R. 722; 21 N. Y. Supp. 457; Jacobs v. Louisville, etc., R. Co., 10 Bush. (Ky) 263.

[74] Philadelphia, etc., R. Co. v. Hoeflich, 62 Md. 300; 50 Am. Rep. 223; 18 Am. & Eng. R. Cas. 373; Louisville, etc., R. Co. v. Guinan, 11 Lea. (Tenn.) 98; 47 Am. Rep. 279; 13 Am. & Eng. R. Cas. 37.

Punitive damages are not recoverable in a negligence case, in Kansas, unless the negligence is so gross as to amount to wantonness. Atchison, etc., Ry. Co. v. Ringle, 80 Pac. Rep. 43.

§ 177. **When exemplary damages are recoverable.**— Exemplary damages have been held properly recoverable, in the following cases, i. e., where a personal injury was caused by the gross carelessness of a railroad company, in the management of trains;[75] where the evidence showed a grossly careless disregard of the safety of the traveling public;[76] where the injury was inflicted under circumstances accompanied by particularly aggravating circumstances;[77] where the defendant's negligence evinces utter recklessness;[78] for gross negligence in failing to keep a bridge over a highway, in repair;[79] where the employees of a company willfully and recklessly fail to stop a train at a signal station, on being signaled;[80] the principal, although a corporation, for the reckless acts of its employees, done within the scope of their employment.[81] But the employee of a company may be liable for exemplary damages, because of his own conduct, when his employer would only be liable for compensatory damages;[82] an employer can be held for such damages, generally, when the employee causing the injury could be so

Where a willful, wanton, or reckless act is done with a reckless design, punitive damages are recoverable, without proof of malice. Thomason v. Southern Ry Co., 72 S. C. 1; 51 S. E. Rep. 443.

[75] Hopkins v. Atlantic, etc., R. Co., 36 N. H. 9.

[76] Richmond, etc., R. Co. v. Vance, 93 Ala. 144; 9 So. Rep. 574; Jacobs v. Louisville, etc., R. Co., 10 Bush. (Ky.) 263.

[77] Western, etc., R. Co., v. Drysdale, 51 Ga. 644; 7 Am. Ry. Rep. 343.

[78] Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282.

[79] South & North Ala. R. Co. v. McLendon, 63 Ala. 266; Vicksburg, etc., R. Co. v. Patton, 31 Miss. 156; Maysville, etc., R. Co. v. Herrick, 13 Bush. (Ky.) 122; 17 Am. Ry. Rep. 53.

[80] Wilson v. New Orleans, etc., R. Co., 63 Miss. 352.

[81] New Orleans, etc., R. Co. v. Bailey, 40 Miss. 395; Goddard v. Grand Trunk R. Co., 2 Am. Rep. 39; Haley v. Mobile, etc., R. Co., 7 Baxt. (Tenn.) 239; 8 Am. & Eng. R. Cas. 541.

[82] Louisville, etc., R. Co. v. Fleming, 14 Lea (Tenn.) 128; 18 Am. & Eng. R. Cas. 347; Nashville, etc., R. Co. v. Stearns, 9 Heisk. (Tenn.) 52.

held, if the act was in the scope of his employment;[83] a company can be held, if it authorized or ratified the wrongful act of its agent and he could be held for punitive damages;[84] a railway company is liable for a reckless injury to a passenger, caused by its employees, acting within the scope of their employment,[85] and an employee of one railroad, defending its property, who is shot and dangerously injured by an employee of another company, trying to take forcible possession of the property of the employing company, is entitled to punitive damages from the company employing the wrongdoer.[86]

§ 178. **When punitive damages should not be allowed.**— Punitive or exemplary damages are not properly recoverable, for an injury caused to one on a railroad track, by the mere failure of the company to build a platform or erect a

[83] Lake Shore, etc., R. Co. v. Rosenweig, 113 Pa. St. 519; 6 Atl. Rep. 545; 26 Am. & Eng. R. Cas. 489; Atlantic, etc., R. Co. v. Dunn, 19 Ohio St. 162; Pittsburg, etc., R. Co. v. Slusser, 19 Ohio St. 157; Gasway v. Atlanta, etc., R. Co., 58 Ga. 216; 16 Am. Ry. Rep. 99.

[84] Bass v. Chicago, etc., R. Co., 42 Wis. 654; 15 Am. Ry. Rep. 45; Philadelphia Tr. Co. v. Orbann, 199 Pa. St. 37; 12 Atl. Rep. 816; 34 Am. & Eng. R. Cas. 432.

[85] Quinn v. South Carolina R. Co., 29 So. Car. 381; 7 S. E. Rep. 614; 1 L. R. A. 682; 37 Am. & Eng. R. Cas. 166.

[86] Denver, etc., R. Co. v. Harris, 122 U. S. 597; 31 Am. & Eng. R. Cas. 592.

"An employee of a railroad company was sent into a pit under an engine to clean the ashes from the engine, and the engineer promised not to move the engine while he was there, but did move it. *Held*, that the employee could recover punitive damages for the resulting injuries; the engineer's conduct being wanton and reckless negligence." Chesapeake & O. Ry. Co. v. Satterfield (Ky. 1907), 100 S. W. Rep. 844.

"Exemplary damages are properly awarded where a motorman running his car at high speed fails to lessen it until too late to prevent collision with one driving near the track, and the motorman sees, or could see, the person in time to check his car or stop it, thereby avoiding the injury." South Covington & C. St. Ry. Co. v. Cleveland (Ky. 1907), 100 S. W. Rep. 283.

light at a point where a branch road connects with its track;[87] punitive damages cannot be allowed, in Mississippi, in the absence of a showing of gross negligence;[88] exemplary damages cannot be allowed for an injury on a railroad bridge, caused by the ignorance of the bridge tender;[89] such damages cannot be allowed for an injury due to the negligence of an employee, unless it is shown that the employer authorized or ratified the wrongful act;[90] the discharge and repudiation of the act of an employee, not previously authorized, would prevent punitive damages for an injury due to his act;[91] an employer cannot be held for punitive damages for an injury due to the recklessness of an employee, unless it is shown that his recklessness was known to the employer;[92] the malicious misconduct of an employee causing an injury, will not justify vindictive damages against the employer, unless the act was within the scope of the employee's agency;[93] a company is not liable unless it in some way participates in the negligence of its employee causing the injury;[94] the employer cannot be held for punitive damages, unless the act of its agent, occasioning the injury, was a malicious or wanton act;[95] and if the act of the employee was wanton or malicious, the employer is not liable, unless it expressly or impliedly authorized or ratified the

[87] Ensley R. Co. v. Chewing, 93 Ala. 24; 9 So. Rep. 458; 50 Am. & Eng. R. Cas. 46; Glass v. Memphis, etc., R. Co., 94 Ala. 581; Savannah, etc., R. Co. v. Meadows, 95 Ala. 137.

[88] New Orleans, etc., R. Co. v. Statham, 42 Miss. 608.

[89] Brooks v. New York, etc., R. Co., 30 Hun (N. Y.) 47.

[90] Hagan v. Providence, etc., R. Co., 3 R. I. 88.

[91] Western, etc., R. Co. v. Turner, 72 Ga. 292; 53 Am. Rep. 842; 28 Am. & Eng. R. Cas. 455.

[92] Illinois, etc., R. Co. v. Hammer, 72 Ill. 347.

[93] Pittsburg, etc., R. Co. v. Slusser, 19 Ohio St. 157; Goddard v. Grand Tr. R. Co., 57 Me. 202.

[94] Fisher v. Metropolitan R. Co., 34 Hun (N. Y.) 433.

[95] Doss v. Missouri, etc., R. Co., 59 Mo. 27; 8 Am. Ry. Rep. 462.

wrongful act;[96] a railroad company is not liable for punitive damages for the wanton or illegal act of a conductor of one of its trains, toward a passenger,[97] and under the Texas death statute, punitive damages cannot be recovered for the mere negligence of an employee, as distinguished from a negligent act of the railroad company itself.[98]

§ 179. **Pleading exemplary damages.**— To entitle the plaintiff in a personal injury action to exemplary or punitive damages, such damages must be set forth in the complaint.[99] A tort, causing a personal injury, which will give punitive damages, must be one accompanied by malice, wantonness, violence or recklessness, and to recover such damages the plaintiff must allege the elements of such a tort.[1] The petition should set forth the facts going to show the fraud, malice, gross negligence or oppression on the defendant's part, and if a corporation is sued, it should be alleged that the fraud, gross negligence or oppression of the company's agents, were done by direction of the employer or that it ratified such acts, after their commission.[2] Where actual and exemplary damages both are set forth, in the same petition,

[96] Ricketts v. Chesapeake, etc., R. Co., 33 W. Va. 433; 35 L. R. A. 354; 10 S. E. Rep. 801; 41 Am. & Eng. R. Cas. 42.

[97] Lake Shore, etc., R. Co. v. Prentiss, 147 U. S. 101; 58 Am. & Eng. R. Cas. 436.

[98] Houston, etc., R. Co. v. Cowser, 57 Texas 293.

"Exemplary damages cannot be awarded, in an action for injuries, unless there is gross negligence or wanton disregard of the safety of others." Illinois Cent. R. Co. v. Lence (Ky. 1907), 100 S. W. Rep. 215.

[99] Alabama, etc., R. Co. v. Arnold, 84 Ala. 159; 4 So. Rep. 359; 5 Am. St. Rep. 354; 35 Am. & Eng. R. Cas. 466; Houston, etc., R. Co. v. Baker, 57 Texas 419; 11 Am. & Eng. R. Cas. 667.

[1] Samuels v. Richmond, etc., R. Co., 35 Car. 493; 14 S. E. Rep. 943; 52 Am. & Eng. R. Cas. 315; Sullivan v. Oregon, etc., R. Co., 12 Oregon 392; 7 Pac. Rep. 508; 21 Am. & Eng. R. Cas. 391.

[2] International, etc., R. Co. v. Garcia, 70 Texas 207; 7 S. W. Rep. 802.

they should properly be set forth in distinct counts, under separate causes of action.[3] But it is not essential that exemplary damages should be claimed, *eo nomine,* in the petition, but it is generally held to be sufficient if the facts alleged and proved are such as to warrant the assessment of such damages.[4]

§ 180. **Evidence to establish exemplary damages.**— It is error to leave the question of punitive damages to a jury when no evidence has been introduced that would authorize a verdict for more than compensatory damages.[5]

Where the evidence is such as to authorize exemplary damages, the jury may properly consider as elements thereof, the probable expenses of the litigation to the plaintiff, and evidence is admissible to show what a reasonable and proper charge for counsel fees would be.[6] It is not improper, in such cases, to allow proof of the pecuniary ability of the defendant,[7] for what would be sufficient damages, by way of example and punishment, for a day laborer, with no estate, would be inconsequential, by way of punishment or example, for a wealthy corporation.[8]

But the jury cannot take into consideration the ability of the defendant to respond in damages, in order to justify an increase of damages, in the absence of bad motive, or some other fact sufficient of itself to justify punitive damages,[9] nor is the poverty or lack of wealth, on the part of the

[3] Galveston, etc., R. Co. v. Le Gierse, 51 Texas 189.

[4] Savannah, etc., R. Co. v. Holland, 82 Ga. 257; 10 S. E. Rep. 200; 41 Am. & Eng. R. Cas. 196.

[5] Pittsburg Southern R. Co. v. Taylor, 104 Pa. St. 306; 49 Am. Rep. 580.

[6] New Orleans, etc., R. Co. v. Allbritton, 38 Miss. 242.

[7] Louisville, etc., R. Co. v. Mahoney, 7 Bush. (Ky.) 235.

[8] Belknap v. Boston, etc., R. Co., 49 N. H. 358.

[9] Hunt v. Chicago, etc., R. Co., 26 Iowa 363; Hayes v. St. Louis, etc., R. Co., 15 Mo. App. 583.

plaintiff material, in such a case, as the damages to which he may be entitled are not at all affected by the wealth or poverty of the plaintiff.[10]

§ 181. **Prospective damages for permanent injuries.**— Where there is a permanent injury to the person, prospective damages resulting therefrom are recoverable, by way of compensation,[11] but to justify the allowance of damages for future or permanent disability, it must be shown that permanent disability is reasonably certain to result from the injuries complained of.[12] Claims for permanent internal injuries should never be allowed, unless they are clearly established by evidence as necessarily arising from the injuries resulting proximately from the negligence of the defendant.[13]

But where the evidence shows an injury resulting from the accident that is permanent in its nature, a recovery may be had for the disabling effects of the injury, both past and prospective; and in estimating such damages, loss of time and incapacity to do as profitable labor after, as before the injury, as well as mental and physical suffering, are held to be proper elements for the jury to consider.[14]

§ 182. **Same — Permanent disability must be reasonably certain.**— Damages for the probable future result of personal

[10] Shea v. Potrero, etc., R. Co., 44 Cal. 414; 5 Am. Ry. Rep. 448.

[11] Gorham v. Kansas City, etc., R. Co., 113 Mo. 408; 20 S. W. Rep. 1060.

[12] Ohio, etc., R. Co. v. Cosby, 107 Ind. 32; 7 N. E. Rep. 373; 27 Am. & Eng. R. Cas. 339; Cleveland, etc., R. Co. v. Newell, 104 Ind. 264; White v. Milwaukee, etc., R. Co., 61 Wis. 536; 21 N. W. Rep. 524; 50 Am. Rep. 154; Am. & Eng. R. Cas. 213.

[13] Dunn v. Pennsylvania R. Co., 20 Phila. (Pa.) 258; Texas Trunk R. Co. v. Ayers, 83 Texas 268; 18 S. W. Rep. 684.

[14] Mobile, etc., R. Co. v. George, 94 Ala. 199; 10 So. Rep. 145.

"A verdict for personal injuries should be for such a sum as will reasonably compensate plaintiff for the injuries he has proved, including therein his loss of time and wages, his pain and suffering in the past,

injuries, to be recoverable, must depend upon the reasonable certainty and probability of the future result of such injury.[15] If not reasonably certain to result from the injury, it would be speculative to allow damages for the permanent nature of the disability.[16] A mere probability of the future occurrence of the disability is not enough, but to entitle plaintiff to damages for future disability the evidence must establish, with reasonable certainty, that such disability will result.[17] Reasonable certainty, however, is all that can be entertained in regard to the future, and hence it is correct to instruct the jury that the plaintiff is entitled to such future damages as it is shown by the evidence will be reasonably certain to result from the injury.[18]

In estimating future damages, evidence tending to show the character and extent of the injury and its probable result, as well as the probability of a return of the disease or disability resulting from the injury in the ordinary course of events, is admissible to show what future damages may reasonably be expected to follow the condition induced by the

and such as may come to him in the future as a result of the injury, and also for any permanent injuries." Simeone v. Lindsay (Del. Sup. 1907), 65 Atl. Rep. 778.

"The verdict in favor of plaintiff in a personal injury action should be for such an amount as will reasonably compensate him for the injury sustained, including therein pain and suffering and all disability that may result therefrom." Reiss v. Wilmington City Ry. Co. (Del. Sup. 1907), 67 Atl. Rep. 153.

[15] Gregory v. New York, etc., R. Co., 8 N. Y. Supp. 525; 28 N. Y. S. R. 726.

[16] Missouri Pacific Ry. Co. v. Mitchell, 75 Texas 77; 12 S. W. Rep. 810; 41 Am. & Eng. R. Cas. 224; Bateman v. New York, etc., R. Co., 47 Hun (N. Y.) 429; 14 N. Y. S. R. 454.

[17] Filer v. New York, etc., R. Co., 49 N. Y. 42; 3 Am. Ry. Rep. 460; Feeney v. Long Island, etc., R. Co., 116 N. Y. 375; 22 N. E. Rep. 402; 26 N. Y. S. R. 729; 5 L. R. A. 544; 39 Am. & Eng. R. Cas. 639.

[18] Feeney v. Long Island, etc., R. Co., 116 N. Y. 375; 22 N. E. Rep. 402; 39 Am. & Eng. R. Cas. 639.

injury.[19] But the jury should not allow damages for future effects of an injury where the testimony only shows that the injury may likely prove permanent and there is not a reasonable certainty that it will be so, for otherwise the permanency of such injury is a mere contingency likely to occur and the allowance of damages for such contingent result would be purely speculation.[20]

§ 183. **Damages for future pain and suffering.**— Pain and physical suffering that may reasonably be expected in the future may be considered in giving damages for injuries to the person, where the evidence shows that they will be experienced as a result of the injury sustained.[21] But while physical pain is a proper element of damages, where it will result in the future from the injury, the damages therefor should be limited to such future pain and suffering as will be reasonably certain to result from the injury and where the existence of such future pain is a matter of mere conjecture, no damages therefor should be allowed.[22]

[19] Wallace v. Western N. Car. R. Co., 104 N. Car. 442; 10 S. E. Rep. 552; 41 Am. & Eng. R. Cas. 212; South & N. R. Co. v. McLendon, 63 Ala. 266; Bay Shore R. Co. v. Harris, 67 Ala. 6.

[20] Meeteer v. Manhattan R. Co., 63 Hun 533; 45 N. Y. S. R. 704; 18 N. Y. Supp. 561.

"In an action for a personal injury, the plaintiff is entitled to recover damages for future consequences of the injury only with respect to such consequences as the evidence shows are reasonably certain to ensue." Daigneau v. Grand Trunk Ry. Co. (U. S. C. C., Mass. 1906), 153 Fed. Rep. 593.

Damages for inability to bear children cannot be recovered. Lennox v. Interurban Ry. Co., 93 N. Y. S. 230; 104 App. Div. 110.

[21] Feeney v. Long Island R. Co., 116 N. Y. 375; 22 N. E. Rep. 402; 26 N. Y. S. R. 729; 5 L. R. A. 544; 39 Am. & Eng. R. Cas. 639; Griswold v. New York, etc., R. Co., 44 Hun 236; 115 N. Y. 61; Metteson v. New York, etc., R. Co., 62 Barb. (N. Y.) 364.

[22] Fry v. Dubuque, etc., R. Co., 45 Iowa 416; Waterman v. Chicago, etc., R. Co., 82 Wis. 613; 52 N. W. Rep. 247; 52 Am. & Eng. R. Cas. 592.

Evidence of an incurable spinal disease, as a result of the injury, will support a verdict for future damages for pain and suffering;[23] where one of the plaintiff's feet was so injured as to require amputation and the other foot had evidences that it was diseased, it is proper to allow damages for future pain;[24] a broken arm that had not recovered a year after the injury, where the physician testified that in his opinion it would not recover, entitled the plaintiff to damages for a permanent injury;[25] the opinion of a physician that permanent disability will result from the injury is generally held sufficient to justify damages for future disability,[26] and where a recovery is not shown at the time of the trial, future damages for physical disability were allowed, in one case.[27]

However, in the absence of evidence that the injury is reasonably certain to cause future pain and suffering, it is error to charge the jury that they may allow damages for future pain,[28] and to justify an instruction for damages for future suffering, in any case, it must be shown that permanent disability or future suffering is reasonably certain to follow the injury.[29]

[23] Weiler v. Manhattan, etc., R. Co., 6 N. Y. Supp. 320.

[24] Lake Shore, etc., R. Co. v. Johnson, 135 Ill. 641; 26 N. E. Rep. 510; Chicago, etc., R. Co. v. Gomes, 46 Ill. App. 255.

[25] Bigelow v. Metropolitan, etc., R. Co., 48 Mo. App. 367.

[26] Kane v. New York, etc., R. Co., 132 N. Y. 160; 30 N. E. Rep. 256; 43 N. Y. S. R. 494; 56 Hun. 648; Crank v. Forty-second St. R. Co., 6 N. Y. Supp. 229.

[27] Stutz v. Chicago, etc., R. Co., 73 Wis. 147; 40 N. W. Rep. 653; 37 Am. & Eng. R. Cas. 187.

[28] Bloom v. Manhattan R. Co., 43 N. Y. S. R. 378; 63 Hun. 629; 17 N. Y. Supp. 812; Crawford v. Delaware, etc., R. Co., 23 J. & S. (N. Y.) 255.

[29] Atlanta, etc., R. Co. v. Johnson, 66 Ga. 259; Union Pac. R. Co. v. Jones, 49 Fed. Rep. 343; 4 U. S. App. 115.

"In an action for injuries, an allegation that plaintiff was reasonably certain to suffer in the future great physical pain and mental anguish was not insufficient to raise such issue, because it did not

§ 184. **Loss of earnings in the future.**— Damages are properly allowable for future loss or suffering due to personal injuries, where the evidence shows that the plaintiff has not recovered at the date of the trial,[30] and the fact that the injury more or less incapacitated the plaintiff for the performance of labor, or the pursuit of his ordinary avocation, is a proper element to be considered by the jury.[31] Prospective damages to an adult, on account of impairment or loss of earning capacity in the future is a proper element of damage and it is even held, in one case, that a jury could take into consideration the loss of earnings of an infant four years old, after he shall have attained his majority,[32] but as he might never earn anything, it would seem to be very uncertain what his earning capacity might be and would be next to speculation to base a verdict for damages on such ground. An instruction should not assume an impairment of earning capacity, however, where the evidence on this point is conflicting or not all one way;[33] but where the evidence shows a loss of earning capacity, it is proper to advise the jury that if they believe, from the evidence, the plaintiff has sustained such loss, in case the verdict is for the plaintiff, then damages should be assessed for such sum as the evidence shows plaintiff will sustain, in the future, by reason of the injury.[34]

charge in terms that she 'would' suffer future pain." Bell v. Central Electric Ry. Co. (Mo. App. 1907), 103 S. W. Rep. 144.

Damages for future suffering must be such as are reasonable only and certain to occur and not merely speculative, remote or probable to happen. Waddell v. Metropolitan R. Co. (Mo.), 88 S. W. Rep. 765.

[30] Eddy v. Wallace, 49 Fed. Rep. 801; 4 U. S. App. 264; 1 C. C. A. 435; 52 Am. & Eng. R. Cas. 265.

[31] Howard, etc., Co. v. Davis, 76 Texas 630; 13 S. W. Rep. 665.

[32] Rosenkranz v. Lindell R. Co., 108 Mo. 9; 18 S. W. Rep. 890.

[33] Fordyce, Receiver, v. Withers (Texas), 20 S. W. Rep. 766.

[34] Pill v. Brooklyn, etc., R. Co., 27 N. Y. Supp. 230; 57 N. Y. S. R. 783; Richmond, etc., R. Co. v. Norment, 84 Va. 167; 4 S. E. Rep. 211.

However, to justify an instruction for loss of earning capacity, it is essential that the evidence on the part of the plaintiff should show what the earnings of the plaintiff were, prior to the injury, for without such evidence, it cannot be ascertained, with any degree of certainty, that there has been a loss in earning capacity, when the earnings prior to the injury are not shown.[35]

[35] Gulf, etc., R. Co. v. Gordon, 70 Texas 80; 7 S. W. Rep. 695.

"In an action for injuries to a person employed a part of the time as a brakeman and a part of the time as an extra conductor, he was entitled, with reference to the question of his earning capacity, to show how much time he was called upon to work as conductor, what he received as such, and what he received as a brakeman." Galveston, H. & S. A. Ry. Co. v. Still (Tex. Civ. App. 1907), 100 S. W. Rep. 176.

"In a personal injury action, evidence considered, and *held* to take the question of decreased earning capacity to the jury." St. Louis, I. M. & S. Ry. Co. v. Leamons (Ark. 1907), 102 S. W. Rep. 363.

"In an action for personal injuries, where the petition had no allegation as to loss of time or expense of cure, and the evidence did not show any permanent impairment of plaintiff's power to earn money, an instruction, authorizing an award of such damages as would reasonably compensate him for the injury, including his suffering, not exceeding the amount claimed in the petition, was erroneous." Louisville & N. R. Co. v. Farris (Ky. 1907), 100 S. W. Rep. 870.

Loss of earnings are never recoverable, unless they are specially pleaded and proved. Zongker v. Peoples Ry. Co., 110 Mo. App. 382; 86 S. W. Rep. 486.

Damages for loss of time, or interference with the business of the injured person, are special damages and must be specially pleaded. Union Traction Co. v. Sullivan (Ind.), 76 N. E. Rep. 116.

There must be evidence upon which to base a verdict for loss of future earnings. St. Louis, etc., Ry. Co. v. Smith (Texas), 86 S. W. Rep. 943.

On issue of loss of earning capacity, it is always competent to show what the injured person's earnings were. Macon Ry. Co. v. Mason, 123 Ga. 773; 51 S. E. Rep. 569; Andrews v. Chicago, etc., R. Co. (Iowa), 105 N. W. Rep. 404; Lewes v. Crane & Sons, 78 Vt. 216; 62 Atl. Rep. 60.

Plaintiff is not limited in his recovery to his earnings in the particular calling that he was in at the time of his injury. Dallas Ry. Co. v. Hardy (Texas), 86 S. W. Rep. 1053.

The wages the deceased was earning at the time of his death was

§ 185. **Special damages must be specially pleaded.**— Damages not the necessary result of the injury complained of and not consequently implied by law, must be specially pleaded.[36] Special damages are such as really took place, but are not implied by law. They may be either such as were superadded to the general damages, from an act injurious in itself, or are such as arise from an act, not actionable in itself, but injurious only in its consequences; they must be set up in the petition with a reasonable degree of particularity and it must appear that the damage claimed is the natural, though not necessary consequence of the wrong complained of.[37]

Money expended or a debt assumed, on account of the injury;[38] wages paid to one to work in the absence of the plaintiff;[39] loss of time resulting from the injury;[40] aggravation of existing physical ailments, by reason of the injury complained of,[41] are all held to be special elements of damage that must be alleged in the petition, in order to furnish the basis of a verdict, and it is error to instruct that damages for such elements may be allowed, when not so alleged in the petition.[42] But the rule is satisfied, when from the facts alleged, the law will infer other facts; for

held competent to be shown, in the following cases: Reiter-Conley Co. v. Hamlin, 144 Ala. 192; 40 So. Rep. 280; Central of Georgia R. Co. v. Alexander, 144 Ala. 257; 40 So. Rep. 424.

[36] Spencer v. St. Paul, etc., R. Co., 21 Minn. 362; Brown v. Hannibal, etc., R. Co., 99 Mo. 310; 12 S. W. Rep. 655; 42 Am. & Eng. R. Cas. 87.

[37] Brown v. Hannibal, etc., R. Co., 99 Mo. 310, *supra.*

[38] South Covington R. Co. v. Ware, 84 Ky. 267; 1 S. W. Rep. 493; 27 Am. & Eng. R. Cas. 206.

[39] Gumb v. Twenty-third St. R. Co., 114 N. Y. 411; 21 N. E. Rep. 993; 43 Am. & Eng. R. Cas. 315.

[40] Slaughter v. Metropolitan R. Co., 116 Mo. 269; 23 S. W. Rep. 760; 58 Am. & Eng. R. Cas. 604; Coontz v. Missouri Pac. R. Co., 115 Mo. 669; 22 S. W. Rep. 572.

[41] Fuller v. Jackson, 92 Mich. 197; 52 N. W. Rep. 1075.

[42] Slaughter v. Metropolitan R. Co., 116 Mo. 269; 23 S. W. Rep. 760; 58 Am. & Eng. R. Cas. 604.

whatsoever the law will infer, the opposite party is presumed to know, whether it is pleaded or not,[43] and where mental worry or suffering would naturally result from the physical injury inflicted, evidence of this fact will justify an instruction for damages on this ground, although it was not specially pleaded.[44]

§ 186. **Evidence of plaintiff's condition, circumstances and pursuit proper.**— Evidence is competent to show the plaintiff's earnings at the time of the injury sued for,[45] as well as the condition of his health, his aptitude and qualifications

[43] Texas, etc., R. Co. v. Curry, 64 Texas 85; 21 Am. & Eng. R. Cas. 448.

[44] Chicago v. McLean, 133 Ill. 148; 24 N. E. Rep. 527; 8 L. R. A. 765.

In an action for personal injuries, an allegation in the petition, which, after stating the injuries, concluded with the words, "and by reason thereof he has been compelled to expend $—— for medicine and medical attention"— is a sufficient allegation that expenditures were made. Detrich v. Metropolitan St. Ry. Co. (Mo. App. 1907), 102 S. W. Rep. 1044.

"Where the petition in an action for personal injuries alleges an injury to the head, eyes, spinal cord, and muscles and ligaments surrounding the same, the extent of which could not be known, evidence of plaintiff's loss of memory and injury to his eyes was admissible." Young v. Metropolitan St. Ry. Co. (Mo. App. 1907), 103 S. W. Rep. 135.

"Where, in an action for personal injuries, the petition alleged that plaintiff incurred expenses for medicine, medical care, and attention, and there was proof of application of medicine and of medical care and attention, with the charge therefor, an instruction submitting the question of expenditure for medicine was proper." Young v. Metropolitan St. Ry. Co. (Mo. App. 1907), 103 S. W. Rep. 135.

In a personal injury action, damages for loss of time must be specially pleaded in order to be recovered. Zongker v. Peoples Ry. Co., 110 Mo. App. 382; 86 S. W. Rep. 486.

Damages for physical suffering may be recovered, though not specially alleged. Louisville & N. R. Co. v. Dickey (Court of Appeals of Kentucky 1907), 104 S. W. Rep. 329.

[45] Alabama, etc., R. Co. v. Frazier, 93 Ala. 45; 9 So. Rep. 303; Simonton v. Chicago, etc., R. Co., 49 Iowa 87; New Jersey, etc., Co., v.

for business and his habits of industry, or anything else concerning his prospective earnings.[46] The nature of his employment and his dependence thereon for support;[47] the value of his personal services in conducting his business;[48] the state of his health before the injury,[49] and his condition in life[50] are all held competent to be considered by the jury.

But the fact that the plaintiff has a family dependent upon him for support is not material or revelant upon any issue in the ascertainment of damages;[51] it is not proper for the plaintiff to show the number and ages of his children,[52] nor is it a proper item of evidence, upon the question of the plaintiff's damages, to show his relative wealth or poverty, as compared to the defendant.[53]

§ 187. **Evidence in mitigation of damages.**— In estimating

Nichols, 33 N. J. L. 434; Staal v. Grand St., etc., R. Co., 107 N. Y. 625; 13 N. E. Rep. 624; 31 Am. & Eng. R. Cas. 21.

[46] McLain v. Brooklyn, etc., R. Co., 116 N. Y. 459; 22 N. E. Rep. 1062; 40 Am. & Eng. R. Cas. 254.

[47] Moore v. Central R. Co., 47 Iowa 688; Louisville, etc., R. Co. v. Falvey, 104 Ind., 409; 3 N. E. Rep. 389; 23 Am. & Eng. R. Cas. 522; Grand Rapids, etc., R. Co. v. Martin, 41 Mich. 667.

[48] Lincoln v. Saratoga, etc., R. Co., 23 Wend. (N. Y.) 425.

[49] Reardon v. Missouri Pacific Ry. Co., 114 Mo. 384; 21 S. W. Rep. 731; Stephens v. Hannibal, etc., R. Co., 96 Mo. 207; 9 S. W. Rep. 589; 38 Am. & Eng. R. Cas. 110.

[50] Dayharsh v. Hannibal, etc., R. Co., 103 Mo. 570.

[51] Pennsylvania R. Co. v. Keane, 143 Ill. 172; 32 N. E. Rep. 260; Chicago, etc., R. Co. v. Few, 15 Ill. App. 125; Georgia, etc., R. Co. v. Homer, 73 Ga. 251; 27 Am. & Eng. R. Cas. 186.

[52] Mahaney v. St. Louis, etc., R. Co., 108 Mo. 191; 18 S. W. Rep. 895; Pennsylvania R. Co. v. Roy, 102 U. S. 451; 1 Am. & Eng. R. Cas. 225; Kreuziger v. Chicago, etc., R. Co., 73 Wis. 158; Pittsburg, etc., R. Co. v. Powers, 74 Ill. 341.

[53] Missouri Pacific Ry. Co. v. Lyde, 57 Texas, 505; 11 Am. & Eng. R. Cas. 188; Howard, etc., Co. v. Davis, 76 Texas 630; 13 S. W. Rep. 665; Wallace v. Western, etc., R. Co., 104 N. Car. 442; 10 S. E. Rep. 552; 41 Am. & Eng. R. Cas. 212.

the expectancy of the plaintiff, with a view of compensating him for a loss of earning power, in the future, it is proper for the jury to take into consideration that plaintiff was suffering with a disease of the kidneys, known as Bright's Disease, at the time of the injury; [54] where special damages are claimed for loss of business, it is competent to show the unlawful character of the business,[55] and, with a view of showing that the injury was aggravated by the neglect of the plaintiff, it is proper to permit evidence of the manner of treatment and conduct of the plaintiff after the injury was received.[56] But in a personal injury action, the moral character of the plaintiff is not relevant, except as affecting his credibility as a witness, and the fact that plaintiff, at the time of her injury, kept a house of ill fame, is immaterial to any issue in the case.[57] Nor is it admissible to show that plaintiff was a man of intemperate habits and had abused himself, so that he could not readily recover from disease; [58] the average cost of living in a town such as that where plaintiff resided, would not be competent evidence, as affecting the

"In an action for injuries to a married woman, her testimony that her family consisted of herself, husband, and five children, and that she took care of the house and family prior to the accident, but had not been able to do so since, was properly admitted for the purpose of showing that she was a healthy woman before her injuries and thereafter incapacitated." Latimer v. Metropolitan St. Ry. Co. (Mo. App. 1907), 103 S. W. Rep. 1102.

"A plaintiff in an action on the case for personal injuries should not be permitted to testify as to the number of his children." Chicago, R. I. & P. Ry. Co. v. Steckman, 125 Ill. App. 299, judgment affirmed, 79 N. E. Rep. 602; 224 Ill. 500.

[54] Bunting v. Hogsett, 139 Pa. St. 363; 21 Atl. Rep. 31; 48 Am. & Eng. R. Cas. 87.

[55] Jacques v. Bridgeport, etc., R. Co., 41 Conn. 61; 6 Am. Ry. Rep. 1.

[56] Malloy v. New York, etc., R. Co., 58 Barb. (N. Y.) 182.

[57] Indianapolis, etc., R. Co. v. Bush, 101 Ind. 582.

[58] Baltimore, etc., R. Co. v. Botelar, 38 Md. 568; 10 Am. Ry. Rep. 506.

measure of damages,[59] nor would the aggravation of the disease by the mistake of a competent surgeon, employed in good faith, be competent as affecting the recovery.[60]

§ 188. **Damages for pecuniary loss to beneficiaries.**— Where the object of a statute giving damages for wrongful death, is compensatory merely and the damages are given by way of compensation to the beneficiaries of the decedent and not as a penalty for the wrongful act, it is generally necessary for the beneficiaries to show some pecuniary loss resulting to them from the death of the decedent, or no recovery can be had. Proof of the death and relationship of the plaintiff to the deceased, does not, of itself, give a right to damages, but the plaintiff must go further and show an actual pecuniary loss to himself.[61] Under Lord Campbell's Act, in an action by a father for the wrongful death of his son, the defendant is entitled to judgment, in the absence of evidence showing reasonable probability of pecuniary benefit to the father from the continued life of the son.[62] And under statutes similar to the act referred to, such as the statute of Arkansas, in an action by the father of an unmarried adult son, against a railroad company, for his son's death, substantial damages can be recovered only by showing that deceased gave assistance to his father, contributed money to his support, or that the father had reasonable expectation of pecuniary benefit from the continued life of his son and in the absence of such a showing no such damages can be recovered.[63]

But under the New York statute, the fact that the children

[59] Simonton v. Chicago, etc., R. Co., 49 Iowa 87.

[60] Houston, etc., R. Co. v. Hollis, 2 Texas Civ. App. 169.

[61] Duckworth v. Johnson, 4 H. & N. 653; 5 Jur. N. S. 630; 29 L. J. Ex. 25.

[62] Bourke v. Cork & M. E. Co., 4 Ir. L. R. 682.

[63] Fordyce v. McCants, 51 Ark. 509; 11 S. W. Rep. 694.

of one killed by the wrongful act of the defendant were all of full age and were not living with the deceased parent, but were supporting themselves, would not, of itself, show that they had sustained no pecuniary loss,[64] and in an action, in the same State, for wrongfully causing the death of a child, the absence of proof of special pecuniary damage to the next of kin is not a ground for ordering a nonsuit and directing a verdict for nominal damages only.[65]

§ 189. **What evidence of pecuniary loss competent.**— Where there is some evidence, although of an uncertain character, showing a pecuniary loss to the next of kin of the deceased, from his death, the question is properly for the determination of the jury,[66] nor is it essential to show that the deceased contributed pecuniary assistance up to the time of his death. Under Lord Campbell's Act,[67] in an action for the benefit of the father of the deceased, where the evidence showed that the father was fifty-nine years old and worked when he could, but was so injured that he could not work regularly; that his deceased son had contributed to his support at various times, but not later than five or six years previous to his death, it was held that there was sufficient evidence of pe-

[64] Lockwood v. New York, etc., R. Co., 98 N. Y. 523; Lustig v. New York, etc., R. Co., 48 N. Y. S. R. 916.

[65] Ihl v. Forty-second Street R. Co., 47 N. Y. 317; 2 Am. Ry. Rep. 409; Houghkirk v. Delaware, etc., R. Co., 92 N. Y. 219; 44 Am. Rep. 370; Little Rock, etc., R. Co. v. Barker, 39 Ark. 491.

"In an action for wrongful death, proof of decedent's earning capacity, his age, probable duration of life, habits of industry, business, etc., constituted sufficient proof from which pecuniary compensation might be awarded." Woodstock Iron Works v. Kline (Ala. 1907), 43 So. Rep. 362.

[66] Davis v. Columbia, etc., R. Co., 21 So. Car. 93; 28 Am. & Eng. R. Cas. 440.

[67] 9 & 10 Vict., ch. 93.

cuniary loss to the father, to justify a submission of the cause to the jury.[68]

Evidence of the condition and circumstances of the decedent's family, his business qualifications and the amount of his earnings, are all competent facts to go to the jury;[69] evidence of the ill health and poverty of the plaintiffs and their dependency upon their deceased son's wages for support;[70] evidence that some of the younger children of the plaintiff's intestate were in poor health is competent to show the pecuniary loss sustained by their mother's death[71] and it is not error to permit plaintiff to prove that deceased had been in the habit of turning his wages over to his wife and permitting same to be expended for the support of the family, as such evidence is competent to show the pecuniary loss sustained by the family because of the death of the deceased.[72]

§ 190. **Necessity of dependence upon deceased for support.**— In many of the statutes giving a right of action for damages for death by wrongful act, for the benefit of the next of kin, it is held competent for the plaintiff to show that he was dependent upon the deceased for support.[73] Evidence of the physical condition of the deceased and his ability to labor and support the plaintiff,[74] is not only admissible, but highly

[68] Hetherington v. North Eastern R. Co., L. R. 9, Q. B. D. 160; 6 Am. & Eng. R. Cas. 490.

[69] Baltimore, etc., R. Co. v. Wightman, 29 Gratt. (Va.) 431; 17 Am. Ry. Rep. 351.

[70] Johnson v. Chicago, etc., R. Co., 64 Wis. 425; 25 N. W. Rep. 223; 25 Am. & Eng. R. Cas. 338.

[71] McKeigue v. Janesville, 68 Wis. 50; 31 N. W. Rep. 298.

[72] Lake Erie, etc., R. Co. v. Mugg, 132 Ind. 168; 31 N. E. Rep. 564; Pennsylvania R. Co. v. Adams, 55 Pa. St. 499.

[73] Little Rock, etc., R. Co. v. Leaveritt, 48 Ark. 333; 3 S. W. Rep. 50; 28 Am. & Eng. R. Cas. 459.

[74] Augusta, etc., R. Co. v. Glover (Ga.), 18 S. E. Rep. 406; 58 Am. & Eng. R. Cas. 269.

proper, if not absolutely necessary,[75] and the plaintiff's health, prospects and pecuniary condition is competent testimony, as well as the ability and willingness of the deceased to support the plaintiff,[76] or any other facts tending to show that the plaintiff needed the services of the deceased, or that he or she will suffer pecuniary loss from his death.[77]

The evidence will generally be held sufficient to show pecuniary damage to the plaintiff, where it shows that there has either been an actual donation for the purpose of support,[78] or that there was a reasonable ground for expecting such a donation in the future.[79] Subject to the statutory limitation that the damages for death must be "fair and just," as it is usually provided, the jury are the sole judges of what pecuniary loss has been sustained by the beneficiary.[80] It is not necessary to show the donation of any actual sum for the support of the plaintiff, to justify a verdict for damages for loss of pecuniary aid,[81] and while it is competent to show that the widow, children or next of kin were dependent upon the deceased for support, it is not competent to show what their pecuniary circumstances have been, since the death of their intestate, for this could only appeal to the passions of the jury and is not relevant to any issue in the case.[82]

[75] Chicago, etc., R. Co. v. May, 108 Ill. 288; 15 Am. & Eng. R. Cas. 320; Pennsylvania R. Co. v. Keane, 143 Ill. 172; 32 N. E. Rep. 260.

[76] Missouri Pacific Ry. Co. v. Peregoy, 36 Kansas 424; 14 Pac. Rep. 7.

[77] Ewen v. Chicago, etc., R. Co., 38 Wis. 613.

[78] Southern Pacific R. Co. v. Lefferty, 57 Fed. Rep. 536.

[79] Hetherington v. North Eastern R. Co., 51 L. J. Q. D. 495; 4 Ry. & C. T. Cas. 15.

[80] Ohio, etc., R. Co. v. Wangelin, 43 Ill. App. 324; Chicago v. Keefe, 114 Ill. 230.

[81] Chicago, etc., R. Co. v. Shannon, 43 Ill. 346; Ohio, etc., R. Co. v. Wangelin, 43 Ill. App. 324.

[82] Pennsylvania R. Co. v. Keane, 143 Ill. 172; 32 N. E. Rep. 260; Chicago & C. R. Co. v. May, 108 Ill. 288.

§ 191. **Competent to show habits, character and capacity of deceased.**—With a view of determining the value of his life to the next of kin, or representatives, it is generally held competent to show the age, strength, health, skill, industry, habits and character of the deceased.[83] The jury may take into consideration the income of the decedent, his personal habits, his station in life, his means and his manner of living, with a view of ascertaining the value of his life to his next of kin.[84] It is competent for the jury to also consider the domestic relations of the deceased; that he was a dutiful husband and father or otherwise and his care or neglect of his family.[85] And on the question of damages, while evidence of the fact that the deceased was or was not a good brakeman, would be immaterial, on the question of contributory negligence, it would be pertinent on the issue of the quantum of damages sustained by his death,[86] and to ascertain the value of his life to his estate, the probable duration of his life, his health, habits of industry or sobriety, his skill and earnings in his business would all be proper items of evidence to go to the jury.[87]

But it would not be competent for witnesses to give their opinions of the value of the services of the decedent in a business in which he had never engaged,[88] nor would it be proper to show that the deceased was in the line of promotion in his employment and would have received greater

[83] Kesler v. Smith, 66 N. Car. 154; Chicago, etc., R. Co. v. Travis, 44 Ill. App. 466; Van Gent v. Chicago, etc., R. Co., 80 Iowa 526; 45 N. W. Rep. 913.

[84] Killian v. Augusta, etc., R. Co., 79 Ga. 234; 4 S. E. Rep. 165.

[85] Cook v. Clay Hill R. Co., 60 Cal. 604; 6 Am. & Eng. R. Cas. 175; Munro v. Pacific Coast R. Co., 84 Cal. 515; 24 Pac. Rep. 303.

[86] Wells v. Denver, etc., R. Co., 7 Utah 482; 27 Pac. Rep. 688.

[87] Wheelan v. Chicago, etc., R. Co., 85 Iowa 167; 52 N. W. Rep. 119; 49 Am. & Eng. R. Cas. 693.

[88] Atlanta, etc., R. Co. v. Newton, 85 Ga. 517; 11 S. E. Rep. 776; Mansfield, etc., Co. v. McEnry, 36 Am. Rep. 664.

wages if he had lived and been promoted,[89] for such items are mere speculations and not proper elements of damage to go to the jury.

§ 192. **Competency of mortality tables to show expectancy of life.**— Where the plaintiff has established the age, health, occupation and earning power of the deceased, it is competent to show the expectancy of life of such a man by approved tables of mortality.[90] Being based upon general population and not upon selected or insurable lives, the Carlisle Tables of Mortality are held admissible as some evidence of the probable expectation of the life of the deceased[91] and the Northampton Tables of Mortality[92] and the Haswell Tables,[93] have also been held competent for this purpose. The Encyclopedia Britannica, being a familiar work of science and an unquestioned authority, it is proper to let it be introduced in evidence, to show these tables, or other approved life tables.[94]

The value of such tables, however, when introduced in evidence, will depend very much upon other matters, such as the state of health, habits, social condition and life of the

[89] Brown v. Chicago, etc., R. Co., 64 Iowa 652; 21 N. W. Rep. 193; Chase v. Burlington, etc., R. Co., 76 Iowa 675; 39 N. W. Rep. 196; 38 Am. & Eng. R. Cas. 148.

[90] Steinbruner v. Pittsburg, etc., R. Co., 146 Pa. St. 580; 23 Atl. Rep. 239; Denver, etc., R. Co. v. Woodward, 4 Colo. 1; Kansas Pacific R. Co. v. Lundin, 3 Colo. 94; Louisville, etc., R. Co. v. Mahoney (Ky.), 7 Bush. 234; San Antonio, etc., R. Co. v. Bennett, 76 Texas 151; 13 S. W. Rep. 319; McKeigue v. Janesville, 68 Wis. 50; 31 N. W. Rep. 298.

[91] Steinbruner v. Pittsburg, etc., R. Co., 146 Pa. St. 504; 23 Atl. Rep. 239.

[92] Georgia, etc., R. Co. v. Oakes, 52 Ga. 410; 7 Am. Ry. Rep. 143; Sauter v. New York, etc., R. Co., 66 N. Y. 50; 23 Am. Rep. 18.

[93] Klanowski v. Grand Trunk R. Co., 57 Mich. 525; 24 N. W. Rep. 801; 21 Am. & Eng. R. Cas. 648.

[94] Worden v. Humeston, etc., R. Co., 76 Iowa 310; 41 N. W. Rep. 26.

deceased and the jury should be advised of these qualifying circumstances, if justified by the evidence.[95] The computation should be made from the date of decedent's death, if an infant, and not from the majority of the decedent;[96] and where the father sues for the death of his son, it is error to permit tables of mortality to be introduced in evidence, to show the probable length of life of the deceased son, for in the ordinary course of events, considering the age of the plaintiff, he would not survive the son and the expectation of the father's life being presumably shorter than that of the son, as it is the expectation of life of him who would soonest die that furnishes the proper basis of damages, the expectancy of the father and not that of the son, should have been shown.[97]

§ 193. **Ill health and habits competent in mitigation of damages.**— To offset the result of the plaintiff's evidence as

[95] Steinbruner v. Pittsburg, etc., R. Co., 146 Pa. St. 504; 23 Atl. Rep. 239.

[96] Walters v. Chicago, etc., R. Co., 41 Iowa 71; Wheelen v. Chicago, etc., R. Co., 85 Iowa 167; 52 N. W. Rep. 119; 49 Am. & Eng. R. Cas. 693.

[97] Illinois, etc., R. Co. v. Crudup, 63 Miss. 291.

"In an action for personal injuries, the Carlisle Tables of Expectancy may be given in evidence after the introduction of credible evidence to show the permanent character of the injury." Howard v. McCabe (Neb. 1907), 112 N. W. Rep. 305.

"In an action for a permanent personal injury, mortality tables in the Code Supplement, prepared pursuant to section 1471a thereof, are admissible to show the expectancy of the life of the person injured." Clark v. Van Vleck (Iowa 1907), 112 N. W. Rep. 648.

Where the medical expert testimony shows permanent disability, tables of mortality are competent to show the probable length of plaintiff's life. Illinois Central R. Co. v. Morris, 28 Ky. L. R. 956; 90 S. W. Rep. 979.

Carlisle Tables of Mortality are held competent, in Washington, to show the probable duration of the impairment of plaintiff's health. Brown v. Blaine, 41 Wash. 287; 83 Pac. Rep. 310.

to the probable duration of the decedent's life and the value of his life to the beneficiaries or next of kin, it is competent for the court to permit the defendant to show the fact that at the time of his death the deceased was suffering from an incurable disease which affected the probable continuance of his life,[98] or that the deceased was a drunken, worthless man, making no provision for his family, but that he was a burden upon them for his support,[99] as these are proper matters to be proved in mitigation of damages.

And it is held competent, in Tennessee, to permit the defendant to show that the deceased was a wreckless, careless and imprudent person,[1] for these habits are competent to go before the jury as affecting the probable duration of his life and the value of that life to the plaintiff.

§ 194. **Nothing allowed as a solatium.**— Under compensatory death statutes the compensation is limited to the loss of the value of the services of the deceased as a supporter of the family, and it does not include anything as a solace for wounded feelings.[2] Sorrow and mental anguish caused by the death are not elements of damage, and nothing can be recovered as a solatium for wounded feelings, and the loss of society can only be referred to and considered for the purpose of estimating the pecuniary loss.[3]

[98] Columbus, etc., R. Co. v. Bridges, 86 Ala. 448; 5 So. Rep. 864; 38 Am. & Eng. R. Cas. 136.

[99] Nashville, etc., R. Co. v. Prince, 2 Heisk. (Tenn.) 580; Nashville, etc., R. Co. v. Stevens, 9 Heisk. (Tenn.) 12; East Tenn., etc., R. Co. v. Mitchell, 11 Heisk. (Tenn.) 400.

[1] Louisville, etc., R. Co. v. Conner, 2 Baxt. (Tenn.) 382; 21 Am. Ry. Rep. 194; Louisville, etc., R. Co. v. Fleming, 14 Lea (Tenn.) 128.

[2] Au v. New York, etc., R. Co., 29 Fed. Rep. 72; Atkyn v. Wabash R. Co., 41 Fed. Rep. 193; 22 Ohio L. J. 151.

[3] Morgan v. Southern Pacific R. Co., 95 Cal. 510; 30 Pac. Rep. 603; 54 Am. & Eng. R. Cas. 101; Southern Pacific R. Co. v. Lafferty, 57 Fed. Rep. 536; Louisville, etc., R. Co. v. Orr, 91 Ala. 548; 8 So. Rep. 360; Louisville, etc., R. Co. v. Trammel, 93 Ala. 350; Kansas Pacific

The damages are purely compensatory, for pecuniary loss. The basis on which the damages are to be estimated is the probable pecuniary loss of the widow or next of kin, by reason of the death of the deceased, and no compensation can be given for wounded feelings or for the loss of the comfort and society of the relative, nor for the pain and suffering of the deceased. If the verdict is greatly in excess of such sum as would reasonably compensate the plaintiff, according to the evidence based upon the pecuniary loss sustained, the court should set it aside.[4]

§ 195. **Damages for death of parent.**— The measure and elements of damages recoverable by children for the death of a parent, depends upon the peculiar language of the act, giving the right of action and whether or not the damages are given by way of a penalty or forfeiture, or by way of compensation. If given as a forfeiture, the fixed sum named in the statute is recoverable, but if the damages named are compensatory in their nature, a sum is usually allowed, which would be equivalent to the pecuniary benefit which the children might reasonably have expected from the continuance

R. Co. v. Miller, 2 Colo. 442; 20 Am. Ry. Rep. 245; Chicago, etc., R. Co. v. Harwood, 80 Ill. 88; Baltimore, etc., R. Co. v. State, 63 Md. 135; 21 Am. & Eng. R. Cas. 202; Baltimore, etc., R. Co. v. State, 71 Md. 573; 18 Atl. Rep. 884; Parsons v. Missouri Pacific R. Co., 94 Mo. 286; 6 S. W. Rep. 464; Carlson v. Oregon, etc., R. Co., 21 Oregon 450; 28 Pac. Rep. 497; 53 Am. & Eng. R. Cas. 135; Pennsylvania R. Co. v. Butler, 57 Pa. St. 335; McGowan v. International, etc., R. Co., 85 Texas 289; 20 S. W. Rep. 80.

[4] Hutchins v. St. Paul, etc., R. Co., 44 Minn. 5; 46 N. W. Rep. 79.

"In an action to recover damages for the death of a child, the court charged that the jury might give such damages, not exceeding $5,000.00, as they deemed fair and just with reference to the necessary injury resulting to plaintiffs, and having regard also to the mitigating or aggravating circumstances attending the neglect complained of. *Held*, that the instruction, though following in substance the language of the statutes, is erroneous as likely to be interpreted to allow damages

of the life of the deceased.[5] In estimating the pecuniary loss sustained by the children, the jury are generally allowed to take into consideration, the nurture, instruction, physical and moral, as well as the intellectual training which they would have received from their deceased parent,[6] but in an action by infants, for the death of their parent, a fair and reasonable compensation is usually held to be the loss of the value of the services of the deceased, during the minority of the children, reckoned from the death of the parent and not from the injury,[7] although in Texas, an infant was permitted to recover, for the death of his father, what he could reasonably expect to have received from the father, during the probable duration of his life.[8] It is error to charge for an allowance such as would reasonably compensate the surviving widow and children, in an action by the children and then deduct from this the amount going to the widow, as she

for sorrow, or for benefits that might have accrued during the child's life." Calcaterra v. Iovaldi (Mo. App. 1906), 100 S. W. Rep. 675.

"In an action for the wrongful death of a minor child, the recovery must be confined to the pecuniary loss sustained by the death of the child, and damages for loss of companionship are not recoverable." Dando v. Home Telephone Co. (Mo. App. 1907), 103 S. W. Rep. 103.

"In an action for death of plaintiff's husband, plaintiff is entitled to recover for loss of deceased's society." Evarts v. Santa Barbara Consol. Ry. Co. (Cal. App. 1906), 86 Pac. Rep. 830.

"In assessing damages claimed by a widow for the negligent killing of her husband, her distress and mental suffering are elements to be considered." Dobyns v. Yazoo & M. V. R. Co. (La. 1907), 43 So. Rep. 934.

[5] Baltimore, etc., R. Co. v. State, 60 Md. 449; Stoher v. St. Louis, etc., R. Co., 91 Mo. 509; 4 S. W. Rep. 389; 31 Am. & Eng. R. Cas. 229.

[6] Searle v. Kanawha, etc., R. Co., 32 W. Va. 370; 9 S. E. Rep. 248; 37 Am. & Eng. R. Cas. 179; St. Louis, etc., R. Co. v. Madry, 57 Ark. 306; 21 S. W. Rep. 472; 58 Am. & Eng. R. Cas. 327.

[7] Atlanta, etc., R. Co. v. Venable, 67 Ga. 697; McPherson v. St. Louis, etc., R. Co., 97 Mo. 253; 10 S. W. Rep. 846.

[8] International, etc., R. Co. v. Kuehn, 2 Texas Civil App., 210; 21 S. W. Rep. 58.

has nothing to do with the recovery by the children;[9] it is also error to charge for the allowance of such a sum as would be fair and just, under the evidence in the case, as this furnishes no basis for the legal assessment of damages, but the jury should be told the proper elements to enter into their computation.[10] But in an action by an infant for death of its parent the jury are not confined to any definite mathematical calculation, in the assessment of damages, but are vested with a discretion, with which the courts will not interfere, unless it is clearly abused.[11]

§ 196. **Recovery for death of husband.**— Under compensatory death statutes, damages to a widow include the value of her support and protection by the husband during the time he would probably have lived and supported her, but for the accident, and it is not improper to permit the jury to consider the addition that the earnings of the husband would probably have made to his estate and the reasonable expectation of the wife to ultimately share in a portion of such estate, as the heir of her husband.[12] The federal court, in a well-considered case, held that the life of an honest, industrious man, had, for his wife, a value in addition to the earnings of his labor,[13] and for this reason it was held error, in another case, to limit the recovery of the widow to a mere money equivalent of the earning power of the husband, based upon an investment paying an annuity to the wife.[14]

[9] Taylor v. Western, etc., R. Co., 45 Cal. 323.

[10] Goss v. Missouri Pacific Ry. Co., 50 Mo. App. 614; Parsons v. Missouri Pacific Ry. Co., 94 Mo. 286; Schaub v. Hannibal, etc., R. Co., 106 Mo. 74.

[11] Stoher v. St. Louis, etc., R. Co., 91 Mo. 509; 4 S. W. Rep. 389; 31 Am. & Eng. R. Cas. 229.

[12] Lawson v. Chicago, etc., R. Co., 64 Wis. 447; 24 N. W. Rep. 618; 54 Am. Rep. 634; 21 Am. & Eng. R. Cas. 249.

[13] Harkins v. Pullman Co., 52 Fed. Rep. 724.

[14] St. Louis, etc., R. Co. v. Needham, 52 Fed. Rep. 371; 10 U. S. App.

The correct rule of damages is the actual pecuniary damage, to be ascertained by inquiring what would be a reasonable support for the wife, considering the habits, occupation and prospects of the husband and taking the present worth of such support to be ascertained by reliable tables of mortality.[15] In other words, the value of a husband's life, to his wife, is to be ascertained by determining how much better off she would be with him, than without him.[16] The loss sustained by the children, in an action by the widow, is not allowable,[17] unless she sues as administratrix, or the representative of the children also.[18]

In Missouri, no allowance is recoverable by way of loss of companionship or society of the husband,[19] but in California, the loss of society of the husband is properly to be considered.[20] The probable length of life of the husband is an essential fact to be shown and in the absence of any evidence on this point, it is held, in Georgia, that the judgment should be for the defendant, as there would be no legal evidence upon which a verdict could be supported.[21]

339; 3 C. C. A. 129; 54 Am. & Eng. R. Cas. 88; St. Louis, etc., R. Co. v. Farr, 56 Fed. Rep. 994.

[15] Macon, etc., R. Co. v. Johnson, 38 Ga. 409; Central, etc., R. Co. v. Roach, 64 Ga. 635; 8 Am. & Eng. R. Cas. 79.

[16] Catawissa, etc., R. Co. v. Armstrong, 52 Pa. St. 282; Kansas Pac. R. Co. v. Cutter, 19 Kansas 83.

[17] Macon, etc., R. Co. v. Johnson, 38 Ga. 409; Schadewald v. Milwaukee, etc., R. Co., 55 Wis. 569; 13 N. W. Rep. 458; Lierman v. Chicago, etc., R. Co., 82 Wis. 286; 52 N. W. Rep. 91.

[18] Louisville, etc., R. Co. v. Trammell, 93 Ala. 350; 9 So. Rep. 870.

[19] Atchison, etc., R. Co. v. Wilson, 48 Fed. Rep. 57; 4 U. S. App. 25; Schaub v. Hannibal, etc., R. Co., 106 Mo. 74; 16 S. W. Rep. 924; Georgia, etc., R. Co. v. Pittman, 73 Ga. 325; 26 Am. & Eng. R. Cas. 474.

[20] Beeson v. Green Mountain, etc., Co., 57 Cal. 20; Munro v. Pacific Coast R. Co., 84 Cal. 515; 24 Pac. Rep. 303; Morgen v. Southern Pacific R. Co., 95 Cal. 510.

[21] Savannah, etc., R. Co. v. Stewart, 71 Ga. 427.

§ 197. **For death of wife.**— Under some death statutes, giving the husband a right of action for death of his wife, the damages recoverable are such as will compensate him for the loss sustained and none other.[22] It is proper to consider the relation of husband and wife, in estimating the value of the wife's services and companionship,[23] and while damages of a sentimental nature are not allowed, the loss of household services ordinarily performed by the wife is such a substantial loss as will support a verdict for damages therefor.[24] It is proper for the jury to consider the fact that the wife was an educated and amiable woman,[25] but under statutes giving damages of a strictly pecuniary nature, it is not competent to allow a recovery for a loss of society,[26] nor is it legitimate, in an action by the husband, for the death of his wife, to allow the jury to take into consideration the loss of the earnings on the part of the wife, as affecting the children surviving, for such earnings would go to the husband himself and the contingency of his continuing in possession of the earnings and dying intestate, during the lifetime of the children is too speculative and remote to be considered.[27]

§ 198. **For death of child.**— The damages recoverable for the wrongful death of a child depend upon the language of the statute and whether the damages are compensatory or

[22] Galveston, etc., R. Co. v. Matula, 79 Texas 577; 15 S. W. Rep. 573.

[23] Pennsylvania R. Co. v. Goodman, 62 Pa. St. 329.

[24] St. Lawrence, etc., R. Co. v. Lett, 11 Can. Sup. Ct. 422; 26 Am. & Eng. R. Cas. 454; Pennsylvania R. Co. v. Adams, 55 Pa. St. 503; Tilley v. Hudson River R. Co., 24 N. Y. 474; McIntire v. New York, etc., R. Co., 37 N. Y. 295.

[25] Green v. Hudson River R. Co., 32 Barb. 25; 30 How. Pr. 593; Bolinger v. St. Paul, etc., R. Co., 36 Minn. 418; 31 N. W. Rep. 856; 29 Am. & Eng. R. Cas. 408.

[26] Green v. Hudson River R. Co., 32 Barb. (N. Y.) 25.

[27] Tilley v. Hudson River R. Co., 24 N. Y. 471; 23 How. Pr. 363; Kansas Pacific R. Co. v. Cutter, 19 Kansas 83.

punitive.[28] In an action by a parent for the death of his minor child the jury is not limited to the actual pecuniary injury sustained by reason of the loss of services of the child,[29] but the damages given must be determined by the jury, in the exercise of their discretion, subject to the review of the court of original jurisdiction. Pecuniary loss is not construed in the strict sense of limiting the recovery to a present loss in money, but prospective advantages of a pecuniary nature may also be considered,[30] along with the fact that the chances of health and life are to be considered in connection with the value of services.[31]

Under compensatory statutes the main element of damages for death of a child is the probable value of the services of the deceased, until its majority only, considering the cost and expense of supporting the child during the early years of its life.[32] If the injury to the child would not have proven fatal, but for the want of reasonable care on the parent's part, after the injury was sustained, the parent could not aggra-

[28] Williams v. South & N. Ala. R. Co., 91 Ala. 635; 9 So. Rep. 77.

[29] Nehrbas v. Central Pacific R. Co., 62 Cal. 320; 14 Am. & Eng. R. Cas. 670; Parsons v. Missouri Pacific Ry. Co., 94 Mo. 286; 6 S. W. Rep. 464; Birkett v. Knickerbocker Co., 110 N. Y. 504; 18 N. E. Rep. 108; Houston City R. Co. v. Sciacca, 80 Texas 350; 16 S. W. Rep. 31; Heusner v. Hudson, etc., R. Co., 27 N. Y. Supp. 365; 57 N. Y. S. R. 528.

[30] Vicksburg v. McLain, 67 Miss. 4; 6 So. Rep. 774.

[31] Telfer v. Northern R. Co., 30 N. J. L. 188.

[32] Parsons v. Missouri Pacific Ry. Co., 94 Mo. 286; 6 S. W. Rep. 464; Goss v. Missouri Pacific Ry. Co., 50 Mo. App. 614; Morgan v. Southern Pacific R. Co., 95 Cal. 510; 30 Pac. Rep. 603; 54 Am. & Eng. R. Cas. 101; St. Louis, etc., R. Co. v. Freeman, 36 Ark. 41; 4 Am. & Eng. R. Cas. 608; Rockford, etc., R. Co. v. Delaney, 82 Ill. 198; Louisville, etc., R. Co. v. Rush, 127 Ind. 545; 26 N. E. Rep. 1010; Benton v. Chicago, etc., R. Co., 55 Iowa 496; 8 N. W. Rep. 330; Hurst v. Detroit, etc., R. Co., 84 Mich. 539; 48 N. W. Rep. 44; Fordyce v. McCants, 51 Ark. 509; 11 S. W. Rep. 694; St. Louis, etc., R. Co. v. Needham, 52 Fed. Rep. 371; 10 U. S. App. 339; 3 C. C. A. 129; 54 Am. & Eng. R. Cas. 88.

vate the damages beyond those actually resulting from the injury,[33] nor would it be competent to show that the parent was too poor to employ domestics to take care of his children, for the poverty or wealth of the plaintiff would be immaterial to the issues in the case.[34] Under some statutes, however, giving damages to parents dependent for support upon their children, the dependency of the parent is a material element of the case and damages are given, based upon the contributions of the child, even after its majority.[35]

The loss of the child's society and the comfort of the parent in raising it are not proper elements of damage,[36] nor is it generally held competent to show the mental anguish and suffering either of the child or the parent.[37]

§ 199. **Same — Medical and funeral expenses.**— A parent is entitled to the services of an infant child during minority and being entitled to its services is legally liable for the support and maintenance of the child and is therefore liable for medical and funeral expenses incurred in the last illness and consequently is entitled to recover such expenses, as a part of the damages due for the wrongful death of the child.[38] Such damages would not be recoverable under a punitive statute, giving a fixed sum for the death of a person wrongfully killed, but expenses incurred for medical treatment and

[33] St. Louis, etc., R. Co. v. Freeman, 36 Ark. 41; 4 Am. & Eng. R. Cas. 608.

[34] Indianapolis, etc., R. Co. v. Pitzer, 109 Ind. 179; 58 Am. Rep. 387; 10 N. E. Rep. 70; 25 Am. & Eng. R. Cas. 313.

[35] Potter v. Chicago, etc., R. Co., 21 Wis. 372; St. Louis, etc., R. Co. v. Davis, 55 Ark. 462; 18 S. W. Rep. 628; Walters v. Chicago, etc., R. Co., 41 Iowa 71; Bowles v. Rome, etc., R. Co., 46 Hun 324; 113 N. Y. 643; 21 N. E. Rep. 414; North Pennsylvania R. Co. v. Kirk, 90 Pa. St. 15; 1 Am. & Eng. R. Cas. 45.

[36] Mobile, etc., R. Co. v. Walty, 69 Miss. 145; 13 So. Rep. 825.

[37] Dorman v. Broadway, etc., R. Co., 16 N. Y. S. R. 753; 1 N. Y. Supp. 334; Morgan v. Southern Pacific R. Co., 95 Cal. 510.

[38] Kennedy v. New York, etc., R. Co., 35 Hun (N. Y.) 186.

funeral expenses are given, by way of compensation,[39] whenever the plaintiff has paid and discharged such legitimate expenses,[40] or when he is legally obligated to pay the same.[41]

But when damages are given to an administrator of the deceased, and when recovered, the damages constitute a part of the assets of his estate, no damages would be allowed, except such as were consequent upon the death and therefore no allowance could be made for expenses of the illness attendant upon the injury causing the death, or for the funeral expenses of the deceased,[42] and no deduction could be allowed the defendant for advancements for such items, nor could it be shown that such expenses had been paid, either in bar, or in abatement of the action.[43]

§ 200. **Exemplary damages for death.**— Exemplary damages for death by wrongful act were unknown at the common

[39] Cleveland, etc., R. Co. v. Rowan, 66 Pa. St. 393.

[40] Petrie v. Columbia, etc., R. Co., 29 So. Car. 303; 7 S. E. Rep. 515; 35 Am. & Eng. R. Cas. 430.

[41] Murphy v. New York, etc., R. Co., 88 N. Y. 445; 8 Am. & Eng. R. Cas. 490; 25 Hun. 311; Brassel v. New York, etc., R. Co., 84 N. Y. 241; Houghkirk v. Delaware, etc., R. Co., 92 N. Y. 219; 44 Am. Rep. 370.

[42] Holland v. Brown, 13 Saw. (U. S.) 284; Pennsylvania R. Co. v. McClosky, 23 Pa. St. 526; Illinois Central R. Co. v. Brown, 5 Wall. (U. S.) 90.

[43] Murray v. Usher, 117 N. Y. 542; 23 N. E. Rep. 564; 27 N. Y. S. R. 928.

"In an action for the death of plaintiff's minor son through the negligence of defendant, it was proper to allow plaintiff the sum of $178 for burial expenses and for transporting the body of decedent to plaintiff's home in Arkansas." Dean v. Oregon R. & Nav. Co. (Wash. 1906), 87 Pac. Rep. 824.

"A husband can recover for funeral expenses resulting directly from the wrongful death of his wife." Philby v. Northern Pac. Ry. Co. (Wash. 1907), 89 Pac. Rep. 468.

"A husband can recover for loss of time resulting directly from the wrongful death of his wife." Philby v. Northern Pac. Ry. Co. (Wash. 1907), 89 Pac. Rep. 468.

law and originated in the idea of punishment for the offender, rather than compensation for the sufferer by the death.[44] In some States, the damages recoverable for wrongful death are not confined to compensation, but punitive damages are given in all cases.[45] In some States punitive or compensatory damages or both may be given, as the jury shall deem fair and just,[46] while in some other States exemplary damages for death will only be allowed, when the killing is attendant by circumstances showing gross negligence or such an element of willfulness or malice, as would authorize punitive damages, if death had not ensued.[47]

Generally, where the death is not accompanied by any aggravating circumstances, but the injury is the result of the want of ordinary care only, exemplary damages cannot be recovered,[48] and while compensatory damages may be recovered, on failure to show a case for punitive damages, provided the statute under which the suit is filed authorizes such recovery,[49] exemplary damages will not be allowed, in any case, unless the statute giving the right of action, expressly provides therefor.[50]

[44] Southern, etc., Co. v. Bradley, 52 Texas 587.

[45] Savannah, etc., R. Co. v. Shearer, 58 Ala. 672; 20 Am. Ry. Rep. 451.

[46] Myers v. San Francisco, 42 Cal. 215; Murphy v. New York, etc., R. Co., 29 Conn. 496; Sherman v. Stage Co., 24 Iowa 515.

[47] Haley v. Mobile, etc., R. Co., 7 Baxt. (Tenn.) 239; 8 Am. & Eng. R. Cas. 541; Kansas City, etc., R. Co. v. Daughtry, 88 Tenn. 721; 13 S. W. Rep. 698; 45 Am. & Eng. R. Cas. 69; International, etc., R. Co. v. McDonald, 75 Texas 41; 12 S. W. Rep. 860; 42 Am. & Eng. R. Cas. 211; Pennsylvania R. Co. v. Ogier, 35 Pa. St. 60; Hutchins v. St. Paul, etc., R. Co., 44 Minn. 5; 46 N. W. Rep. 79; Kansas Pacific R. Co. v. Cutter, 19 Kansas 83.

[48] Louisville, etc., R. Co. v. Chaffin, 84 Ga. 519; 11 S. E. Rep. 891; Hamilton v. Morgan's, etc., R. Co., 42 La. Ann. 824; 8 So. Rep. 586; Parsons v. Missouri Pacific Ry. Co., 94 Mo. 286; 6 S. W. Rep. 464; Illinois Central R. Co. v. Crudup, 63 Miss. 291.

[49] Claxton v. Lexington, etc., R. Co., 13 Bush. (Ky.) 636; 17 Am. Ry. Rep. 12. But see, Cincinnati, etc., R. Co. v. Privitt, 92 Ky. 223.

[50] Illinois Central R. Co. v. Crudup, 63 Miss. 291; Cincinnati, etc.,

§ 201. **When nominal damages only recovered for death.**—In the absence of a showing of any special damages, in an action for death by wrongful act, the recovery may, or may not be limited to the recovery of nominal damages only, according to the peculiar phraseology of the act.[51] It was

R. Co. v. Privitt, 92 Ky. 223; 17 S. W. Rep. 484; Houston, etc., R. Co. v. Baker, 57 Texas 419; 11 Am. & Eng. R. Cas. 667.

"Under act (April 4, 1868) limiting the amount to be recovered for wrongful death to compensation for loss and damages pecuniarily suffered, no exemplary damages can be recovered for injuries resulting in death in an action by a parent." Palmer v. Philadelphia, B. & W. R. Co. (Pa. 1907), 66 Atl. Rep. 1127.

"In an action for wrongful death, the measure of plaintiff's damages is such a sum as the deceased would probably have accumulated during life, and which would have gone to his next of kin, considering deceased's age, ability and disposition to labor, and habits of living and expenditure." Coughlan v. Philadelphia, B. & W. R. Co. (Del. Sup. 1907), 67 Atl. Rep. 148.

"Under Rev. St. 1898, § 2912, providing that the damages recoverable in an action for wrongful death shall be such as under all the circumstances of the case may be just, the damages in an action by parents for the negligent death of an adult child are not limited to the probable contributions of money which the parents would have received during the child's lifetime, but may also consist of the elements entering into the domestic relations of parent and child living in one family, or otherwise." Rogers v. Rio Grande Western Ry. Co. (Utah 1907), 90 Pac. Rep. 1075.

In an action for death under what is known as the penalty section of the Missouri death statute (R. S. 1899, § 2864), if different acts of negligence are alleged and proved, some of which are for common-law violations of duty, or other acts of negligence than acts of the employees in charge of the engine and cars of the defendant, which would furnish a basis for compensatory damages only, under another section of the same statute (§ 2866), it is error to instruct the jury that damages in a lump sum can be given, as is authorized only where the action is under the penalty section of the statute alone. Crumpley v. Hannibal, etc., R. Co., 98 Mo. 34; 11 S. W. Rep. 244; 111 Mo. 152; 19 S. W. Rep. 820; Culbertson v. Metropolitan St. Ry. Co., 140 Mo. 35; 36 S. W. Rep. 834; King v. Missouri Pacific Ry. Co., 98 Mo. 235; 11 S. W. Rep. 563; Rapp v. St. Joseph, etc., R. Co., 106 Mo. 423; 17 S. W. Rep. 487; Casey v. Transit Co. (Mo.). 103 S. W. Rep. 1146.

[51] Corliss v. Worcester, etc., R. Co., 63 N. H. 404; 21 Am. & Eng. R. Cas. 208.

held, under the Kansas statute, in an action by the personal representative in behalf of the next of kin, that nominal damages were recoverable, if the death was shown to have resulted by the wrongful act of the defendant and there were no actual pecuniary damages shown.[52] And in an action by the administrator, for the next of kin, only damages nominal in amount can be recovered, where the evidence shows that the next of kin were not dependent upon the deceased for support.[53] The husband has been held entitled to only nominal damages for the death of his wife, where no special damages were shown,[54] and only nominal damages can be recovered, in a suit by an administrator, if there are not shown to be any distributees, named in the statute, as entitled to substantial damages.[55] But under some of the death statutes, the recovery will not be limited to nominal damages only, although there is a total absence of evidence going to show actual pecuniary loss to the next of kin, or party entitled to sue for the death.[56]

§ 202. **Excessive damages in death actions.**— Even in a State where the recovery in actions for wrongful death is without limit, as to amount, the jury is not without some restraint, and if its assessment of damages be so great as to shock the sense of justice, and to indicate that the verdict is

[52] Atchison, etc., R. Co. v. Weber, 33 Kansas 543; 6 Pac. Rep. 877; 21 Am. & Eng. R. Cas. 418.

[53] Chicago, etc., R. Co. v. Swett, 45 Ill. 197; Howard v. Delaware, etc., Canal Co., 40 Fed. Rep. 195; 41 Am. & Eng. R. Cas. 473.

[54] Mitchell v. New York, etc., R. Co., 2 Hun. (N. Y.) 535; 5 T. & C. 122; 64 N. Y. 655; Parsons v. New York, etc., R. Co. 37 Hun. 128.

[55] James v. Richmond, etc., R. Co., 92 Ala. 231; 9 So. Rep. 335; 48 Am. & Eng. R. Cas. 522; Louisville, etc., R. Co. v. Trammell, 93 Ala. 350.

[56] Dickens v. New York, etc., R. Co., 1 Abb. App. Dec. (N. Y.) 504; Tilley v. Hudson River R. Co., 29 N. Y. 252.

the result of passion and prejudice, the trial court ought to set it aside, and failing in this duty, the appellate court will reverse the judgment, because of the excessive amount.[57] So where the earning capacity of the deceased, considering his age and prospcts in life, was such that an annuity for the aggregate annual earnings could be purchased for much less than the amount of the verdict, and there was no evidence of any probable increase in the earning capacity of the decedent, it was held that a verdict largely in excess of such sum as would render an annuity of the amount earned, should be set aside, on appeal, as it evidenced that the jury arrived at their verdict by the wrong process of calculating the damages.[58]

But when no amount or limit of damages is fixed by law, in a death action, the recovery is not necessarily limited to the amount of the earnings of the person killed and a finding should not be disturbed, on appeal, where it does not appear that the jury were influenced by passion or prejudice and had given due regard to the facts existing at the time of the death.[59]

[57] Little Rock, etc., R. Co. v. Barker, 39 Ark. 491; 19 Am. & Eng. R. Cas. 195; Ihl v. Forty-second street, etc., R. Co., 47 N. Y. 317; Oldfield v. New York, etc., R. Co., 14 N. Y. 310; Drew v. Sixth Ave. R. Co., 26 N. Y. 49; McIntyre v. New York, etc., R. Co., 37 N. Y. 287; Pennsylvania R. Co. v. Bantom, 54 Pa. St. 495; Louisville & N. R. Co. v. Connor, 9 Heisk. (Tenn.) 19; Houghkirk v. Delaware & H. Canal Co., 92 N. Y. 219; 44 Am. Rep. 370; Morley v. Great Western R. Co., 16 U. C. Q. B. 504.

[58] St. Louis, etc., R. Co. v. Robbins, 57 Ark. 377; 21 S. W. Rep. 886; Rose v. Des Moines Valley R. Co., 39 Iowa 246; 9 Am. Ry. Rep. 7; 20 Am. Ry. Rep. 326; Locke v. Sioux City, etc., R. Co., 46 Iowa 109; Balch v. Grand Rapids & I. R. Co., 67 Mich. 394; 11 West Rep. 476; 34 N. W. Rep. 884; Serensen v. Northern Pacific R. Co., 45 Fed. Rep. 407.

[59] Missouri Pacific Ry. Co. v. Lehmberg, 75 Texas 61; 12 S. W. Rep. 838; Kelly v. Twenty-third Street R. Co., 14 Daily (N. Y.) 418; 14 N. Y. S. R. 699; Chicago, etc., R. Co. v. Bonafield, 104 Ill. 223; 8 Am. & Eng. R. Cas. 493; St. Louis, etc., R. Co. v. Robbins, 57

§ 203. **Same — For death of father.**— While no fixed amount can be given beyond which a jury cannot give a verdict for the death of a father, under a statute authorizing compensatory damages, but each case must depend upon the peculiar circumstances and conditions existing, as a ground for the recovery, the courts have announced that certain sums will not be held excessive, for the death of an ordinarily industrious, sober and thrifty man of medium age, in the absence of anything to show passion or prejudice as the basis for the verdict. A number of cases have held that the sum of five thousand dollars would not be deemed excessive for the death of a father of medium age, who provided fairly well for his family and was possessed of ordinary earning capacity and education.[60] The Arkansas court holds that the sum of seven thousand five hundred dollars cannot be held excessive, for the death of a man fifty-two years old, of ordinary earning capacity and industrious habits and whose services in educating his minor children would have a pecuniary value.[61] The California court held that the sum of eight thousand dollars could not be held excessive

Ark. 377; 21 S. W. Rep. 886; Jeffersonville M. & R. Co. v. Riley, 39 Ind. 568; 10 Am. Ry. Rep. 325; Annas v. Milwaukee, etc., R. Co., 67 Wis. 46; 27 Am. & Eng. R. Cas. 102; 30 N. W. Rep. 282; 58 Am. Rep. 848; Walter v. Chicago, etc., R. Co., 39 Iowa 33; Wabash, etc., R. Co. v. Schevers, 18 Ill. App. 52; Chicago, etc., R. Co. v. Snyder, 18 Ill. App. 640; Bierbauer v. New York, etc., R. Co., 15 Hun. (N. Y.) 559; 77 N. Y. 588; Webb v. Denver & R. G. R. Co., 7 Utah 363; 26 Pac. Rep. 981; Wells v. Denver & R. G. R. Co., 7 Utah 482; Dimmey v. Wheeling, etc., R. Co., 27 W. Va. 32; McDermott v. Iowa Falls, etc., R. Co. (Iowa), 47 N. W. Rep. 1037; East Line, etc., R. Co. v. Smith, 65 Texas 167.

[60] Staal v. Grand Rapids, etc., R. Co., 57 Mich. 239; 23 N. W. Rep. 795; Howard County Com. v. Legg, 110 Ind. 479; 11 N. E. Rep. 612; Bolinger v. St. Paul, etc., R. Co., 36 Minn. 418; 31 N. W. Rep. 856; 29 Am. & Eng. R. Cas. 408; St. Louis, etc., R. Co. v. Johnson, 78 Texas 536; 15 S. W. Rep. 104.

[61] St. Louis, etc., R. Co. v. Madry, 57 Ark. 306; 21 S. W. Rep. 472; 58 Am. & Eng. R. Cas. 327.

for the death of a father fifty years old, who was a merchant of medium means;[62] ten thousand dollars was held, by the Texas court, not to be an excessive verdict, for the death of a father thirty-five years old, who was earning fifty dollars a month and was stout, healthy and sober,[63] and the same court held that a verdict of twelve thousand dollars was not excessive for the death of a parent of middle age, who was earning one hundred dollars a month.[64] On the other hand, in Illinois, it was held that a verdict for five thousand dollars, for the death of a father, a common laborer, whose earnings or education did not appear, was excessive;[65] and the Texas court held a verdict of eighteen thousand dollars excessive, for the death of a brakeman, earning sixty-five dollars a month.[66] The decisions in cases where this ground has been urged, as a reason for a new trial are almost as numerous as the sands of the seashore and a few of the cases that have come to the attention of the author, will be found in the footnote.

§ 204. **Same — Death of husband.**— Only a few of the many decisions on the limitation placed by the courts upon the amount of the recovery that will be allowed by the wife for the death of the husband, can be given in this section, as space will not permit an elaboration or presentation of the grounds of the decisions in detail.

Where the deceased was thirty years old, was temperate

[62] Cook v. Clay Hill, etc., R. Co., 60 Cal. 604; 6 Am. & Eng. R. Cas. 175.

[63] Missouri Pacific Ry. Co. v. Lehmberg, 75 Texas 61; 12 S. W. Rep. 838.

[64] International, etc., R. Co. v. Ormond, 64 Texas 485; 27 Am. & Eng. R. Cas. 139.

[65] Illinois, etc., R. Co. v. Weldon, 52 Ill. 290; Peoria, etc., R. Co. v. O'Brien, 18 Ill. App. 28.

[66] Gulf, etc., R. Co. v. Johnson, 1 Texas Civ. App. 103; 20 S. W. Rep. 1123.

and industrious and had earned fifty-five dollars a month, a verdict for four thousand dollars, in favor of his widow, was held not to be excessive.[67] A verdict for five thousand dollars was held not excessive, for the death of a man who earned about a thousand dollars a year and had an expectancy of twenty years.[68] A verdict for six thousand cannot be held excessive, for the death of a young man twenty-six years of age, who was earning over a hundred dollars a month.[69] A verdict for seven thousand for the death of a laborer thirty years of age, who was stout and able-bodied and was earning about four hundred dollars a year, was held not to be excessive.[70] It was held to be no abuse of the discretion of the jury to give a verdict in the sum of eight thousand dollars, for the death of a husband fifty-nine years old, who left an invalid wife and had always made a comfortable living for his family,[71] and a verdict for ten thousand dollars, in Texas, was held not excessive, for the death of an engineer, twenty-nine years old, who was earning one hundred and twenty-five dollars a month and was sober and healthy.[72]

[67] Central Trust Co. v. Wabash, etc., R. Co., 34 Fed. Rep. 616.

[68] Georgia R. Co. v. Pittman, 73 Ga. 325; 26 Am. & Eng. R. Cas. 474.

[69] Cleveland v. Central R. Co., 73 Ga. 793; Taylor v. Central R. Co., 79 Ga. 330.

[70] Harkins v. Pullman Palace Car Co., 52 Fed. Rep. 724.

[71] Cook v. Clay Hill R. Co., 60 Cal. 604; 6 Am. & Eng. R. Cas. 175.

[72] Texas, etc., R. Co. v. Geiger, 79 Texas 13; 15 S. W. Rep. 214.

"In an action for death of a strong, healthy man thirty-two years of age, employed as a teamster, a verdict *held* excessive above the sum of ten thousand dollars." Gorman v. Hand Brewing Co. (R. I. 1907), 66 Atl. Rep. 209; 28 R. I. 180.

"In an action for wrongful death of deceased, a strong, vigorous man about thirty-five years of age, earning, when employed, from ten dollars to fifteen dollars a week, a verdict for two thousand dollars was not excessive." Sipple v. Laclede Gaslight Co. (Mo. App. 1907), 102 S. W. Rep. 608.

"In an action for negligent death, a verdict of two thousand dollars to decedent's wife, who was twenty-nine years old, and to each of his

§ 205. **Same — For death of wife.**— In Wisconsin, in an action for the death of a wife, the testimony bearing upon the amount of damages was very indefinite, but it appeared that the deceased was a superior woman, as a wife, mother and member of society. The verdict was for five thousand dollars, and it was held by the Supreme Court that there was nothing in the amount of the verdict calling for the interference of the court.[73]

In the absence of any evidence of mistake, misconduct or prejudice on the part of the jury, other than as gathered from the verdict for a sum of five thousand dollars for the death of a wife, it was held, in Maine, in a well-considered case, that as there was no standard by which the value of a human life can be determined, such a verdict could not be held to be a clear abuse of the discretion of the jury [74] and this is the trend of the decisions.

However, in an Iowa case,[75] a verdict for eight thousand

seven children, was not excessive; decedent being thirty-six years old at his death, and earning from seven hundred dollars to eight hundred dollars a year." Galveston, H. & S. A. Ry. Co. v. Murray (Tex. Civ. App. 1907), 99 S. W. Rep. 144.

"A verdict for five thousand dollars in an action for damages for causing the death of a man twenty-one years old, in good health, and capable of earning good wages, *held* not excessive." Williams v. Alaska Commercial Co. (Alaska 1903), 2 Alaska 43.

"In an action for the wrongful death of a regular practicing physician forty-four years of age, a verdict in favor of plaintiff for twelve thousand dollars *held* not excessive." Evarts v. Santa Barbara Consol. Ry. Co. (Cal. App. 1906), 80 Pac. Rep. 830.

"In an action by a wife for the death of her husband, thirty-five years of age, she showed that at the time of his death he earned seventy-five dollars a month and gave practically all of it to her. According to the mortuary tables he had a life expectancy of twenty-five years. *Held,* that a verdict for fifteen thousand dollars would not be set aside as excessive." Texas Mexican Ry. Co. v. Higgins (Tex. Civ. App. 1907), 99 S. W. Rep. 200.

[73] Whiton v. Chicago, etc., R. Co., 2 Biss. (U. S.) 282.

[74] Hobbs v. Eastern R. Co., 66 Me. 572; 19 Am. Ry. Rep. 210.

[75] Sherman v. Western Stage Co., 24 Iowa 515.

dollars for the death of a wife and infant child was held to be excessive and a reversal was ordered, unless the plaintiff would remit the sum of three thousand dollars therefrom.

§ 206. **Same — For death of child.**— As the basis of the parents' recovery for the death of a minor child, under compensatory death statutes, is the value of the earnings of the child during its minority, less the expense of its support, as the earnings, at the child's majority, belong to the child itself, a verdict in excess of this amount is generally held to be excessive by the courts.[76] Accordingly, a verdict in the sum of three thousand seven hundred and seventy-five dollars, for the death of a daughter ten years old, who was earning nothing, was held to be excessive;[77] a verdict for five thousand dollars for death of a daughter seventeen years old, who was earning but eleven dollars a week, was excessive;[78] four thousand dollars for the death of a son eight years old, was held excessive;[79] a verdict for two thousand two hundred and fifty dollars, for the death of a son eighteen years old, who was earning fifty dollars a month, was held excessive;[80] four thousand five hundred was held excessive for death of a child five years old;[81] a verdict for twenty thousand dollars was set aside, as excessive, in California, in the absence of any evidence of special damages, for death of an infant child, in a suit by the mother;[82] ten

[76] Parsons v. Missouri Pacific Ry. Co., 94 Mo. 286 and cases cited.

[77] Potter v. Chicago, etc., R. Co., 22 Wis. 615.

[78] Chicago, etc., R. Co. v. Adamick, 33 Ill. App. 412.

[79] Vicksburg v. McLain, 67 Miss. 4; 6 So. Rep. 774.

[80] Hickman v. Missouri Pacific Ry. Co., 22 Mo. App. 344; State v. Baltimore, etc., R. Co., 24 Md. 107; North Pennsylvania R. Co. v. Kirk, 90 Pa. St. 15.

[81] Little Rock, etc., R. Co. v. Barker, 33 Ark. 350; Hurt v. St. Louis, etc., R. Co., 94 Mo. 255; 34 Am. & Eng. R. Cas. 422; 7 S. W. Rep. 1.

[82] Morgan v. Southern Pacific R. Co., 95 Cal. 510; 54 Am. & Eng. R. Cas. 101; 30 Pac. Rep. 603.

thousand dollars was held to be excessive, for the death of a switchman, in an action by his mother, where it did not appear what he had contributed to her support,[83] and three thousand dollars was held to be excessive damages for the death of a son nineteen years old.[84]

On the other hand, it was held that a verdict for one thousand five hundred dollars for the services of a boy from eleven to twenty-one years could not be held to be excessive;[85] two thousand dollars was held not to be excessive for the death of a boy five years old;[86] a verdict for four thousand two hundred dollars was held not to be excessive for the death of an only adult son, who supported his mother, in Texas;[87] three thousand five hundred dollars was held not to be excessive damages to give for the death of a girl thirteen years old;[88] five thousand dollars was held not to be excessive for the death of a bright only daughter, six years old[89] and for the wrongful killing of his five infant children, a verdict for ten thousand eight hundred dollars was held not to be excessive, in California.[90] Of course on this question of excessive verdicts there is a hopeless lack of

[83] Atchison, etc., R. Co. v. Brown, 26 Kansas 443; 6 Am. & Eng. R. Cas. 228.

[84] Paulmier v. Erie R. Co., 34 N. J. L. 151.

[85] O'Meara v. Hudson River R. Co., 38 N. Y. 445; Ihl v. Forty-second St., etc., R. Co., 47 N. Y. 317.

[86] Moskovitz v. Lighte, 68 Hun. (N. Y.) 102; Fordyce v. McCants, 55 Ark. 384; 18 S. W. Rep. 371.

[87] Texas, etc., R. Co. v. Lester, 75 Texas 56; 12 S. W. Rep. 955.

[88] Pineo v. New York, etc., R. Co., 34 Hun. (N. Y.) 80.

[89] Houghkirk v. Delaware, etc., Canal Co., 63 How. Pr. (N. Y.) 328.

[90] Nehrbas v. Central Pacific R. Co., 62 Cal. 320; 14 Am. & Eng. R. Cas. 670.

"Where the mother and next of kin of decedent had an expectancy of life of 17.4 years, and he contributed as much as five dollars a month for her support, and sometimes more, an award of five hundred and seventy-two dollars for his wrongful death was not excessive." St. Louis, 1 M. & S. Ry. Co. v. Block (Ark. 1906), 95 S. W. Rep. 155.

"In an action by a father for the death of a child about seven years

harmony in the decisions and no fixed rule or sum can be laid down as a test to govern, in any case, but the facts and conditions existing must alone determine the result, with the peculiar training or inclination of the judge writing the final decision, as an element also affecting the determination of the question.

old, a verdict for $1,000 is not excessive." Indianapolis Traction & Terminal Co. v. Beckham (Ind. App. 1907), 81 N. E. Rep. 82.

"In an action for the wrongful death of plaintiff's son, aged seven years and one month, it appearing that the child was healthy and intelligent, and of excellent disposition, a verdict for $1,500 was not excessive." Black v. Michigan Cent. R. Co. (Mich. 1906), 109 N. W. Rep. 1052; 13 Detroit Leg. N. 863.

"A verdict for $2,160.20 for the death of a one-year-old child was not excessive, in the absence of anything indicating prejudice or passion." Abby v. Wood (Wash. 1906), 86 Pac. Rep. 558.

"Where intestate, a girl fifteen years of age, of average health, intelligence, and capacity, was killed by an explosion due to defendant's negligence, a judgment for $3,000 was not excessive." Ellis v. Republic Oil Co. (Iowa 1906), 110 N. W. Rep. 20.

"An award of $3,500 to parents sixty-one and fifty-two years old respectively, in poor health and depending on their son for support, for his death at the age of eighteen or nineteen years, was not excessive." Hayes v. Chicago, M. & St. P. Ry. Co. (Wis. 1907), 111 N. W. Rep. 471.

"In an action for the death of a young man of twenty-five years, who resided with his father, who was forty-nine years of age, and earned about $12 a week, and was in good health and good habits, a verdict for $6,000 was not excessive." Sembler v. Cowperthwait (N. Y. Sup. 1907), 103 N. Y. S. 979; 53 Misc. Rep. 28.

"A man twenty-two years of age, and earning from $50 to $100 per month, most of which sums were given to his mother, fifty-four years of age, was killed. His expenses were from $10 to $12 per month. *Held*, that a verdict, in an action for his death, for $6,000 was not excessive." International & G. N. R. Co. v. Hays (Tex. Civ. App. 1907), 98 S. W. Rep. 911.

"Decedent, a railroad engineer, twenty-five years of age, in good health, industrious, and of good habits, was killed through defendant's negligence. Decedent was earning from $100 to $130 a month, most of which he gave to plaintiff, his mother, who was about fifty-four years of age. There was also evidence that decedent was thrifty and careful in matters of expenditure. *Held*, that a verdict awarding plaintiff

$7,500 was not excessive. Baker v. Philadelphia, etc., Ry. Co. (U. S. C. C., Pa., 1907), 149 Fed. Rep. 882.

"For the death of a mail carrier drawing $50 a month, thirty-five years of age, and in good health, a verdict for $8,000 was not excessive." Louisville & N. R. Co. v. Lucas' Admr. (Ky. 1906), 98 S. W. Rep. 308.

CHAPTER X.

GENERALLY OF EMPLOYER AND EMPLOYEE, IN PERSONAL INJURY ACTIONS.

§ 207. Terms applicable to what class.
208. Pleading relationship of employer and employee.
209. Injury should result from acts of employees charged.
210. Person causing injury must be employee of company.
211. Who generally regarded as an employee.
212. When relation of employer and employee a jury question.
213. Generally, no liability for neglect or malpractice of physician or surgeon.
214. Same — The rule in the federal court.
215. Same — The rule in Florida.
216. The Indiana rule.
217. The law in Iowa.
218. No liability, in Kansas.
219. Rule the same in Maryland.
220. No liability, in Nebraska.
221. Tennessee rule the same.
222. Washington rule.
223. Status of volunteers and substituted employees.
224. Postal clerks and express messengers not employees.
225. News agents and others carried under contract.
226. Substituted employer — Train and crew controlled by another.
227. Injury must occur in course of employment.
228. When one deemed employee of two or more companies.
229. Different companies using same track or train.
230. Joint or several liability of companies jointly operating road.
231. Liability of connecting and joining roads.
232. Liability under joint-traffic arrangement.
233. Agent causing injury and company both liable.
234. Employer not liable when negligent employee discharged.
235. Lessor's liability for injuries to employees of lessee.
236. Mortgagor not liable for negligence of mortgagee.
237. Negligence of trustees for bondholders.
238. Road operated by receiver.

§ 239. Liability of reorganized company.
240. Liability of consolidated company.
241. Purchasing company not generally liable.
242. Holding companies liable for negligence of companies held.

§ 207. **Terms applicable to what class.**— Under the terms employer and employee, the author will treat all classes of persons in the service of railroad companies, from the highest to the lowest grade of the service. These terms may be used interchangeably with their legal synonyms, master and servant, which are no doubt found in more general use than those of employer and employee. The retention of such terms, by the legal profession, is an evidence of the fact that the bench and bar are partial to the use of words with which they have become familiar, or that have been put to a general use for a long period of time and that they are slow to give up the use of such terms, even though others may be used to express the meaning better, or may be really more consistent with American civilization and institutions. Artificial entities which are incapable of exercising any control or direction, except through their agents or employees, come within the definition of the term "master" and the individuals exercising the greatest power of control and direction, in the maintenance of personal injury actions, are classed as mere "servants" and so generally are these terms employed, in the law, that it may be doubted if they are ever to be discarded for those more nearly expressing the relation occupied by those engaging and the persons who enter the service of another, in the performance of other than mere menial labor.[1]

[1] Notwithstanding every trial lawyer is loath to refer to his own or his opponent's client, in the presence of a representative jury, as a "servant," and trial courts will find the use of these terms in instructions rather grating upon the ears of the average American citizen, text books and lawyers and courts, year after year, continue to use the terms, more from force of habit than because they are more apt definitions of the parties and the relation in which they are used. The term "servant" is never applied to the lowest menial,

§ 208. **Pleading relationship of employer and employee.**— As explained in a previous section, since the liability for personal injuries is based upon the breach of a specific duty owing to the injured person by the one charged with the responsibility therefor, it is necessary, in all cases, to set forth the specific relation from which the correlative duty and responsibility would follow. Under this general rule, where the plaintiff sues as an employee, he must allege the specific relation going to show the employment, from which

by those considerate of the feelings of their fellows, yet it is applied, in the law, to those independent citizens, free and equal under our constitution, who labor for their sustenance, if they are so unfortunate as to maintain a personal injury action. The use of the term "master," in itself, will prejudice an average jury against the employer. "Master and servant" suggests master and slave; such a relation is impossible under the law, in the United States, and such terms should be dropped by courts and lawyers, for others equally as expressive and more in keeping with our civilization and institutions.

In Parkes v. Seasongood (152 Fed. Rep. 583), Judge Brown, sitting in the Federal Circuit Court for Rhode Island, held that a trained nurse performing her usual duties and exercising the skill which is the result of training in that profession, does not come within the definition of a servant, but rather is one who renders personal service to an employer in the pursuit of an independent calling, and the employer is not liable as master for her acts.

The great Paul of Tarsus said: "Art thus called, being a servant? Care not for it; but if thou mayst be made free, use it rather. For he that is called in the Lord, being a *servant*, is the Lord's freeman; likewise, also, he that is called, being free, is Christ's *servant*. Ye are bought with a price; be not ye the *servants* of men." (I Cor. vii, 21–23.)

Historians of the future, judging the present American wage-worker, by the terms applied to him by modern economic writers and the language of the courts, are apt to regard him much as we of the present day do the "slaves" and "bondmen" of preceding ages. Terms that so illy befit American citizens should be discarded. It is no discredit to those designating the humblest wage-earner, to speak of him as an employee, and if all persons engaged in the service of others, regarded those for whom they labored, rather as an employer, than a master — which smacks of the Eyptian taskmasters, of old — a better feeling might to-day exist between employer and employee.

the court will determine whether or not the liability for the injury exists. Generally, in setting forth the relation, it is sufficient to allege that "the defendant was a railroad company and, at the time of the casualty complained of, was engaged in the operation of a railroad; that the plaintiff was then in the service of the defendant"— setting forth in what capacity employed — "and that, while in the actual discharge of his duties, as such, he received the injuries," [2] for the recovery of damages for the infliction of which the action is prosecuted. Upon the sufficiency of a petition containing practically the allegations above set forth, the Supreme Court of Alabama, in a comparatively recent case, said: "These averments set forth a relationship between the defendant and the plaintiff, at the moment of receiving the injuries * * * and were, we think, sufficient statements of the duty which the defendant owed the plaintiff in the premises." [3] In this case, it was objected that the complaint alleged a mere conclusion of the pleader, without setting out the facts showing the employment; the court held that in stating the employment this was permissible, but it was not denied that facts showing the relation must be alleged, and, if not, that the complaint would be objectionable for this reason. This is the general rule.[4]

[2] Kansas City, M. & B. R. Co. v. Burton, 53 Am. & Eng. R. Cas. 115. A failure to specify the duties performed, so that the defendant and the court can be advised of the nature and cause of the injury, will be subject to a motion to make the complaint more definite and certain in this particular. White, Per. Inj. in Mines, § 50, p. 58, and cases cited. See, also, Diamond Block Coal Co. v. Cuthbertson (Ind.), 67 N. E. Rep. 558.

[3] Kansas City, Memphis & B. R. Co. v. Burton, *supra*. It is error to strike out the only paragraph of a petition alleging that the employee who caused the injury was an employee of defendant. Schneider v. Missouri Pac. R. Co. (Mo.), 94 S. W. Rep. 730.

[4] Railway Co. v. Chewning, 93 Ala. 24; 50 Am. & Eng. R. Cas. 46; Railway Co. v. Davis, 92 Ala. 300; Railway Co. v. Hawkins, 92 Ala. 241.

§ 209. **Injury should result from acts of employees charged.**— Since it is not only essential for the plaintiff to allege and show a connection between the negligence of the defendant and the injury to the plaintiff, but also to establish that the specific negligence alleged occasioned the injury,[5] where certain employees of the defendant are charged with having occasioned the injury, it is not held to meet this allegation of negligence to establish that other employees, in a separate department of the business, by their acts, caused the injury. Illustrative of this doctrine and principle, where it was alleged, in a late Missouri case, that the employees on a certain car, by their acts, caused the injury and the evidence developed that they had, in fact, done nothing, but the injury was occasioned by the employees of another car, in no way connected with the car described, it was held to be a fatal variance.[6] But in other cases, in the same State, where it was alleged that an injury had resulted from the negligence of employees in charge of a train, and the evidence developed that the collision causing the injury was due to the negligence of a train dispatcher, who, in fact, was in charge of the train, this was held to bear out the allegations of the petition and a recovery was permitted as for the negligence charged in the petition.[7] The reason for this ruling was on account of the fact that the evidence was really that charged and not the negligence of other employees. The defendant is entitled to a definite allegation and to rely upon this charge alone being established, as a basis of his liability and if other than the charge alleged is relied on for

[5] International & G. N. R. Co. v. Wray (Tex.), 96 S. W. Rep. 74; McGrath v. St. Louis Tr. Co. (Mo.), 94 S. W. Rep. 872; Van Horn v. St. Louis Transit Co. (Mo.), 95 S. W. Rep. 326.

[6] Coyne v. United Ry, Cos. (Mo. App.), per Goode, J., 98 S. W. Rep. 110.

[7] Malloy v. Chicago, etc., R. Co., 173 Mo. 75; 73 S. W. Rep. 159; Hennessy v. St. Louis, etc., R. Co., 173 Mo. 86; 73 S. W. Rep. 162.

a recovery, the defendant is entitled to have this charge definitely alleged and to defend as to the specific charge, without reference to any others.

§ 210. **Person causing injury must be employee of company.**— Not only is it essential that the injured person, when he sues, must establish the relation of an employee of the company, in order for him to show the resulting duty toward himself, which would render the company liable, but if his injury was due to an act of another, he must establish that this other person, was, in fact, an employee of the company, for whose acts it would be responsible.[8]

A railway company is not liable for an injury to an employee, at work on its station platform, from a mail sack, thrown from a moving train by a railway postal clerk, in the employment of the Government;[9] the postal clerks are not agents or employees of the railway company, or subject to its direction or control, but are in the service of the Government alone.[10] Likewise, it has been held that a company would not be responsible, for the act of a mere volunteer, assisting one of its regular employees, without its knowledge or consent,[11] nor for an assistant of one of its employees, who had no power to engage an assistant.[12] In other words, the company itself, being the one sought to be charged, must have the dominion or power to control the acts

[8] Patterson, Ry. Acc. Law, p. 102; Scott v. London Dock Co., 3 H. & C. 596; Bard v. Yohn, 26 Pa. St. 482; Coleman v. Riches, 16 C. B. 104; 81 E. C. L. 478; Stevens v. Woodward, 6 Q. B. D. 318.

[9] Muster v. Chicago, M. & St. P. Ry. Co., 61 Wis. 325; 18 Am. & Eng. R. Cas. 113.

[10] Snow v. Fitchburg R. R. Co., 136 Mass. 552; 18 Am. & Eng. R. Cas. 161; Carpenter v. Boston & Albany R. Co., 97 N. Y. 494; 21 Am. & Eng. R. Cas. 331.

[11] Burrows v. Erie Ry. Co., 63 N. Y. 556; Morrison v. Erie Ry. Co., 56 N. Y. 302; Patterson on Ry. Acc. Law, p. 103.

[12] Jewell v. Grand Trunk Ry. Co., 55 N. H. 84,

of the one causing the injury, for otherwise, it would be unjust to hold it liable for his acts.[13]

But this rule does not obtain as to passengers, in all its strictness, for if the company, by reasonable care, could prevent an injury to a passenger, by preventing or having corrected, the acts of third persons, such as other passengers, or persons not in its service, and it fails to do so, it will be held liable, in case of a resulting injury, based upon the obligation of its special contract to safely carry the passenger, or afford him reasonably safe surroundings and facilities.[14]

§ 211. **Who generally regarded as an employee.**— The question of who is and who is not, an employee, within the meaning of the law, so as to subject an alleged employer to damages for an injury to the one claiming to be in his service, is often a difficult question to decide. The right to employ and discharge the alleged employee is a controlling element in solving such a question, but not necessarily determining, or so important as the duty or obligation to control and protect the injured person.[15]

The United States Supreme Court holds that the right to employ and discharge a given employee will not even decide the question of vice-principalship,[16] but, in all cases, the vital question is not so much the right to discharge or employ, as the duty owing to the injured person by the one sued for

[13] Reedie v. L. & N. W. R. Co., 4 Ex. 243; Quarman v. Bennett, 6 M. & W. 499; Hughes v. Boyer, 9 Watts 556. Company not liable for act of stranger, throwing switch, by which employee injured. Bennett v. Long Island Co., 21 App. Div. 25; 47 N. Y. Supp. 258; 163 N. Y. 1; 57 N. E. Rep. 79. But see, *contra*, Houston, etc., R. Co. v. Gaither (Tex.), 43 S. W. Rep. 266.

[14] Snow v. Fitchburg R. Co., 136 Mass. 552; 18 Am. & Eng. R. Cas. 161; Carpenter v. Boston & Albany R. Co., 97 N. Y. 494; 21 Am. & Eng. R. Cas. 331; Putnam v. Broadway R. R. Co., 55 N. Y. 113.

[15] Roe v. Winston, 86 Minn. 77; 90 N. W. Rep. 122.

[16] Alaska Treadwell Gold M., etc., Co. v. Whelen, 168 U. S. 85.

the breach of the duty, forming the basis of the liability. This is generally stated to be the test for determining the existence of the relation,[17] and, in every case, since the responsibility depends solely upon the establishment of a duty and the breach of that duty, to hold one as an employer, it would seem to be required to at least show a duty to control, or right of control, and a corresponding duty to protect the injured person.

Under the Ohio statute making a railroad company liable to its employees, for failure to block guard rails on its line of road, the question is said to be, was the injured person, under the authority of the company, rightfully on the track, at the time of his injury? If he was, he is held to be an employee, although paid by another than the owner of the track.[18]

§ 212. **When relation of employer and employee a jury question.**— Where the facts are disputed, upon the question whether or not the injured person was in the service of the one causing the injury, at the time when he was injured, the issue is one for the jury, like any other issue of fact, where the evidence is in conflict. In a Wisconsin case, the injured person was in the employment of the alleged employer, a railroad company, with others, and had been, for a long time, at work on a pile driver. At the time of the injury, the plaintiff and his coemployees had been placed under the care of a third person, the owner of a bridge and

[17] 4 Thompson on Neg., § 3721, p. 7.

[18] Atkyn v. Wabash R. Co., 41 Fed. Rep. 193; 23 Ohio L. J. 151; 4 Thompson on Neg., § 3743, p. 22.

It is said in Patterson, on Railway Accident Law: "The test of the existence of the relation of master and servant is to be found, not in the payment of the servant's wages by the railway, but in the exercise by the railway of authority in appointing the servant, in directing his acts, in receiving the benefit of those acts, and in reserving the power of dismissing the servant." Patterson, Ry. Acc. Law, p. 103.

transfer business, under a contract with his employer, the railroad company, to furnish its engine, track layers and pile driver and employees and cause them to be loaned, as it were, to the bridge owner, during the construction of the bridge and tracks, necessary for the transfer of the business of the railroad company to the transfer owner. The plaintiff contended that when injured he was in the service of the railroad company only, but this was denied and it was shown that when injured the plaintiff and his coemployees were not under the direction or control of the railroad company at all, but were being paid by and were subject to the control only of the owner of the bridge and transfer business. On this conflicting testimony, upon the issue of the employment by the defendant, the court held that it was a question for the jury.[19]

§ 213. **Generally, no liability for neglect or malpractice of physician or surgeon.**— The rule is very generally announced by the different State and federal courts, that a railroad company is not liable for an injury to an employee or third party, due to the negligence or malpractice of a physician or surgeon employed by it, of reputable skill, and professional standing.[20]

For the convenience of the practitioner, some of the holdings by the federal and State courts are given in the subsequent sections.

[19] Schultz v. Chicago, etc., Ry. Co., 40 Wis. 589.

[20] Pittsburgh, etc., R. Co. v. Sullivan, 141 Ind. 83; 50 Am. St. Rep. 313, and note, 40 N. E. Rep. 138; 27 L. R. A. 840; Quinn v. Kansas City, etc., R. Co., 95 Tenn. (10 Pickle) 713; 45 Am. St. Rep. 767; 30 S. W. Rep. 1036; 28 L. R. A. 552; Laubheim v. Royal Netherland, etc., Co., 107 N. Y. 228; 13 N. E. Rep. 781; 1 Thompson on Neg., § 633, p. 582, and cases cited.

The effect of unskillful treatment of a physician or surgeon, employed by the injured person, as affecting his recovery, is discussed in chapter on Elements and Computation of Damages.

§ 214. **Same — The rule in the federal court.**— The holding of the federal courts is in accordance with that of a majority of the States and territories, where the courts have had occasion to pass upon this question and it is held that a railroad company that sends its employee for treatment to a hospital, maintained by the company for charitable purposes, is not responsible for injuries caused to the employee by the negligence of the hospital attendants, where the company had exercised ordinary care in the selection of such attendants.[21]

§ 215. **Same — The rule in Florida.**— The courts of Florida hold that an employer performs his entire duty in respect to furnishing surgical aid for an injured employee, where he employs a physician or surgeon of ordinary skill in his profession, and, having thus discharged his duty, in this regard, to his employee, he is not responsible for the negligence of the physician or surgeon, in the performance of his professional duties.[22]

§ 216. **The Indiana rule.**— The holding is the same in Indiana and where a railroad company voluntarily employs a physician for its injured employee, it is only bound to exercise ordinary care in selecting a competent person and it is not liable for the physician's negligence or tortious acts while attending the injured employee.[23]

[21] Union Pacific Ry. Co. v. Artist, 60 Fed. Rep. 365; 9 C. C. A. 14; 19 U. S. App. 612; Pierce's Admr. v. Union Pacific Ry. Co., 66 Fed. Rep. 44; 13 C. C. A. 323; 32 U. S. App. 48.

The physician or surgeon is generally regarded as any other independent contractor, over whom the employer reserves no control or supervision. 1 Thompson on Neg., §§ 632, 633, pp. 581, 582, and cases cited.

[22] South Florida R. Co. v. Price, 32 Fla. 46; 13 So. Rep. 638.

[23] Pittsburg, C., C. & St. L. Ry. Co. v. Sullivan, 141 Ind. 83; 40 N. E. Rep. 138; 50 Am. St. Rep. 313; 27 L. R. A. 840; Ohio &

§ 217. **The law in Iowa.**— A railway company voluntarily furnishing a hospital for the treatment of its employees, is not liable for the malpractice or negligence of its surgeons, provided it exercised reasonable care in their employment,[24] nor would it be liable for an additional injury to its employee caused by the negligence of its physicians in having such injured employee removed from one place to another.[25]

§ 218. **No liability, in Kansas.**— The rule as announced in Kansas is in accord with the great weight of judicial authority upon this question, and in that State, it is held, where an employer employs a competent physician to attend upon an injured employee, the employer cannot be held liable for the death of such employee,[26] caused by a mistake of the physician.

§ 219. **Rule the same in Maryland.**— The same rule, as to the nonliability of a railroad company for injuries from the negligence of its physicians, is announced, in an early case, in Maryland. The duty of the company was held to cease when the injured employee was placed under the care of a reputable physician and surgeon and it was not liable for the result of his neglect.[27]

§ 220. **No liability, in Nebraska.**— Upon this question, the Nebraska courts follow the trend of the decisions in other States, and in that State, an employer who calls a surgeon to

M. Ry. Co. v. Early, 141 Ind. 73; 40 N. E. Rep. 257; 28 L. R. A. 546.

[24] Eighing v. Union Pacific Ry. Co., 93 Iowa 538; 61 N. W. Rep. 1056; 27 L. R. A. 296.

[25] York v. Chicago, M. & St. P. Ry. Co., 98 Iowa 544; 67 N. W. Rep. 574.

[26] Atchison, T. & S. F. Ry. Co. v. Zeiler, 54 Kan. 340; 38 Pac. Rep. 282.

[27] Baltimore & O. R. Co. v. State, 41 Md. 268.

aid an injured employee is not liable for the negligence or malpractice of the surgeon, provided the surgeon was ordinarily skilled in his profession and the employer had no reason to believe that he would not properly discharge his duty toward the employee.[28]

§ 221. **Tennessee rule the same.**— In Tennessee, the relation of employer and employee does not exist between a railroad company and a physician employed by it to take care of its injured employees. The railroad company is bound to exercise only reasonable care in the employment of a physician and surgeon to care for its injured employees and there is no liability, on the part of the company, for the negligence of its physicians or surgeons.[29]

§ 222. **Washington rule — No liability.**— In a case which arose in Washington, the injured employee worked for a mining company which assessed its employees for the maintenance of a hospital and the employment of surgeons. Upon the issue as to the employer's liability for the want of skill on the part of the surgeon, the court held that the company was not liable to the employee for the negligence or malpractice of the physician, as he was employed, without profit to the company, for the treatment of its employees and possessed ordinary skill in his profession and it was held to be immaterial that the employee had contributed to the fund out of which he was paid.[30]

§ 223. **Status of volunteers and substituted employees.**—

[28] Chicago, B. & Q. R. Co. v. Howard, 45 Neb. 570; 63 N. W. Rep. 872.

[29] Quinn v. Kansas City, M. & B. R. Co., 94 Tenn. (10 Pickle), 713; 30 S. W. Rep. 1036; 45 Amer. St. Rep. 767; 28 L. R. A. 552.

[30] Richardson v. Corlean Hill Coal Co., 10 Wash. 648; 39 Pac. Rep. 95.

Since the existence of the relation of employer and employee depends rather upon the appointment of the employee and the direction of his acts, in receiving the benefit of his acts, the payment for his services and the reserved power of dismissal,[31] than upon the nature or character of the duties performed, one who is not engaged or under the direction of the employer, whose services do not enure to his benefit and whom the employer cannot dismiss and does not pay for his services, is not generally deemed to be in his employment to the extent of rendering him liable for an injury to such a person, through the negligence of those regularly in his service.[32]

The duty of furnishing a reasonably safe place in which to work, which extends to all regular employees, is held not to apply to one who volunteers, for the employee's benefit, to assist him in his work, without the knowledge or consent of the employer;[33] nor would the employer be held liable for the negligence of such a volunteer, in case his other employees were injured as a result of his negligence.[34] But if the negligence of a mere volunteer has occasioned a defect in an appliance, which would have been disclosed by a proper and timely inspection, the employer will be responsible, if no proper inspection has been had, in case an injury results to an employee, for in such case, the negligence is not that alone of such stranger or volunteer, but it is his, combined with that of the employer himself.[35]

[31] Patterson, Ry. Acc. Law, p. 103.

[32] 4 Thompson, Neg., § 3756, and cases cited.

[33] Langan v. Tyler, 114 Fed. Rep. 716; Craven v. Myers, 165 Mass. 271; 42 N. E. Rep. 1131.

[34] Bennett v. Long Island R. Co., 163 N. Y. 1; 57 N. E. Rep. 79.

[35] In Texas, where an engineer was killed as a result of the displacement of a switch, caused by a bolt having been removed by a stranger, but which could have been discovered, by a proper inspection, the employer was held liable. Houston, etc., R. Co. v. Gaither, 43 S. W. Rep. 266. But see, Bennett v. Long Island R. Co., *supra*.

§ 224. **Postal clerks and express messengers not employees.** — In accordance with the customary legal tests for determining the existence of the relation of employer and employee, postal clerks and express messengers are not usually regarded as the railway company's employees,[36] for the company does not employ them; does not pay their wages or exercise any authority, either in appointing or directing their acts, nor does it receive the benefit of their service, or have the power to dismiss them.

But it does not follow that the railway company may not owe these persons some duty, if not that of an employer, and while it was held, in Wisconsin, that a postal clerk was not such an employee of the railway company, as to render the company liable for an injury resulting from his negligence,[37] it has been held in New York [38] and some other States, that such persons can recover for an injury from the negligence

Where, at the time plaintiff was injured while riding on a freight train under an invalid employment by the conductor, he was neither an employee nor a passenger, the fact that the carrier, several months after the injury, issued plaintiff a pass to enable him to return to his home, in which he was described as an "injured employee," was inadmissible to show a ratification of the conductor's attempted employment. Vassar v. Atlantic Coast Line R. Co. (N. C. 1906), 54 S. E. Rep. 849.

An apprentice, engaged in studying the business of railroading and helping, as flagman, with the consent of the railroad's trainmaster, is held to be an employee, in Illinois, and the company is liable for his death, through a collision, caused by his coemployees' negligence, under the statute. Huntzicker v. Illinois Cent. R. Co., 129 Fed. Rep. 548.

[36] Muster v. Chicago, M. & St. P. Ry. Co., 61 Wis. 325; 18 Am. & Eng. R. Cas. 113; Patterson on Ry. Acc. Law, pp. 102, 103.

[37] Muster v. Chicago, M. & St. P. Ry. Co., *supra*.

[38] Nolton v. Western R. R. Co., 15 N. Y. 444; Blair v. Erie R. R. Co., 66 N. Y. 313; Putnam v. Broadway R. R. Co., 55 N. Y. 113; Carpenter v. Boston & Albany R. Co., 97 N. Y. 494; 21 Am. & Eng. R. Cas. 331. See, also, Snow v. Fitchburg R. Co., 136 Mass. 552; 18 Am. & Eng. R. Cas. 161.

of the company, or its employees, while this is denied in Pennsylvania [39] and other States.

§ 225. **News agents and others carried under contract.**— Analogous to the position occupied by mail and express agents is that of news agents or those carried, under a contract with their employer, to sell refreshments or render other services for other than the railroad company, on its trains.

In these and similar relations, while the relation of employer and employee does not exist between the railroad company and such persons, rightfully on its trains, it does not follow that it would be free from a duty toward them, for being rightfully on the train, the railroad owes them the obligation to prevent injuring them, through its own negligence, and if an injury is sustained by such a person, although no relation of employer or employee could be held to exist, the railroad would none the less be liable for the result of its own negligence.[40] But the liability would not extend to those who might be invited upon the train of a railroad company, by such persons, as express agents, newsboys or mail clerks, for as to these parties, the company would owe them no duty aside from that which it would owe

[39] Pennsylvania R. R. Co. v. Price, 96 Pa. St. 256; 1 Am. & Eng. R. Cas. 234. But an express messenger, who also acted as baggage man, with the knowledge of the employer, although he had no contract as such, was held to be an employee, in Texas. Missouri, etc., R. Co. v. Reasor, 28 Tex. Civ. App. 302; 68 S. W. Rep. 332.

[40] Yeomans v. Railroad, 44 Cal. 71; Commonwealth v. Vermont, etc., R. Co., 108 Mass. 7; Hammond v. Northeastern R. Co., 6 S. C. 130; Houston & Texas Central R. Co. v. Hampton, 64 Texas 427; 22 Am. & Eng. R. Cas. 291; Pennsylvania R. Co. v. Price, 96 Pa. 256; Seybold v. New York, etc., R. Co., 95 N. Y. 562; Pennsylvania R. Co. v. Woodworth, 26 Ohio St. 585; Blair v. Erie R. Co., 66 N. Y. 313; Chamberlain v. Minneapolis, etc., R. Co., 11 Wis. 238.

any other trespasser, for their position is no different from that of a mere trespasser.[41]

§ 226. **Substituted employer — Train and crew controlled by another.**— So material in the determination of the relation, is the right or duty of control over the injured employee, that it has been held that if a railroad company loans or hires its train and train crew to another person or corporation, and, while under the control and subject to the direction of this other, an injury happens to another by one of the crew, the person exercising the right of control, at the time of the injury, will be regarded as the employer, for the purposes of the damage suit and not the original employer, who, at the time, retained no control or supervision over the employee causing the injury.[42]

But it is not true that an employer could relieve himself from liability, by substituting another for himself, without an express renunciation of his claim against him, by the employee, and for an injury to his own employees, caused by the negligence of the substituted employer, it has been held that the original employer would remain liable.[43]

§ 227. **Injury must occur in course of employment.**— For the employer to be held liable, in damages, for an injury to

[41] Duff v. Railroad, 91 Pa. St. 458; Missouri Pacific Ry. Co. v. Nichols, 8 Kan. 505; Patterson, Ry. Acc. Law, p. 217.

A sleeping car porter is not an employee of the railroad company where the car in which he worked is operated by the sleeping car company and it is paid by the railroad company to run it over its road. Chicago, R. I. & P. R. Co. v. Hamlin, 215 Ill. 525; 74 N. E. Rep. 705.

[42] Coughlan v. Cambridge, 166 Mass. 268; 44 N. E. Rep. 218. In this case, the injured person was another original employee of the defendant.

[43] Rook v. N. J., etc., Co., 76 Hun (N. Y.) 54; 148 N. Y. 758; 43 N. E. Rep. 989; Murray v. Dwight, 161 N. Y. 301; 55 N. E. Rep. 901.

an employee, the injury must not only arise out of, but it must also occur "in the course of" the employment.[44] If the employee, instead of attending to the business of the employer, at the time of the injury, was engaged upon some business of his own, or if the work done by him was outside the scope of his employment, and as a result of the performance of such outside duties, he was injured, then the employer is not responsible, for in the performance of such duties, the relation of employer and employee did not exist, since he was not employed to perform any such service.[45] And not only is an employee himself precluded from recovering for an injury, where he had voluntarily abandoned the service of his employer and engaged himself upon some independent business, but his employer is not responsible for any injury that he may occasion other employees, while so engaged upon such outside business, for to render the employer liable for injuries caused by his employees, the act that caused the injury must have been done in the scope of the employee's duties for the employer.[46] Injuries received before the day's work for the employer is commenced,[47] or after it is over,[48] are not held to be received in the course of the employment; nor would an injury during a temporary cessation of the work, where the employee had turned aside from the business of the employer,[49] but if, during a tem-

[44] Smith v. Lancashire, etc., R. Co., 1 Q. B. 141; 79 L. T. (N. S.) 633; 68 L. J. Q. B. 51; 47 Wkly. Rep. 146; Hartford v. Northern Pac. R. Co., 91 Wis. 374; 64 N. W. Rep. 1033; Southern R. Co. v. Guyton, 122 Ala. 231; 25 So. Rep. 34.

[45] Reed v. Missouri Pac. R. Co., 94 Mo. App. 371; 68 S. W. Rep. 364; Nashville, etc., R. Co. v. McDaniel, 12 Lea. (Tenn.) 386.

[46] Hartford v. Northern Pac. R. Co.; 91 Wis. 374; 64 N. W. Rep. 1033.

[47] Davis v. Atlanta, etc., R. Co., 63 S. C. 370, 577; 41 S. E. Rep. 468, 892.

[48] International, etc., R. Co. v. Ryan, 82 Texas 565; 18 S. W. Rep. 219.

[49] Ellsworth v. Metheny, 104 Fed. Rep. 119; 44 C. C. A. 484; 51

porary absence from his place of work, an employee is in a place provided by the employer for the purpose, or under the direction or control of his agents,[50] or even before commencing or after finishing his day's work, if he is going to, or returning from his place of work, on appliances provided by the employer, the relation is so far held to continue to exist, as to render the employer liable for any injury received in such cases, on account of his own negligence, the same as though the injury had been received in the regular course of the employer's business.[51]

§ 228. **When one deemed employee of two or more companies.**— It not infrequently happens, under the multiform transactions of commerce, that two or more railroad companies, at the same time, may occupy such a relation toward a given individual, as to enable him, in case of an injury, to hold them jointly or severally, at his election, liable for such injury.

This effect would logically follow the engagement of two or more companies to perform a given duty toward one, as an employee, for in case of a breach of such duty, they would be jointly and severally liable for a failure to perform it, or for a negligent performance of such duty.[52] This principle,

L. R. A. 389; Louisville, etc., R. Co. v. Hocker, 111 Ky. 707; 64 S. W. Rep. 638.

[50] Heldmaier v. Cobbs, 195 Ill. 172; 62 N. E. Rep. 853.

[51] Jensen v. Omaha, etc., R. Co., 115 Iowa 404; 88 N. W. Rep. 952; Bowles v. Indiana R. Co., 27 Ind. App. 672; 62 N. E. Rep. 94.

[52] Machine Co. v. Keifer, 134 Ill. 481; Story, Part. (7 ed.), §§ 166, 167; Champion v. Bostick, 18 Wend. 174; Wood v. Luscomb, 23 Wis. 287; Wood, Mas. & Serv. (2 ed.), § 357, p. 735; Vary v. Burlington, etc., R. Co., 42 Iowa 246; Wisconsin Cent. R. Co. v. Ross, 142 Ill. 9; 53 Am. & Eng. R. Cas., p. 73.

A railroad company operating a road jointly with another corporation is responsible for an injury to its employees, the same as a natural person would be for liabilities of a firm, of which he is a

upon grounds of public policy, is applied to the engagement of two or more railroad companies, the same as it is against two or more individuals, and however numerous the association of companies may be, if there is a joint assumption of a duty toward one, as an employee, he has his election, in case of an injury, whether he will proceed against them all, or sue them separately for the breach of this joint obligation.[53]

If a train is controlled by the agents of two companies jointly, at the time of an injury to an employee, regardless whose track is being used, both companies will be liable for the injury; but if the agents of one company alone cause the injury, by their negligence, then the employer of those agents will alone be responsible, whether it was caused by the agents of the owner of the train, or those of the owner of the track.[54]

§ 229. **Different companies using same track or trains.**— Where different companies use the same track, depots, or yards, each company will be held liable for a failure to use ordinary care for the protection, not only of its own employees but also of those of the other company, rightfully on the premises, in the discharge of their various duties. The measure of care due from the different companies toward the employees of the other company is not essentially different from that due to its own employees, and for a breach of this duty, and a resulting injury, a liability will result.[55]

member. Harrill v. South Carolina & G. R. Co., 135 N. C. 601; 47 S. E. Rep. 730.

[53] This is practically the language of the court, in Railway Co. v. Shacklet, 105 Ill. 364; 12 Am. & Eng. R. Cas. 166; Vary v. Burlington, etc., R. Co., *supra*.

[54] Stetler v. Railway Co., 46 Wis. 497; Railroad Co. v. Kanouse, 39 Ill. 272; Snow v. Railroad Co., 8 Allen, 441; Wood, Mas. & Serv. (2 ed.), § 357, p 735; Nashville, etc., R. Co. v. Carroll, 6 Heisk. (Tenn.) 347; Harper v. Newport News, etc., R. Co. (Ky.), 13 S. W. Rep. 346; 44 Am. & Eng. R. Cas 653; 4 Thompson, on Neg., § 3723; Wisconsin Central R. Co. v. Ross, 53 Am. & Eng. R. Cas. 73.

[55] The use of a railroad track, by two roads, in Pennsylvania, is held

The employing company will be liable for an injury to its own employees from a defect in the track or premises of the other company, the same as it would be, had it owned the premises,[56] but the company owning the property is not without obligation toward the employees of the other company and if an injury results from a defective condition of its premises it may also be held responsible therefor.[57] A member of a train crew on a through run over connecting lines of different companies can hold the company liable, on whose road he is injured, if the injury results by reason of a defective condition of the track or roadbed;[58] but where the train or engine is that of one company and a rental is paid for the use of it by the connecting carrier, for an injury to its own employee, by reason of a defect in the engine, the owner thereof will alone be held liable.[59]

A company, using the track of another company, as licensee, would not be liable to one of its own employees, for an injury caused by the negligence of the licensor company,[60]

to be the track of the company using it, at time of an injury, regardless of the terms of the contract under which it is being used. Keck v. Philadelphia, etc., R. Co., 206 Pa. 501; 56 Atl. Rep. 47. And see, O'Sullivan v. Chicago, etc., R. Co., 23 Ill. App. 646; McMarshall v. Chicago, etc., R. Co., 80 Iowa 757; 45 N. W. Rep. 1065; Omaha, etc., R. Co. v. Morgan, 40 Neb. 604; 59 N. W. Rep. 81; Wisconsin Cent. R. Co. v. Ross, 142 Ill. 9; 31 N. E. Rep. 412; 53 Am. & Eng. R. Cas. 73.

Company permitting use of its road and franchises by another company is liable for negligence of the other company, as it will be viewed as the agent of the owner. West Chicago, etc., R. Co. v. Anderson, 200 Ill. 329; 65 N. E. Rep. 717.

[56] Illinois, etc., R. Co. v. Frelka, 110 Ill. 498; Brady v. Chicago, etc., R. Co., 114 Fed. Rep. 100; 52 C. C. A. 48; 57 L. R. A. 712; 4 Thompson on Neg., § 3730.

[57] Nugent v. Boston, etc., R. Co., 80 Me. 62; 12 Atl. Rep. 797.

[58] Goodrich v. Kansas City, etc., R. Co., 152 Mo. 222; 53 S. W. Rep. 917.

[59] Hurlburt v. Wabash R. Co., 130 Mo. 657; 31 S. W. Rep. 1051.

[60] Brady v. Chicago, etc., R. Co., 114 Fed. Rep. 100; 52 C. C. A. 48; 57 L. R. A. 712.

and if the licensor company was sued for an injury to an employee of the licensee company, it could avail itself of the rules or regulations of the employer of the injured employee, if the violation of the rules contributed to bring about the injury, the same as it could set up any other act of contributory negligence, to avoid the action.[61]

[61] Texas, etc., R. Co. v. Moore, 8 Tex. Civ. App. 289; 27 S. W. Rep. 962.

A fireman of one company, while running on his engine over the track of another company, is not deprived of his right of action against his own employer, because the injury was due to the defective condition of the track of the other company, over which his employer had no right of repair or control. The employer could not delegate the duty to furnish its own employees a reasonably safe place to work, and the owner of the track would be held the agent of the owner of the train, for the purpose of making the repairs.

Story v. Concord, etc., R. Co., 70 N. H. 364; 48 Atl. Rep. 288.

The owner of a track was held liable to an employee of another company using it, for an injury due to a negligent condition of the track, in Southern Kansas, etc., R. Co. v. Sage, 80 S. W. Rep. 1038.

A company merely using the track of another company to run its cars over, will not be liable for an injury from the unsafe condition of the track, to others than its own employees. Collier v. Great Northern Ry. Co., 40 Wash. 639; 82 Pac. Rep. 935.

For joint liability for an injury to one of the company's employees, from a collision, caused by a negligent use of the same track by both companies, see Chicago & W. I. R. Co. v. Marshall (Ind.), 75 N. E. Rep. 973.

A company jointly using a railroad yard, with another company, is liable for an injury to one of its brakemen from a negligently located telegraph pole, in close proximity to a moving train, although it had no interest in the yard or control of the premises. Illinois Terminal R. Co. v. Thompson, 210 Ill. 226; 71 N. E. Rep. 328.

But the owner of a roadbed and track, used by another company, will not be liable for an injury to an employee of the other company, due wholly to the negligence of its own employees. Ederle v. Vicksburgh, etc., Co., 112 La. 728; 36 So. Rep. 664.

A railroad company owning a track is liable for an injury to a person on the track, although the train which struck him was operated by another company, with its consent. Gulf, C. & S. F. R. Co. v. Miller (Texas), 79 S. W. Rep. 1109; 83 S. W. Rep. 182; Ray v. Pecos & N. T. R. Co., 80 S. W. Rep. 112; Aycock v. Ry. Co., 89 N. C.

§ 230. **Joint or several liability of companies jointly operating road.**— There is a marked distinction between the liability of a railroad company, for the acts of an independent contractor, engaged in the construction of the railroad, prior to its completion and the liability of such company for the acts of another company, subsequent to the completion of the road, that is jointly engaged in operating trains over its tracks. In the one case, the construction company is not assuming the exercise of the franchises delegated by the legislature to the railroad company, while in the other the railroad company jointly using the tracks of the other company, is presumed to be doing so under the franchise of the company owning the road. Where the cars, machinery or appliances,[62] or the track,[63] or yards[64] of one company is jointly used by two or more companies, each will be liable for an injury to an employee of any one of such companies,

321. But see, Clymer v. R. R., 5 Blatchf. 317; Harper v. R. R., 90 Ky. 359; 14 S. W. Rep. 346.

Where cars of connecting roads are transferred from one road to another, under agreement, an employee of the receiving road, injured by a defective car, can sue either railroad company. Hoye v. Great Northern Ry. Co., 120 Fed. Rep. 712; Teal v. American Mining Co. (Minn.), 87 N. W. Rep. 837; Moon v. Northern Pac. R. Co., 46 Minn. 106; 48 N. W. Rep. 679; 24 Am. St. Rep. 194.

[62] Central R. Co. v. Passmore, 90 Ga. 203; 15 S. E. Rep. 760; Lockhart v. Little Rock, etc., R. Co., 40 Fed. Rep. 631; Cincinnati, etc., R. Co. v. Long, 112 Ind. 166; 13 N. E. Rep. 659; 31 Am. & Eng. R. Cas. 138; Kain v. Smith, 80 N. Y. 458; 2 Am. & Eng. R. Cas. 545.

[63] Wisconsin, etc., R. Co. v. Ross, 142 Ill. 9; 31 N. E. Rep. 412; 53 Am. & Eng. R. Cas. 73; Gulf, etc., R. Co. v. Dorsey, 66 Texas, 148; 25 Am. & Eng. R. Cas. 446; McMarshall v. Chicago, etc., R. Co., 80 Iowa 757; 45 N. W. Rep. 1065; Illinois, etc., R. Co. v. Frelka, 110 Ill. 498; 18 Am. & Eng. R. Cas. 7; Roll v. Northern C. R. Co., 15 Hun (N. Y.) 496.

[64] Missouri Pacific Ry. Co. v. Jones, 75 Texas 151; 12 S. W. Rep. 972; 41 Am. & Eng. R. Cas. 363; McMarshall v. Chicago, etc., R. Co., 80 Iowa 757; 45 N. W. Rep. 1065; Gulf, etc., R. Co. v. Shelton (Texas), 72 S. W. Rep. 165.

sustaining injury because of the negligence of any one of such companies. But where two or more companies jointly use the same track, while the owner of the track would be liable to the employees of the other company, for any injury caused by the negligent condition of its own track,[65] it would not be liable to one of its own employees due to the negligence of an employee of the other company, but the company whose employee caused the injury would alone be liable for the result of such wrongful act.[66]

§ 231. **Liability of connecting and joining roads.**— It is held, in Massachusetts, where two railroad companies are created by concurrent legislation of two or more States and they have a joint interest in the operation and management of the road through such States, that they are jointly liable for a tort committed in either State through which the road extends.[67] But if the roads are not created by the same or joint legislative acts, and are not jointly interested in the business of the other, it is doubtful if this result would follow. The rule, where cars of one road are handled on a connecting road, is that the company owning the car is liable, if its duty is so stipulated, for an injury from the delivery of a defective car, to the connecting carrier;[68] but not if the car has passed an inspection of the connecting road, generally,[69] and not for injuries to employees of the consignee of the connecting road.[70]

[65] Gulf, etc., R. Co. v. Dorsey, 66 Texas, 148; 25 Am. & Eng. R. Cas. 446.

[66] Georgia, etc., R. Co. v. Friddell, 70 Ga. 489; 7 S. E. Rep. 214; Cincinnati, etc., R. Co. v. Long, 112 Ind. 166; 13 N. E. Rep. 659; 31 Am. & Eng. R. Cas. 138.

[67] Smith v. New York, N. H. & H. R. Co., 96 Fed. Rep. 504.

[68] Moon v. Northern Pac. R. Co., 46 Minn. 106; 48 N. W. Rep. 679.

[69] Glynn v. Central R. Co. (Mass.), 56 N. E. Rep. 698.

[70] Sykes v. St. Louis & San Francisco R. R. Co., 178 Mo. 693.

§ 232. **Liability under joint-traffic arrangement.**—Where the use of one road by the trains and crews of two companies is regulated under a joint-traffic arrangement, as is frequently done, the liability for injuries from negligence of the agents of either company, attaches to both alike. In a recent Kentucky case,[71] two companies had agreed to jointly maintain the roadbed owned by one of them and the engines and cars of the other company, though used and managed by its employees, were to be subject to the direction of the officers of the owner of the roadbed and track and the tickets sold by the agents of that company were to be honored by the employees of the other company on its trains, and it received one-fourth the proceeds of tickets. The company operating the trains also agreed to pay its part of the cost of maintenance and a track rental and proportionate part of the taxes. The court held that the contract was a joint traffic arrangement between the two roads and the trains were to be considered as though operated by both companies and both were liable for injuries from negligence in the operation of such trains.

§ 233. **Agent causing injury and company both liable.**—Under the rule of joint and several liability of tort feasors, not only different companies operating a railroad together will be jointly and severally liable to an injured employee for the result of the negligence of the employees of any one

[71] Louisville & N. R. Co. v. Breeden's Admr., 23 Ky. L. R. 1021, 1763; 64 S. W. Rep. 667.

In Illinois, no matter under what arrangement the use is had, the owner of a railroad is liable for damages for negligence of another road using its track. Chicago, etc., R. Co. v. Schmitz, 211 Ill. 406; 71 N. E. Rep. 1050.

If an employer deals with and adopts an instrumentality as his own, the fact that he did not own it is immaterial, in case of an injury to one of his employees. Central of Georgia Ry. Co. v. McClifford, 120 Ga. 90; 47 S. E. Rep. 590.

of them,[72] but the employee whose negligence occasioned the injury may also be sued jointly with the principal or employer,[73] or he may be sued alone.[74] It has accordingly been held that an engineer who negligently caused an injury to another employee, would be jointly liable for such injury, together with the railroad company,[75] or he could be sued alone for the damages resulting to the injured party from his negligence, and it would be no defense that he did not own the engine, or was not running it on his own account.[76]

But in case of a suit against a company and an employee who caused the injury, it is always essential to establish that the employee sued did, in fact, commit some overt act which would connect him individually with the injury, or it will be error to hold him personally liable with the employing company therefor. Accordingly, in a Missouri case, where the engineer who managed the engine which injured the plaintiff and the conductor who operated the train, were both joined in a suit against the company, and there was no evidence that the conductor even knew of the accident to the plaintiff, but the verdict and judgment was rendered against all three, it was held that the judgment would have to be reversed as to the conductor.[77]

§ 234. **Employer not liable when negligent employee discharged.**— Where the right of the plaintiff to recover is de-

[72] Harrill v. South Carolina & G. R. Co., 135 N. C. 601; 47 S. E. Rep. 730.

[73] Illinois Central R. Co. v. Houchins, 28 Ky. L. R. 499; 89 S. W. Rep. 530; 1 L. R. A. (N. S.) 375.

[74] Illinois Central R. Co. v. Coley, 28 Ky. L. R. 336; 89 S. W. Rep. 234; 1 L. R. A. (N. S.) 370.

[75] Illinois Central R. Co. v. Houchins, *supra*.

[76] Illinois Central R. Co. v. Coley, *supra*.

[77] But under a special statute (R. S. Mo. 1899, § 866), it was affirmed as to the engineer and company. Stotler v. Chicago & A. R. Co., 98 S. W. Rep. 509.

pendent solely upon the doctrine of respondeat superior, and the plaintiff has sued both the negligent employee causing the injury and the employer, if there is a finding that the employee, through whose negligence the employer is attempted to be held liable, has not himself been negligent, then a judgment against the employer is improper.[78] The jury cannot say, by their verdict, that the employee, whose act alone caused the injury, was not negligent, and at the same time hold his employer negligent, when nothing further was done by it than what it did through its employee. Such a verdict would be both inconsistent and unreasonable. But if the employer, through other agents, has directed or ratified a trespass or committed other wrongful act, wherein one of its employees is not alone to blame, the mere discharge of such an employee would not alone relieve it from all liability to the injured person, for in such case the rule applying to joint tort feasors would obtain, between whom there is no right to contribution.[79]

[78] Stevick v. Northern Pac. R. Co., 39 Wash. 501; 81 Pac. Rep. 1001; Doremus v. Root, 23 Wash. l. c. 715; 63 Pac. Rep. 574; 54 L. R. A. 649; Oceanic, etc., R. Co. v. Compania Translantique, etc., Co., 134 N. Y. 461; 31 N. E. Rep. 987; 30 Am. St. Rep. 685. See, also, able opinion of Graves, J., in McGinnis v. Chicago, R. I., etc., R. Co. (Mo.), 98 S. W. Rep. 590.

[79] Berkson v. Kansas City, etc., R. Co., 144 Mo. 211; 45 S. W. Rep. 1119. This case is distinguished, in McGinnis v. Chicago, etc., R. Co. (98 S. W. Rep. 590), *supra*.

"There are two parallel cases by the Supreme Court of Washington, wherein, in our judgment, the true rule is announced. In case of Doremus v. Root *et al.* (23 Wash. l. c. 715; 63 Pac. Rep. 574; 54 L. R. A. 649), the court says: 'Joint tort feasors are liable to the injured person (other than that he may have but one satisfaction) as if the act of causing the injury was the separate act of each of them, and they have, except in certain special cases, no right of contribution among themselves. But the defendants in this character of action are in no sense joint tort feasors, nor does their liability to the plaintiff rest upon the same or like grounds. The act of an em-

§ 235. Lessor's liability for injuries to employees of lessee. —Except as to defects in the track or roadbed, or other

ployee even in legal intendment is not the act of his employer, unless the employer either previously directs the act to be done or subsequently ratifies it. For the injuries caused by the negligent act of an employee not directed or ratified by the employer, the employee is liable because he committed the act which caused the injury, while the employer is liable, not as if the act was done by himself, but because of the doctrine of *respondeat superior*, the rule of law which holds the master responsible for the negligent act of his servant, committed while the servant is acting within the general scope of his employment and engaged in his master's business. The primary liability to answer for such an act, therefore, rests upon the employee, and, when the employer is compelled to answer in damages therefor, he can recover over against the employee.' Oceanic Steamer Nav. Co. v. Compania Translantic Espanola, 134 N. Y. 461; 31 N. E. 987; 30 Am. St. Rep. 685; note to Village of Carterville v. Cook, 16 Am. St. Rep. 248; 1 Shearman & Redfield, Negligence (5 ed.), par. 242; 2 Van Fleet, Former Adjudication, p. 1162. Again, on page 716 of 23 Wash.; 63 Pac. Rep. (54 L. R. A. 649) Fullerton, J., in that case, further says: 'So, also, in such an action, whether brought against the employer severally or jointly with the employee, the gravamen of the charge is, and must be, the negligence of the employee, and no recovery can be had unless it be proved, and found by the jury, that the employee was negligent. Stated in another way, if the employee who causes the injury is free from liability therefor, his employer must also be free from liability.' This was held in New Orleans & N. E. R. R. Co. v. Jopes, 142 U. S. 18; 12 Sup. Ct. 109; 35 L. Ed. 919. In the Doremus case, *supra*, the verdict was against defendant railway company, but said nothing as to defendant Root. By the judgment, Root, a conductor of the railway company, was exonerated of negligence, and the railroad company found liable, and it appealed. The court reversed the judgment and remanded the case, with directions to the lower court to enter judgment for the defendant. In case of Stevick v. Northern Pacific R. Co. *et al.*, 39 Wash., l. c. 506, 81 Pac. Rep. 1001, the court through Mount, C. J., says: 'The only negligence alleged or attempted to be proven was that the engine was out of repair and was leaking steam, and that Gregg, the agent of the company, had notice to repair it. The defendant Gregg was joined in the action by reason of the fact that he was the master mechanic in charge of the engine, knew its condition, and, it is alleged, neglected to make the necessary repairs. The fact was admitted that the defendant Gregg was the master mechanic in charge of the engine, and that it was his duty to keep it

premises leased,[80] a railroad company leasing its road and property to another company would not be liable for personal injuries inflicted by the lessee company, in the absence of a statute imposing such liability. This is the general rule, but it is not followed in all the different States,[81] where the lease is made in pursuance to law.

in repair. When the jury found that defendant Gregg was not negligent, then it necessarily followed that the railway company was not negligent, because the negligence of the railway company, as stated in the complaint, is based upon the negligence of Gregg. It is true that the complaint states 'that defendants, and both of them, negligently failed to repair said locomotive,' but the complaint, taken as a whole, shows that the negligence of the company is based entirely upon the alleged negligence of its servant Gregg in charge of its locomotives. The jury, having found that defendant Gregg was not negligent, and having returned a verdict in his favor, necessarily exonerated the railway company. Doremus v. Root, 23 Wash. 719; 63 Pac. 572; 54 L. R. A. 649. In this case the verdict was practically in form of the verdict in case at bar. It found for the defendant Gregg, the employee, and against the railway company. The court reversed the judgment and ordered the action dismissed.'

"In the case of Delaplain v. Kansas City *et al.*, 109 Mo. App. 1, c. 113; 83 S. W. 72, the Kansas City Court of Appeals has touched upon the question herein involved."

Above is taken from the opinion of Graves, J., in McGinnis v. Chicago, etc., R. Co., 98 S. W. Rep., p. 593.

[80] In Kentucky, an employee of the lessee, injured as a result of his employer's negligence alone, has no remedy against the lessor. Lewis v. Mayesville, etc., R. Co., 25 Ky. L. R. 948; 76 S. W. Rep. 526.

The duty due the general public is held to be entirely separate and distinct from the duty owing to an employee of its lessee, by a railroad company, and it is held not liable for an injury to such employee, on account of his employer's negligence, without a special contract therefor. Williard v. Spartanburg, etc., R. C., 124 Fed. Rep. 796; Southern Ry. Co. v. Sittasen (Ind. App.), 74 N. E. Rep. 898; Muntz v. Algiers & G. R. Co., 115 La. 437; 38 So. Rep. 410.

[81] If the lease is not made in pursuance to statutory authority, the lessor remains liable always, since it cannot delegate its franchises and avoid liability. Washington A. & G. R. Co. v. Brown, 84 U. S. 453; 17 Wall. 445; 21 L. Ed. 675; Ingersol v. R. R. Co., 8

Where there is a statute, however, the rule is otherwise, and the lessor company may be rendered liable for injuries from the negligence of the lessee, if the statute imposes such responsibility. Under the Missouri statute,[82] authorizing foreign railroad companies to lease or purchase lines of railroad within the State, but making a domestic corporation that leases its line "liable as if it operated the road itself," it is held that a domestic company, which leases its line of road to a foreign company is responsible for injuries to its employees, incurred in the operation of the road, by the leasing company.[83] But the Ohio statute,[84] which makes both lessor and lessee liable for any injuries from the negligence of the lessee in the operation of the road, is held to apply to injuries to those sustained in the relation of a carrier and not to employees, and an employee injured by the lessee's negligence must look alone to his employer for recovery and cannot hold the lessor company responsible for damages.[85]

Unless the lease is made in accordance with the provisions of a given statute, the lessor remains liable in all cases, for the negligence of the lessee company, for the reason that it could not delegate to another its franchises or responsibilities and thus avoid liability for the use thereof by another.[86]

Allen, 438; Langley v. R. R. Co., 10 Gray 103; Redf. on Railways (5 ed.), p. 616.

[82] Rev. St. Missouri, 1899, § 1060.

[83] Keller v. Kansas City, St. L., etc., R. Co., 135 Fed. Rep. 202.

[84] Rev. St. Ohio, 1892, § 3305.

[85] Axline v. Toledo, W. & V. O. R. Co., 138 Fed. Rep. 169; Beltz v. Baltimore & Ohio R. Co., 137 Fed. Rep. 1016.

[86] Thomas v. W. J. Ry. Co., 101 U. S. 71; 11 Otto 71; 25 L. Ed. 950; Railroad v. Winans, 17 How. 30; 58 U. S. 27; Black v D. & R. Canal Co., 22 N. J. Eq. 130; Speed v. Atl. & Pac. R. R. Co., 71 Mo. 303; 2 Am. & Eng. R. Cas. 77; Freeman v. M. & St. P. Ry. Co., 28 Minn. 443; 7 Am. & Eng. R. Cas. 410.

§ 236. **Mortgagor not liable for negligence of mortgagee.**— It is very generally held that a railroad company is not liable, either at common law, or under statutes imposing a liability for injuries resulting in death, for the negligence of mortgagees of the railroad company, while they are operating the road, under a possession taken and held adversely to the mortgagor railroad company.[87] The reason for holding that there is no liability on the part of the mortgagor, lies at the basis of all liability for personal injuries through negligence, which is that the personal negligence of the one alleged to have caused the injury must have been the cause of the injury, before a liability will result. A railroad company, like any other corporation, is only liable for the negligence of its employees or authorized agents, for acts done within the real or apparent scope of their authority and never for the acts of third persons, who could not be said to be its agents. "A mortgagor, out of possession of property, real or personal, ought not to be liable for the acts of the

Where no statutory authority for a lease is shown, the company owning the tracks, is liable for an injury through the negligence of the lessee's employees, in Texas. Missouri, K. & T. Ry. Co. v. Owens, 75 S. W. Rep. 579.

By virtue of Illinois statute (3 Starr, etc., Ann. St. 1896, ch. 114, p. 3247), a railroad company leasing its line of road to another company, is liable for an injury to an employee of the lessee company by the negligence of the lessee alone. Chicago & G. T. R. Co. v. Hart, 209 Ill. 414; 70 N. E. Rep. 654; 66 L. R. A. 75; Balsley v. St. Louis, etc., R. Co., 119 Ill. 68; 8 N. E. Rep. 859; 59 Am. Rep. 784; West v. St. Louis, etc., Co., 63 Ill. 545.

The Missouri statute (Laws 1870, p. 89), is held to hold the lessor company liable for damages for an injury to an employee of its lessee, in Markey v. Louisiana & M. R. Co., 185 Mo. 348; 84 S. W. Rep. 61.

Lessor company liable for tort of lessee company, in operation of road, in North and South Carolina. Smith v. Atlanta, etc., R. Co., 130 N. C. 344; 42 S. E. Rep. 139; Davis v. Atlanta, etc., Co., 63 S. C. 370, 577; 41 S. E. Rep. 468, 892.

[87] Pierce, R. R., p. 285; State v. Railway Co., 67 Me. 479.

mortgagee, who is in possession of such property and has an independent and adverse control of it.[88] The possession and operation of the road, by the mortgagee, is not as the agent of the mortgagor, but in the right of the mortgagee, adversely to the mortgagor."

§ 237. **Negligence of trustees for bondholders — Company liable.**— Notwithstanding a railroad company is not liable for the negligence of its mortgagee, in possession, it is held, in several cases, that where the road is placed in possession of trustees for the bondholders, since they are the agents of the company itself, as well as the bondholders, that it would be liable for their negligence from the operation of the road.

In an Illinois case, the court held the company liable, because of the following facts and reasoning: "These trustees seem to have been exercising the same functions the corporation was formed to exercise. The character of the trust is not specifically shown by the proofs, but the fair inference would seem to be, that the trustees were the trustees for the corporation, of its own selection, as well as of the bondholders, and were running the road to earn money to be applied in the payment of the debts of the corporation."[89] And this language is quoted with approval in a later case, in the same State.[90]

§ 238. **Road operated by receiver.**— Analogous to the position of a mortgagee of a railroad, in possession, is that of a

[88] Wisconsin Central R. Co. v. Ross (Ill.), 53 Am. & Eng. R. Cas. 73.

After a sale under a mortgage, a mortgagor railroad company cannot be held liable for an injury to an employee of a lessee of the purchaser. Williard v. Spartanburg, etc., R. Co., 124 Fed. Rep. 796.

[89] Transportation Co. v. Ullman, 89 Ill. 244.

[90] Wisconsin Central R. Co. v. Ross, 53 Am. & Eng. R. Cas. 73.

receiver for the creditors, appointed by the court to operate the road for the benefit of its creditors. He is so far regarded as in possession and control of the operation of the road as to render him liable, in case of an injury due to the negligence of his employees, to one in his employment.[91] He cannot defend upon the ground that he was but an agent or trustee of the company, or that he was a public officer of the court, or of the State, engaged in the prosecution of his duties, for this would render him immune from the result of his own negligence. It is therefore very generally held that for injuries due to his own or his employees' negligence, a receiver, by consent of the court making his appointment, may be sued, the same as the company owning the road could have been sued, had it been operating it at the time of the injury.[92]

But under the Georgia statute, making a railroad *company* liable for an injury resulting from the negligence of the injured employee's coemployee, it is held that this would not render a receiver liable for an injury to one of his employees, caused by the negligence of a coemployee.[93]

§ 239. **Liability of reorganized company.**— It frequently happens, in the reorganization of railroad companies, that

[91] Murphy v. Holbrook, 20 Ohio St. 137; 4 Thompson on Neg., § 3726.

Company is not liable for an injury due to the negligence of receivers, while they were in possession. St. Louis & S. F. R. Co. v. Bricker (Kan.), 69 Pac. Rep. 328; McGhee v. Willis (Ala.), 32 So. Rep. 301.

[92] 4 Thompson on Negligence, § 3726.

[93] Central Trust Co. v. East Tenn., etc., R. Co., 69 Fed. Rep. 353.

A legal discharge of receivers of a railroad company, by order of the court, releases them from a claim for injuries to a fireman, while the road was being operated by them. Tobin v. Cent. Vt. Ry. Co., 185 Mass. 337; 70 N. E. Rep. 431; McGhee v. Willis, 134 Ala. 281; 32 So. Rep. 301; Missouri K. & T. R. Co. v. Wylie (Texas), 33 S. W. Rep. 771.

provision is either made by express contract, or by statutory enactment, for the responsibility, on the part of the reorganized company, for the torts of the old company, and where this is true, the latter company can be sued, instead of the former, for a personal injury due to the negligence of the old company.

In a New York case, during the pendency of a damage suit for personal injuries, caused by the negligence of the agents of the receivers of the road, the company was reorganized and the receivers discharged, on the agreement of the reorganized company to protect them from any judgment obtained in the pending suit. This agreement was held sufficient to entitle the plaintiff to a personal judgment against the reorganized company and it was held liable, regardless of the fact that the reorganization committee would not have been liable to the plaintiff, nor could it plead limitation to avoid the claim, after the plaintiff's judgment had been reversed on appeal.[94]

§ 240. **Liability of consolidated company.**— Analogous to the position of a reorganized company, where, by statute or contract the liability for torts of the old companies is assumed by the new company, is that of a consolidated company, and it is held, under the South Carolina statute,[95] that such a company is liable for a tort committed by one of the constituent companies before the consolidation, the same as if the liability, instead of being placed upon the consolidated company by the law, had been assumed by an express contract.[96]

[94] Baer v. Erie R. R. Co., 95 N. Y. S. 486.

[95] Act Feb. 19, 23 St. at Large, p. 1152.

[96] Pickett v. Southern Ry. Co., 69 S. C. 445; 48 S. E. Rep. 466.

A consolidated company is liable for tort of old companies, by statute in South Carolina (R. S. 1615–18). Stewart v. Walterboro & W. R. Co., 64 S. C. 92; 41 S. E. Rep. 827.

§ 241. **Purchasing company not generally liable.**— In the absence of statute, or an express contract, imposing such a liability, a railroad company purchasing the track and property of another company would not be liable for damages resulting from the torts of the selling company, any more than an individual would be responsible, in purchasing the property or business of another individual, for the preceding wrongful acts of his seller.

It was accordingly held, in Missouri, that where a railroad company purchased the property of another company, which had caused an injury to the plaintiff, if the purchasing company, in the contract of purchase, did not assume liability for the torts of the selling company, it would not be liable therefor.[97] And if a company purchases the railroad track and property of another company, at receiver's sale, unless there is an express provision of the contract, or some statute law making it liable, it would not be held to assume responsibility for the torts of the preceding company, in the operation of the road.[98]

Where the defendant railroad company purchased the property of the company which caused the injury to the plaintiff and did not assume liability for torts committed by the selling company, it is not liable therefor. Karn v. Illinois Southern Ry. Co., 114 Mo. App. 162; 89 S. W. Rep. 346.

In Georgia, without exemption of its duty to public, a railroad remains liable therefor, even after a sale or lease. Hawkins v. Central of Georgia Ry. Co., 119 Ga. 159; 46 S. E. Rep. 82.

[97] Where a purchasing company assumes the liabilities of the selling company, it is not liable for an injury to an employee, before the sale. Hawkins v. Central of Georgia R. Co., 119 Ga. 159; 46 S. E. Rep. 82.

[98] A company that purchases at receiver's sale is not liable for an injury to an employee of the receiver, in Massachusetts. Tobin v. Central Vt. Ry. Co., 185 Mass. 337; 70 N. E. Rep. 431.

In Louisiana, the seller of a railroad track will not be liable for an injury due to the negligence of the purchaser's employees, in charge of an engine, although the sale was not registered, as required by law. Goodwin v. Bodcaw, etc., Co., 109 La. 1050; 34 So. Rep. 74.

§ 242. **Holding companies liable for negligence of companies held.**— It is not an infrequent occurrence, at the present day, in the United States, for one railroad company to hold the stock of several other companies, which are managed and operated as separate and independent companies, by separate and distinct managements. The Federal Court of Appeals, of New York, recently had the question before it of the liability of such a company for the negligence of some of its companies, whose stock it held, where they were managed and operated as separate and distinct companies. It was held that where one railroad company controls others, through the ownership of their stocks and operates the lines of all, as a single system, although the general management of each road is retained by the company owning it, the relation between the dominant company and its subordinates, with reference to business originating upon its own line, is that of principal and agent and the holding company would be directly liable to one injured while unloading one of its own cars on the track of one of its subordinate companies, though the injury result solely through the negligence of the employees of such company.[99]

[99] Lehigh Valley R. Co. v. Delachesa, 145 Fed. Rep. 617.

CHAPTER XI.

THE VARIOUS DUTIES OF THE EMPLOYER.

§ 243. Created by the law as incidents to relation.
244. Liability based upon breach of duty.
245. General duties of the employer.
246. None of these duties can be delegated.
247. Same — Protection of employees and charter powers.
248. Employer held to no greater degree of care than employee.
249. Reasonable and ordinary care alone required.
250. Jury cannot set up higher standard than that of ordinary use.
251. Employer not an insurer of his employees.
252. Reasonably safe machinery and appliances should be furnished.
253. Newest and safest appliances not essential.
254. Same — Engines and cars.
255. Same — Scaffolds, lights and ladders.
256. Injuries from hidden defects in appliances.
257. Must provide reasonably safe place.
258. Same — Railroad tracks, bridges and similar structures.
259. Injuries from defective bridges.
260. Obstructions on or near track.
261. Fit and competent employees must be employed.
262. Duty to employ a sufficient number of employees.
263. Duty to promulgate rules.
264. What railway duties require rules and what do not.
265. Effect of violation of rule by employee.
266. Duty of inspection.
267. Same — Hidden defects — Ordinary tools.
268. Inspection of foreign cars.
269. Warning to inexperienced employees.
270. Warnings of cars and tracks to be given, when.
271. Obligation to repair appliances.
272. Duty to provide a reasonably safe system.
273. Necessity for some system to prevent collisions.
274. Duty to protect employee from weather.
275. Duty as to employment of infants.

§ 243. **Created by law as incidents to relation.**— Since the relation of employer and employee is usually created by general contract, under which the one engages the other to labor for him, or in his interest, and the details or terms of such contracts are not customarily reduced to specific shape, but the details are left to the future engagements or service to determine, the general duties of the different parties to such an engagement, because of a failure on the part of the parties to express the same, are implied by the law, as general incidents growing out of the relation.[1]

The basis of such duties rests, also, upon the concern the law has for the lives and limbs of its citizens and hence, rests in a large measure upon an enlightened public policy, as well as the necessity of the undertaking, for even in those cases where the parties have attempted to regulate the reciprocal rights and duties of the respective parties to such an agreement, if the terms of such specific undertakings are opposed to the general interests of the State, as where the protection of a statute, enacted for the benefit of the employee is expressly waived, the courts will hold such contracts void and still enforce the duty implied by the law, upon the part of the employer for the protection of his employee, the same as though no such contract had been made.[2]

[1] Bailey, Mas. Liab. Inj. Serv., p. 2; Naylor v. Ry. Co., 53 Wis., 661; 11 N. W. Rep. 24; Holden v. Fitchburg R. R. Co., 129 Mass. 268; Cincinnati, etc., R. Co. v. Roesch, 126 Ind. 445; 26 N. E. Rep. 171; Ferren v. Ry. Co., 143 Mass. 197; 9 N. E. Rep. 608.

[2] Contracts releasing a railroad company from all liability for injuries from its negligence are not generally enforced. Tarball v. Rutland, etc., R. Co., 73 Vt. 347; 51 Atl. Rep. 6; but see, Peterson v. Traction Co., *contra*, 23 Wash. 615; 63 Pac. Rep. 539; 4 Thompson, Neg., § 3850 and cases cited. Nor are contracts imposing certain risks of the service upon the employee, Lake Shore, etc., R. Co. v. Ryan, 70 Ill. App. 45, such as an assumption of risks of injuries from structures near the track, or waiver of notice as to unsafe track and such things, Gulf, etc., R. Co. v. Darby, 28 Tex. Civ. App. 413; 67 S. W. Rep. 446, as such contracts are held to be against

§ 244. **Liability based upon breach of duty.**— In every action for personal injuries, where a recovery is sought, in damages, against the one who is alleged to have caused such injury, a breach of legal duty must always be shown by the injured party, on the part of the one claimed to have caused such injury. A liability cannot be predicated without a vio-

public policy, in permitting the railroad company to delegate its duty to furnish a reasonably safe place, etc., 4 Thompson on Neg., §§ 3848, 4634 and cases cited.

A contract releasing a railroad company from all damages from accidents, in consideration of its subscription to the benefits of a relief association, for its employees, is enforced. Ferguson v. Grand Trunk R. Co., Rap. Jud Que., 20 C. S. 54; Harrison v. Alabama Mid. R. Co., 144 Ala. 246; 40 So. Rep. 394; Pennsylvania R. Co. v. Chapman, 220 Ill. 428; 77 N. E. Rep. 248; Oyster v. Chicago, etc., R. Co. (Neb.), 91 N. W. Rep. 699; 59 L. R. A. 291.

An employee injured on a Pullman car is held bound by the rule of the company brought to his notice, when he engaged in the service, that he assumed the risks of injury incident to travel in its cars, and the fact that he did not read the rule, is immaterial, in the Federal Court. New York, etc., Co. v. Diffendaffer, 125 Fed. Rep. 893. See, also, Chicago, R. I. & P. R. Co. v. Hamler, 215 Ill. 525; 74 N. E. Rep. 705.

A contract releasing an employer from liability for injuries from his own negligence, is generally held to be void, as against sound public policy. Wagner v. Elevated R. Co., 188 Mass. 437; 74 N. E. Rep. 919; Tarbell v. Rutland R. Co., 73 Vt. 347; 51 Atl. Rep. 6; Coley v. North Car. R. Co., 129 N. Car. 407; 40 S. E. Rep. 195; Mexican Nat. R. Co. v. Jackson, 118 Fed. Rep. 549; 55 C. C. A. 315.

A contract that a failure to give notice to the company within thirty days after an injury, will relieve the railroad from liability to brakemen and other employees for injuries received is in conflict with Iowa Code. Mumford v. Chicago, etc., Ry. Co., 128 Iowa 685; 104 N. W. Rep. 1135.

Under Gen. St. 1901, § 5858, a contract entered into by a railroad employee, exempting the company from all liability for damages by the negligence of the company, is against public policy and void. Atchison, T. & S. F. Ry. Co. v. Fronk (Kan. 1906), 87 Pac. Rep. 698.

A contract exempting a railroad company in advance from liability to an employee for negligence is void. Cannaday v. Atlantic Coast Line R. Co. (N. C. 1906), 55 S. E. Rep. 836.

lation of the right of the injured party, whether the right arises out of a contractual relation or belongs to the individual as a member of society, in the absence of a contract, and hence it is, that the basis of a liability for personal injuries is always the violation of a right of the injured party. This infraction of the rights of the injured person, by the act causing the injury, is generally termed a breach of duty, by the one whose act causes such injury, which breach of duty, neglect or negligence is always the primary fact upon which the right of a recovery depends.[3]

§ 245. **General duties of the employer.**— The obligations imposed by law upon the employer are usually said to be the exercise of ordinary or reasonable care in furnishing a reasonably safe place to work;[4] the employment of competent and a sufficient number of employees;[5] reasonably safe machinery and appliances;[6] the promulgation of reasonable rules and regulations;[7] warnings or instruction to inexperi-

[3] Kennedy v. Chase, 119 Cal. 637; Buswell Per. Inj., § 3, p. 2; Armour v. Golkewska, 95 Ill. App. 494.

[4] Pahlan v. Detroit, etc., R. Co., 122 Mich. 232; 81 N. W. Rep. 103; Nadau v. White River, etc., Co., 76 Wis. 120; 43 N. W. Rep. 1135; Middle Georgia, etc., R. Co. v. Barnett, 104 Ga. 582; 30 S. E. Rep. 771; 12 Am. & Eng. R. Cas. (N. S.) 532.

[5] Craig v. Chicago, etc., R. Co., 54 Mo. App. 523, where insufficient number of employees were furnished. Incompetent or unskilled employees was the ground of complaint in the following cases: St. Louis, etc., R. Co. v. Hackett, 58 Ark. 581; 24 S. W. Rep. 881; Cincinnati, etc., R. Co. v. Madden, 134 Ind. 462; 34 N. E. Rep. 227; Union Pac. R. Co. v. Young, 19 Kan. 488; Sweat v. Boston, etc., R. Co., 156 Mass. 284; 31 N. E. Rep. 296; Coppins v. N. Y., etc., R. Co., 122 N. Y. 557; 44 Am. & Eng. R. Cas. 618; 25 N. E. Rep. 915; Norfolk, etc., R. Co. v. Thomas, 90 Va. 205; 17 S. E. Rep. 884.

[6] This duty includes the duty of inspection and repair. Hill v. Southern Pac. R. Co., 23 Utah 94; 63 Pac. Rep. 814; Atchison etc., R. Co. v. Kingscott, 65 Kan. 131; 69 Pac. Rep. 184; 4 Thompson, on Neg., § 3986, *et sub.*

[7] Regan v. St. Louis, etc., R. Co., 93 Mo. 348; 6 S. W. Rep. 371;

enced or youthful employees [8] and, where the business is sufficiently extensive to require it, the establishment and maintenance of a system for the conduct of the business, so as to safeguard, in a reasonably safe manner, the services performed by the employees.[9]

In the absence of a statute imposing other specific duties these general duties are all those imposed by the law upon the employer and although there is perhaps a growing tendency of legislatures and the courts in some of the States to create a liability, where none otherwise existed at common law,[10] and some of the text writers complain at the common-law limitations upon the liability of the employer, under the growing tendency toward damage suit litigation,[11] it may be safely stated that when the employer has used reasonable care, or such as an ordinarily careful man, engaged in the same business, customarily employs in the performance of the same duties, or if he has complied with all the general duties above enumerated, he has, as stated, in the absence of legislative act, or an extension, by judicial interpretation, of the general duties of the employer, in the jurisdiction where the right is attempted to be enforced, complied, substantially, with the general duties imposed by the common law, upon the employer of men.[12]

§ 246. **None of these duties can be delegated.**— As the various duties imposed by the law upon the employer are im-

Missouri, Pac. R. Co. v. McElyea, 71 Tex. 386; 9 S. W. Rep. 313; Norfolk, etc., R. Co. v. Graham, 96 Va. 430; 31 S. E. Rep. 604.

[8] Grannis v. Chicago, etc., R. Co., 81 Iowa 444; 46 N. W. Rep. 1067; Galveston, etc., R. Co. v. Garrett, 73 Tex. 262; 13 S. W. Rep. 62.

[9] Lockwood v. Chicago, etc., R. Co., 55 Wis. 50.

[10] For comment on this growing tendency, see opinion of Judge Marshall, in Grattis v. Kansas City, etc., R. Co., 155 Mo. 493.

[11] See 4 Thompson on Neg., § 3760, *et sub.*

[12] This common-law rule is clearly stated by Judge Bailey, in his excellent work on Mas. Liab. Inj. Serv., p. 24.

plied for the protection of the employee, upon grounds of public policy, it is very generally held that the performance of these duties cannot be delegated by the employer, since this would be tantamount to permitting him to take the law into his own hands.[13]

As distinguished, therefore, from the duties arising as mere incidents of the details of the service, which may properly be performed by a coemployee, as such, the primary, or inalienable duties of the employer, enumerated above, must always be borne in mind.[14] Regardless of the grade of the service, or the character of the employee, any one empowered by the employer with the duty of performing any of these duties imposed by the law upon the employer, in order to protect his employee from injuries, will be held to be a vice-principal, in the performance of such duties and for a failure to perform the duties imposed, the employer will be liable, in case of a resulting injury, to the same extent as if he had personally been guilty of a breach of duty.[15]

[13] The neglect of a car inspector in failing to discover that a car furnished was defective, was held the negligence of the employer, in International & G. N. R. Co. v. Kernan, 78 Tex. 294; 9 L. R. A. 703; Harrison v. Detroit, etc., R. Co., 79 Mich. 409; 7 L. R. A. 623.

[14] Chicago, etc., R. Co. v. Scanlan, 170 Ill. 106; Chicago, etc., R. Co. v. Eaton, 194 Ill. 441; 62 N. E. Rep. 784; 4 Thompson on Neg., §§ 3874, 3950, and cases cited; also § 3988, and cases cited.

[15] International & G. N. R. Co. v. Kernan, 78 Texas 294; Chicago, etc., R. Co. v. Eaton, 194 Ill. 441; 62 N. E. Rep. 784; 4 Thompson on Neg., §§ 3874, 3950, 3988, and cases cited.

An employer cannot, by rules, dispose of a nondelegable duty, such as providing appliances or safe place to work. Chicago T. Co. v. Sawusch, 119 Ill. App. 349; 218 Ill. 130; 75 N. E. Rep. 797; 1 L. R. A. (N. S.) 670.

The duty to furnish reasonably safe appliances cannot be delegated. English v. Amidon, 72 N. H. 301; 56 Atl. Rep. 548; Neeley v. Southwestern, etc., Co., 13 Okl. 356; 75 Pac. Rep. 537; 64 L. R. A. 145.

There can be no delegation of the duty to keep appliances in a reasonably safe condition for use. Meehan v. Great North. R. Co.

§ 247. **Same — Protection of employees and charter powers.**— If an employer were permitted to delegate to an employee, or agent, the performance of the duties that the law imposes upon him, for the protection of his employees, he could, by such delegation, avoid the consequences of his own neglect and so the law does not permit a delegation, by the employer, of the duties imposed upon him, for the protection of his employees,[16] and the rule that where an employer delegates to an agent the performance of duties he owes his employees, he remains liable for the manner in which such duties are performed, is applicable as well to corporations, as to individuals.[17]

After the relation of employer and employee is established by a contractual relation, the employer cannot escape liability for an injury to his employee from negligence which would render him liable, by relegating his employee to the service of another, and especially would this be true, where the employee was continued in his original employment, without notice of any change in the relation between himself and his employer.[18]

But the rule that a railroad company cannot delegate to a

(N. D.), 101 N. W. Rep. 183; Wood v. Rio Grande R. Co. (Utah), 79 Pac. Rep. 182.

The duty of inspection cannot be delegated to a coemployee, so as to relieve the employer of the duty. Union Traction Co. v. Sawusch, 218 Ill. 130; 75 N. E. Rep. 797; 1 L. R. A. (N. S.) 670.

A railroad cannot delegate to its employees the duty of inspecting its appliances, as where it required all engineers to inspect their engines and provided no inspector therefor and an injury resulted from an accumulation of grease on the engine step. Bookrum v. Galveston, etc., R. Co., 57 S. W. Rep. 919.

The duty of employing an adequate number of employees cannot be delegated. Alabama G. S. R. Co. v. Vail (Ala.), 38 So. Rep. 124.

[16] Killien v. Hyde, 63 Fed. Rep. 172.

[17] Corcoran v. Holbrook, 59 N. Y. 517; 17 Am. Rep. 369.

[18] Missouri, K. & T. Ry. Co. of Texas v. Ferch (Texas Civ. App.), 36 S. W. Rep. 487.

contractor its charter right to construct its road, so as to exempt it from liability, does not apply to the ordinary means used for its construction, but to the extraordinary corporate powers which the company itself could not exercise, without a compliance with the conditions of its charter.[19]

§ 248. **Employer held to no greater degree of care than employee.**— In a leading early English case,[20] the reasonable rule was announced that an employer would be held to no greater degree of care, for the protection of his employee, than the latter, if a man of ordinary experience, would be held to exert, for his own protection. The doctrine of this well-considered case has become a part of the law of personal injury actions, alleged to be due to negligence and it is now well settled that while an employer owes to his employee the duty to provide for his safety, as far as can reasonably be expected, under the circumstances, he is not bound to take greater care of the employee than he would be reasonably expected to take of himself, as a prudent man.[21]

§ 249. **Reasonable and ordinary care alone required.**— In the performance of the implied duties placed upon him, for the protection of his employees, the employer is required only to exercise reasonable and ordinary care and is not liable, although an injury may result to an employee, if he has discharged any of the specified duties in a reasonably careful manner, or in such a manner as ordinarily prudent men in the same business use.[22]

As said in an Iowa case,[23] "It may be and doubtless is,

[19] Sanford v. Pawtucket St. Ry. Co., 19 R. I. 537; 35 Atl. Rep. 67; 33 L. R. A. 564.

[20] Priestley v. Fowler, 3 M. & W. 1.

[21] Berns v. Gaston G. C. Co., 27 W. Va. 285; 55 Amer. Rep. 304.

[22] Bailey, Mas. Liab. Inj. Serv., pp. 3 to 12, and cases cited.

[23] Willoughby v. Railway Co., 37 Iowa 432.

true, that under circumstances of great peril, more prompt efforts should be put forth to avoid a threatened injury, than are required under circumstances when the danger is less imminent." As noted, in the same case, however, "this is only the exercise of ordinary and reasonable diligence." The most generally recognized test for determining the existence of negligence, on the part of the employer, when a breach of duty in any of these particulars is charged, is, therefore, "the ordinary usages of the business," [24] or, what is the same thing, the diligence or care required is that only of ordinarily prudent men in the same kind of business.[25]

The standard of ordinary usage of the business has been quite severely arraigned by some text writers [26] and the highest court in the United States, in one opinion, rather attempted to establish a different test,[27] as did the Supreme Court of Texas, in one opinion, lay down a special rule as to the duty owed by railway companies to their employees, different from that of other employers.[28] Ordinary care is generally defined, however, to be that degree of care which an ordinarily prudent man in the same business uses for the

[24] Titus v. Railway Co. (Pa.), 20 Atl. Rep. 517; International & G. N. R. Co. v. Bell, 75 Tex. 50; 12 S. W. Rep. 321; Burlington, etc., R. Co. v. Liehe, 17 Colo. 280; 29 Pac. Rep. 175; Texas & Pac. R. Co. v. Hoffman, 83 Texas 286; 18 S. W. Rep. 741. See, also, 4 Thompson on Neg., § 3776, and cases cited.

[25] Ernst v. Hudson River R. Co., 35 N. Y. 9; Ward v. Railway Co., 29 Wis. 148; Mad River, etc., R. Co. v. Barber, 5 Ohio St. 541; Aerkfetz v. Humphries, 145 U. S. 418; 12 Sup. Ct. Rep. 835; Warden v. Railway Co., 137 Mass. 204; Cooper v. Railway Co., 44 Iowa, 134; Brymer v. Railway Co., 90 Cal. 497; 27 Pac. Rep. 371; Cleveland, etc., R. Co. v. Selsor, 55 Ill. App. 685; Houston, etc., R. Co. v. Harnett (Texas), 48 S. W. Rep. 773.

[26] 4 Thompson on Neg. § 3770.

[27] Wabash R. Co. v. McDaniels, 107 U. S. 454; 2 Sup. Ct. Rep. 932.

[28] International, etc., R. Co. v. Williams, 82 Texas 342; 18 S. W. Rep. 700.

protection of his employees;[29] there is no distinction to be recognized, in the application of the rule, between different classes of employers and in a later case than that above referred to, by the Supreme Court, it is recognized that there is no better test than that of the ordinary or customary usage of the business, for determining what is proper care, in a given case.[30]

§ 250. **Jury cannot set up higher standard than that of ordinary use.**— As the legal standard of reasonable care is

[29] Bailey, Mas. Liab. Inj. Serv., pp. 3 to 12, and cases cited; 4 Thompson on Neg., § 3769, and cases cited.

[30] Grand Trunk Ry. Co. v. Ives, 144 U. S. 417; 12 Sup. Ct. Rep. 679.

A railroad company is not an insurer, or bound to furnish the very best or latest appliances, but it discharges its full duty, if it furnishes reasonably safe machinery, roadway, structures and instrumentalities. McCabe v. Montana Cent. R. Co. (Mont.), 76 Pac. Rep. 701; Wabash R. Co. v. Burris, 111 Ill. App. 258; Weed v. Chicago, etc., R. Co. (Neb.), 99 N. W. Rep. 827; Southern Pac. R. Co. v. Gloyd, 138 Fed. Rep. 388; Cleveland, etc., R. Co. v. Snow (Ind.), 74 N. E. Rep. 908; Texas & Pac. R. Co. v. Hemphill (Texas), 86 S. W. Rep. 350; Smith v. Fordyce, 190 Mo. 1; 88 S. W. Rep. 679; Buttner v. Baltimore, Car, etc., Co. (Md.), 60 Alt. Rep. 597; Post v. Chicago, B. & Q. R. Co. (Mo.), 97 S. W. Rep. 233.

Ordinary care is such as reasonably prudent men use under like circumstances, whether it is in the furnishing of appliances, tools, machinery, place or employees, and, in every case, regard is to be had as to the nature of the work and the difficulties and dangers attending it. Fisher's Admr. v. Chesapeake & O. R. Co. (Va.), 52 S. E. Rep. 373.

Slight negligence is not incompatible with the exercise of ordinary care. Mallett v. Schlosser, 119 Ill. App. 259.

The degree of care due from an employer to his employee does not vary with the increase or diminution of the danger, but the quantum of diligence to be used does differ, under different conditions. Galveston, etc., R. Co. v. Gormley, 91 Texas 393; 43 S. W. Rep. 877.

None of the duties due toward an employee are due to a mere volunteer, for as to such person, the only duty owing is not to injure him, after discovery of his danger. Atlanta, etc., Ry. Co. v. West, 121 Ga. 641; 49 S. E. Rep. 711; 67 L. R. A. 701.

that of ordinary use or custom of the reasonably prudent men in the same business, it is not permitted to juries to set up a different standard of their own, or to base a verdict upon a liability dependent upon a dangerous service or a method or appliance that did not prove absolutely safe. To establish that a business, as customarily conducted, is dangerous, does not prove that it was necessarily negligent. Many trades, as carried on by reasonably prudent men, are most dangerous vocations, but this does not argue that they are carelessly pursued. Absolute safety is hardly attainable in any business and as it is very easy to judge of any course or method as careless, after an accident has happened, such standards could not be followed, with justice, by the courts. Such standards would not be reliable, but nothing short of ordinary or customary use, could be held a just standard. However strongly a jury may believe that there was a better or safer way to carry on the business, therefore, than the employer has pursued, if the way used was a usual or ordinary method, since it was not a negligent way, according to law, it cannot be made such by any jury, where the law controls them. They can only determine the responsibility of individual conduct; not the standards that shall control the methods of a given business, when judged according to legal rules.[31]

§ 251. **Employer not an insurer of his employees.**— While the duties imposed upon the employer by the law, for the protection of his employees, are absolute in the sense that he cannot avoid them by delegating them to an employee, they are not absolute in the sense that he insures his appliances,

[31] This is, practically, the reasoning of the Supreme Court of Pennsylvania, in a well-considered case, by one of its strongest judges. Titus v. Railway Co., 136 Pa. St. 618; 20 Atl. Rep. 517; Northern Cent. Ry. Co. v. Husson, 101 Pa. St. 1; cited and quoted by Bailey, in Mas. Liab. Inj. Serv., pp. 23, 24.

places, warnings or other things made necessary by the law, nor can he be held liable, as an insurer, in case of an injury to an employee, by reason of a failure to provide absolutely safe or sound appliances, places, or instrumentalities, or absolutely competent or skillful employees.[32] He discharges his duty, fully, when he uses such care or diligence, in the performance of his various duties, as ordinarily careful men in the same business customarily use and when he does this, he cannot be held for a resulting injury to his employees.[33] Any higher degree of care than that of ordinary care, or the ordinary usage of the business, whether that of railroading, mining, or other hazardous or less hazardous vocations, is erroneous, and, if made the basis of a charge to the jury, is reversible error.[34]

§ 252. **Reasonably safe machinery and appliances should be furnished.**— As in the performance of the other duties imposed upon him by the law, the employer is bound to furnish machinery and appliances reasonably safe and suitable for the use to which they are adapted. If the employer fails in the performance of this duty he will be liable to an employee

[32] Bailey, Mas. Liab. Inj. Serv., p. 14; 4 Thompson, Neg., § 3767, and cases cited; Lawless v. Railway Co., 136 Mass. 1; Cincinnati, etc., R. Co. v. Roesch, 126 Ind. 445; 26 N. E. Rep. 171; Chicago, etc., R. Co. v. Avery, 109 Ill. 314; Washington, etc., R. Co. v. McDade, 135 U. S. 571; 10 Sup. Ct. Rep. 1044.

[33] Central, etc., R. Co. v. Lanier, 83 Ga. 587; 10 S. E. Rep. 279; Gutridge v. Mo. Pac. Ry. Co., 105 Mo. 520; Covey v. Hannibal, etc., R. Co., 86 Mo. 635; Atchison, etc., R. Co. v. Winston, 56 Kan. 456; 43 Pac. Rep. 777; Whalen v. Michigan, etc., R. Co., 114 Mich. 512; 72 N. W. Rep. 323; Hough v. Texas & Pac. R. Co., 100 U. S. 213; Mason, etc., R. Co. v. Yockey, 103 Fed. Rep. 265; 43 C. C. A. 228; Oliver v. Ohio River R. Co., 42 W. Va. 703; 26 S. E. Rep. 444; Galveston, etc., R. Co. v. Garrett, 73 Texas, 262; 13 S. W. Rep. 62.

[34] Nolan v. Montana, etc., R. Co., 25 Mont. 107; 63 Pac. Rep. 926; Galveston, etc., R. Co. v. Gormley, 91 Texas 393; 27 S. W. Rep. 1051; 4 Thompson on Neg., § 3736, and cases cited; Bailey, Mas. Liab. Inj. Serv., pp. 16 and 17, and cases cited.

for an injury from a defect in the machinery or tools in use, which may have occasioned the injury, provided such defect causing the injury was known to him, or had existed for a length of time sufficient to charge him with constructive notice thereof, if such defect was unknown to the employee.[35]

The test of performance of the employer's duty is general use and although a given appliance or attachment may have prevented the injury, as viewed in the light of transactions subsequent to the injury, this will not be evidence upon which a verdict can be rendered against the employer,[36] for when a tool or appliance has stood the test of general or cus-

[35] Chicago, etc., R. Co. v. Avery, 109 Ill. 314; Indianapolis, etc., Ry. Co. v. Toy, 91 Ill. 474; Ellis v. Ry. Co., 95 N. Y. 546; Lawless v. Railway Co., 136 Mass. 1; Hough v. Ry. Co., 100 U. S. 213; Washington, etc., R. Co. v. McDade, 135 U. S. 571; Cincinnati, etc., Ry. Co. v. Roesch, 126 Ind. 445; 26 N. E. Rep. 171; McCombs v. Ry. Co., 130 Pa. St. 182; 18 Atl. Rep. 613.

A flogging hammer, in Minnesota, is held to come within the rule requiring the employer to furnish a reasonably safe tool. Vant Hul v. Great Northern R. Co., 90 Minn. 329; 96 N. W. Rep. 789.

[36] Delaware River, etc., Co. v. Nuttall, 119 Pa. St. 149; 13 Atl. Rep. 65; Northern Cent. Ry. Co. v. Husson, 101 Pa. St. 1; Laflin v. Ry. Co., 106 N. Y. 136; 12 N. E. Rep. 599.

"A railroad company is bound to provide suitable material and structures in the construction of its road, and if from a defective construction an injury happens to an employee, the company is liable." McCabe & Steen Const. Co. v. Wilson (Okl. 1906), 87 Pac. Rep. 320.

Duty as to reasonably safe appliances. Armour v. Hahn, 111 U. S. 313; 28 L. Ed. 440; Railroad Co. v. Jackson, 65 Fed. Rep. 48; 27 U. S. App. 519; 12 C. C. A. 507; Carlson v. Railroad Co. 21 Or. 450; 28 Pac. Rep. 497; Gaulden v. Kansas City S. Ry. Co., 106 La. 409; 30 So. Rep. 889; Haas v. Chicago B. & Q. R. Co., 97 Ill. App. 624; Covey v. Railroad Co. 86 Mo. 635; Bowen v. Railroad Co., 95 Mo. 268; 8 S. W. Rep. 230; Friel v. Railroad Co., 115 Mo. 503; 22 S. W. Rep. 498; Railroad Co. v. Doyle, 49 Tex. 190; Coley v. North Car. R. Co., 129 N. Car. 407; 40 S. E. Rep. 195; Moore v. Southern Ry. Co. (N. C.), 53 S. E. Rep. 745; Healy v. Buffalo, etc., R. Co., 97 N. Y. S. 801; 111 App. Div. 618; Wood v. Rio Grande, etc., Ry., Co. (Utah), 79 Pac. Rep. 183; Illinois Ter. R. Co. v. Thompson, 210 Ill. 226; 71 N. E. Rep. 328; Franklin v. Missouri K. & T. R. Co., 97 Mo. App. 473; 71 S. W. Rep. 540; O'Neill v. Chicago, etc., R. Co.

tomary use and no accident or injury has resulted, it is not to be anticipated that such will result, and what could not reasonably be anticipated, can never be held to be negligence, because it was not foreseen.

§ 253. **Same — Newest or safest appliances not essential.**— The absolute safety or suitability of appliances is not guaranteed by the employer, but such only as are reasonably safe for the business in which they are used; employers are neither insurers of their employees nor of the absolute safety of their own appliances. The duty of furnishing reasonably safe appliances is implied by the law, as before stated, but the law will not imply a contract of insurance, where no premium is paid therefor. No employer could long remain in the business if such a high standard were erected and hence, he is not bound to guard against every possible contingency, through which an accident may result; he is not bound to

(Neb.), 92 N. W. Rep. 731; 60 L. R. A. 443; Atlantic, etc., Ry. Co. v. West (Va.), 42 S. E. Rep. 914.

Automatic signals in a switch yard are not essential, in the absence of evidence that the signal in use is dangerous. McGregor v. Pennsylvania R. Co., 212 Pa. 482; 61 Atl. Rep. 1017.

It is not negligence for a railroad company to use unblocked frogs in its freight yard, in the absence of evidence that they are not ordinarily used in the business. Kilpatrick v. Choctaw, etc., R. Co., 195 U. S. 624; 49 L. Ed. 349.

For liability of company for injury from unsafe hand-hold on tender of engine, see Woods' Admr. v. Southern Ry. Co. (Va.), 52 S. E. Rep. 371.

In an action for an injury to an unskilled employee in the use of a machine, the issue is not whether the use of the machine was a customary use, for that purpose, but whether it was reasonably safe for an employee to use, with such experience as the injured one had. Chicago R. I. & P. R. Co. v. Daugaard, 118 Ill. App. 67.

Negligence cannot be predicated upon mere failure to provide automatic switch signals in yard, in absence of proof that they are the only kind that would be reasonably safe. McGregor v. Pa. R. Co. (Pa.), 212 Pa. 482; 61 Atl. Rep. 1017.

furnish either the newest, safest or best appliances,[37] but only such as are generally or customarily used in the business and such as general use has demonstrated to be reasonably safe for the business, as customarily carried on.[38]

The Supreme Court of Alabama,[39] while recognizing the general rule stated above, holds that railroads should keep themselves reasonably abreast with improved methods, so as to lessen the dangers attendant upon the service, resulting from the hazardous nature of the business. It may be stated as perhaps the general rule that while it is not incumbent upon the employer to adopt every new invention useful in the business, which might serve to lessen the danger, it is his duty to discontinue old methods which have been found unsafe and to adopt such improvements as are in ordinary use by reasonably prudent men or companies in the same business, for this is really the test, i. e., customary use by those of ordinary care in the same line of business.[40]

[37] Wonder v. Baltimore & Ohio Ry. Co., 32 Md. 418; Washington, etc., R. Co. v. McDade, 135 U. S. 574.

[38] Bailey's Mas. Liab. Inj. Serv., pp. 14, 19, 26, 30, and cases cited.

[39] Richmond, etc., R. Co. v. Jones, 92 Ala. 218; 9 So. Rep. 276; Georgia Pac. Ry. Co. v. Propst, 83 Ala. 518; 3 So. Rep. 764.

[40] Bailey's Mas. Liab. Inj. Serv., p. 30, and cases cited.

Reasonably safe appliances, tools and machinery, is all the law holds the employer to. The Chico, 140 Fed. Rep. 568; Drake v. San Antonio, etc., Ry. Co. (Texas), 89 S. W. Rep. 407; Bryan v. International, etc., Ry. Co. (Texas), 90 S. W. Rep. 693; DeMase v. Oregon, etc., Ry. Co., 40 Wash. 108; 82 Pac. Rep. 170.

Employer is not bound to furnish the best appliances, or those in use by some other man in the same business. Norfolk, etc., Ry. Co. v. Bell, 52 S. E. Rep. 700.

The employer is only required to use ordinary care to furnish a tool or appliance or machinery that is reasonably safe, according to the circumstances under which it is being used. San Antonio, etc., Ry. Co. v. Drake (Texas), 85 S. W. Rep. 447; 89 S. W. Rep. 407; Bryan v. International, etc., Ry. Co., 90 S. W. Rep. 693. And the same applies as to furnishing a reasonably safe place to work. Fisher's Admr. v. Chesapeake & O. R. Co. (Va.), 52 S. E. Rep. 373.

In selection of instrumentalities, etc., it is sufficient if the employer

§ 254. **Same — Engines and cars.**— Cars and engines come within the definition and meaning of the term appliances [41] and under the rules of law applicable thereto a railroad company that fails to furnish engines and cars that are reasonably safe for the use to which they are to be put, is guilty of negligence and a cause of action will accrue to an injured employee for an injury from a defect in, or an inherently dangerous car or engine.[42]

The duty obtains not only as to cars used in passenger and freight service, but also to cars used by hand, on section or track work and for a defective car used by employees who were not familiar with the defect a liability will generally accrue, in case of an injury.[43] If the car or engine is not equipped with the appliances required by a statute or special rule of law appertaining thereto, it is held to be negligence, as a matter of law, against the employer; [44] but before a liability would result, the defect in the car or engine, must,

keeps reasonably abreast with improved methods and appliances; he is not bound to furnish the best known or those used by some other employer in the same business. Norfolk & W. R. Co. v. Bell (Va.), 52 S. E. Rep. 700.

[41] A car is an appliance, not a place, within the employer's duty to keep it reasonably safe. Wagner v. New York, etc., R. Co., 78 N. Y. S. 696; 76 App. Div. 552.

[42] The use of a car too light to hold the load required to be placed on it, is negligence. Mitchell v. Wabash R. Co., 97 Mo. App. 411; 76 S. W. Rep. 647.

[43] A section foreman, as well as the laborers under him, is entitled to be supplied with reasonably safe derrick cars and appliances and if not so furnished, if he is injured, can maintain an action therefor. Texas Central R. Co. v. George, 89 S. W. Rep. 1091.

A section foreman cannot recover for an injury from an obviously defective hand car which employees, under his orders, ran too fast. Atlantic Coast, etc., R. Co. v. Ryland (Fla.), 40 So. Rep. 24.

[44] A failure to comply with the safety appliance act, of Congress, is negligence, *per se*. Winkler v. Philadelphia, etc., R. Co. (Del.), 53 Atl. Rep. 90; Northern Pac. R. Co. v. Tynan, 119 Fed. Rep. 288; Johnson v. Southern Pac. R. Co., 117 Fed. Rep. 462; 54 C. C. A. 508; Philadelphia & R. Ry. Co. v. Winkler, 56 Atl. Rep. 112.

of course, have been the proximate cause of the injury and although not the safest or most improved cars or engines in the market, if they are such as is reasonably safe, or, if not, if the defects therein are obvious, the employer will not, generally, be held liable for an injury therefrom.[45]

[45] A railroad company is not liable for a defect in a hand car which would deceive human judgment. Atlantic Coast Line R. Co. v. Ryland (Fla.), 40 So. Rep. 24.

Negligence in maintaining a wheel and brake staff, without a nut, as a result of which an employee is injured, although negligence, is assumed, when the absence of the nut was apparent. Missouri, K. & T. R. Co. v. Hansom (Tex.), 90 S. W. Rep. 1122.

In Georgia, where a petition disclosed equal means of knowledge of a defect in appliances, on the employee's part, as on the employer's, a demurrer thereto was held properly sustained. Lee v. Atlantic Coast Line R. Co., 54 S. E. Rep. 678.

An employee who knowingly uses defective machinery, is held, in Florida, to be without a right of action. Atlantic Coast, etc., R. Co. v. Ryland, 40 So. Rep. 24.

A short or "stub pilot" for an engine, is not, in itself, such a defective appliance, as to give a cause of action to an employee injured by the overturning of the engine running into stock. Briggs v. Chicago & N. W. R. Co., 125 Fed. Rep. 745; 60 C. C. A. 513.

A step on a caboose, which protruded fifteen inches from the car, is not necessarily a defective car step. Turner v. Detroit Southern R. Co. (Mich.), 100 N. W. Rep. 268.

Nor is a car without bumpers necessarily a defective car. Filbert v. New York, etc., Ry. Co., 88 N. Y. S. 438; 95 App. Div. 199.

The mere fact that a negligent manner of loading cars is customary with railroads, is not a legal excuse, so as to relieve a company from liability to an employee injured as result of such negligence. Hosic v. C. R. I. & P. R. Co., 75 Iowa 683; 37 N. W. Rep. 963.

But the mere fact that a car by which a brakeman was killed, was improperly loaded, by reason of the fact that lumber projected over the end thereof so as to interfere with the space where he had to stand in making the coupling, or even the fact that the conductor knew that the car was improperly loaded does not, of itself, show willful neglect; but to constitute such neglect it must appear that the conductor or other person in charge of the car had knowledge, or by exercising usual care, could have known that the improper loading of the car would endanger the life of the deceased. Louisville & N. R. Co. v. Brice, 84 Ky. 298; 1 S. W. Rep. 483.

§ 255. **Same — Scaffolds, lights and ladders.**— In the absence of a specific duty, imposed by statute, it is the duty of the employer to furnish reasonably safe scaffolds and ladders, where the business requires the use of such appliances and for a failure so to do and a resulting injury, the employer is responsible.[46] By statute in some of the States,[47] the same duty is imposed by express enactment, but such statutes are held, generally, to apply only to completed structures, not those in process of construction, for the manifest reason that while being constructed, they could not be kept safe, at all times.[48] If the defects in ladders or scaffolds, however, are known to the injured employee, or are apparent, no liability will result;[49] there is no responsibility, if the defect causing the injury could not be ascertained by a careful inspection,[50] and if the selection of the material was made by the injured employee or his coemployees and the employer had furnished proper material, he would not be liable for the result of the negligent construction of the scaffold or ladder by his employees,[51] nor would he be responsible

Loading a car so that lumber protrudes over the end is not, *per se*, negligence, and in the absence of a showing of other facts going to show negligence, on the defendant's part, the employee injured by reason of such cause, cannot recover. Louisville & N. R. Co. v. Gower, 85 Tenn. 465; 3 S. W. Rep. 824.

[46] Flynn v. Bridge Co., 42 Mo. App. 529; Missouri, etc., R. Co. v. Miller (Tex.), 61 S. W. Rep. 978; Thompson v. Great North. R. Co., 79 Minn. 291; 82 N. W. Rep. 637; Flanigan v. Smelting Co., 63 N. J. L. 647; 44 Atl. Rep 762; Chicago, etc., R. Co. v. Scanlon, 170 Ill. 106; Vosburg v. Lake Shore, etc., R. Co., 94 N. Y. 378.

It is negligence to permit a hole to remain in a floor which employees are required to pass over. Burke v. Manhattan Ry. Co., 96 N. Y. S. 516; 109 App. Div. 722.

[47] Laws N. Y. 1897, ch. 415, § 18.

[48] Pursley v. Bridge Works, 67 N. Y. S. 719; 56 App. Div. 71; 168 N. Y. 589; 60 N. E. Rep. 1119.

[49] Lee v. Atlantic Coast Line Co. (Ga.), 54 S. E. Rep. 678; Atlantic Coast R. Co. v. Ryland (Fla.), 40 So. Rep. 24.

[50] McCarthy v. Muir, 50 Ill. App. 510; 4 Thompson on Neg., § 3952.

[51] Benn v. Null, 65 Iowa 407; Devlin v. Smith, 89 N. Y. 470.

for an unauthorized or negligent use of a reasonably safe scaffold or ladder.[52] It is also held to be negligence, on the employer's part, to fail to furnish sufficient lights to enable his employees to perform their work with reasonable safety;[53] but it is not generally held to be negligence to fail to maintain light at a certain place on a railroad track, to indicate to employees, by way of warning, that it is a place in the track where the speed should be slowed down.[54]

These two cases are criticised by Judge Thompson, in his bulky and diffuse work on negligence, but it seems to the author that they are both based upon well-considered precedents and salutary principles. See note to 4 Thompson on Neg., § 3950. See, also, Mauer v. Ferguson, 44 N. Y. St. Rep. 372; Garrow v. Miller, 72 Vt. 284; 47 Atl. Rep. 1087; Lambert v. Pulp Co., 72 Vt. 278; 47 Atl. Rep. 1085.

[52] Young v. Burlington, etc., Co., 79 Iowa 415; 44 N. W. Rep. 693; Fraser v. Lumber Co., 42 Minn. 520; 44 N. W. Rep. 878; Crebarry v. Transit Co., 28 N. Y. S. 291; 77 Hun 74.

[53] It is negligence not to provide sufficient lights to enable an employee to perform his work with reasonable safety. Stewart v. Texas & Pac. R. Co. (La.), 37 So. Rep. 129.

[54] But lights are not necessary to indicate where speed of cars should be reduced. Godfrey v. St. Louis Tr. Co. (Mo.), 81 S. W. Rep. 1230.

For dangerous or defective scaffolds or platforms negligently built, in case of an injury, the employer is liable. Chaffee v. Erie R. Co., 73 N. Y. S. 908; 66 App. Div. 578; Nugent v. Brooklyn El. R. Co., 72 N. Y. S. 67; 64 App. Div. 351. But see, Hayes v. New York, etc., Ry. Co., 187 Mass. 182; 72 N. E. Rep. 841.

"A scaffold may be reasonably safe notwithstanding it may not have been provided with a railing." Chicago Union Traction Co. v. Theorell, 120 Ill. App. 490.

"A railroad company is not bound as a matter of law to furnish a stationary ladder or one with hooks for the use of a fireman in climbing to the top of one of its engines, but was only bound to exercise reasonable care to see that the ladders furnished were safe and proper for the use for which they were intended." McDonnell v. New York, N. H. & H. R. R. (Mass. 1906), 78 N. E. Rep. 548.

"In an action by an employee for injuries sustained while descending a ladder, the fact that the two bottom steps had been worn off was not sufficient to warrant the inference that the other parts of the ladder were defective, so as to render the employer guilty

§ 256. **Same — Injuries from hidden defects in appliances.** — As a general rule the employer is not responsible for injuries to his employees through hidden defects in his appliances, of which he had no knowledge at the time of the injury and of which notice of the defect could not have been discovered by the exercise of ordinary care on his part.[55] To hold him liable for such an injury would be to hold him to a greater degree of care than the law exacts and would be to make of him, a practical insurer of his employees, or a guarantor of the safety of his appliances.

The mere fact, therefore, that machinery causing an injury is found to possess a latent defect, through which an injury has resulted, is not ordinarily sufficient to constitute negligence, on the part of the employer, nor is the fact, that, after the injury, the defect was discovered and remedied, any evidence of negligence.[56] If proper and careful inspections were made before the injury, no negligence could be predicated upon the fact of a defect discovered subsequently thereto,[57] for it is not the knowledge which comes to the employer after the injury, that determines his liability, but that he possessed before the injury, that determines his liability. Where there is doubt, however, under the facts of a given case, whether or not the employer was remiss in his

of negligence in failing to discover the defect." St. Louis, I. M. S. Ry. Co. v. Andrews (Ark. 1906), 96 S. W. Rep. 183.

"Deceased was killed by being thrown from a hanging scaffold under an elevated railroad structure, by a collision between a truck and the scaffold. The scaffold was suspended from the elevated structure only a short distance above the tops of the surface cars, and it was impossible for men to work thereon and keep watch for approaching vehicles. *Held*, that the elevated railroad company was guilty of negligence in failing to provide a watchman to warn approaching vehicles of the scaffold." Sheridan v. Interborough Rapid Transit Co., 100 N. Y. S. 821.

[55] Bailey's Mas. Liab. Inj. Serv., p. 22.

[56] O'Donnell v. Baum, 38 Mo. App. 245.

[57] Hart v. Naumberg, 123 N. Y. 641; 25 N. E. Rep. 385.

duty of inspection, or of using ordinary care to discover a given latent defect in his appliances, as where, from the facts in evidence it is disputed whether or not a hand-hold on a hand car, although not apparent to the eye to be defective, ought to have been discovered to be a dangerous appliance, by the exercise of ordinary care, it will be a question for the jury, whether by ordinary care, the defect could have been discovered by the employer.[58]

§ 257. **Must provide reasonably safe place.**— Analogous to the duty on the part of the employer to furnish reasonably safe machinery and appliances for the use of his employees, in the given duties of their service, is that to furnish a suitable and reasonably safe place for the performance of the work.[59] The same measure of care as that which determines the liability for failure to provide reasonably safe machinery and appliances, governs the responsibility of the employer as to the place of work, and if he uses such care as reasonably prudent men in the same business use, he cannot be held liable for an injury due to the defective condition of the place of work.[60]

The same care as to supervision and inspection of the place of work, where the nature of the place demands it, should be bestowed by the employer as obtains in the case of machinery and appliances apt to get out of repair by continued use, [61] and if the employer permits his employees

[58] Gartridge v. Railway Co., 105 Mo. 520; 16 S. W. Rep. 943.

[59] Gibson v. Railway Co., 46 Mo. 163; Russell v. Railway Co., 32 Minn. 230; 20 N. W. Rep. 147.

Ordinary care as to place of work is such as reasonably prudent men in the same business employ. Fisher's Admr. v. Chesapeake & Ohio Co. (Va), 52 S. E. Rep. 373.

[60] Bailey, Mas. Liab. Inj. Serv., p. 34; 4 Thompson on Neg., § 3814, and cases cited.

[61] *Ante idem*, Gibson v. Railway Co., 46 Mo. 163; Cook v. Railway Co., 34 Minn. 47; 24 N. W. Rep. 311.

to labor in a place he knows to be dangerous, or in a place where such knowledge could be obtained, by reasonable care on his part, he will be liable to an injured employee, in case of an injury.[62]

But where the nature of the employee's work, as it progresses, is such as to continuously change the character of the place and nothing short of a continuous inspection by the employer would advise him of the different changes, as where the service is that of excavating for cuts or other similar work, such as ditches and the like, the rule as to a reasonably safe place does not apply, and for an injury in such a place, there is no liability on the employer's part, for it is the duty of the employee, in such case, to look out for the safety of the place he himself makes for his work, and to hold the employer liable for a want of discretion on his part, in such a case, would be to make of him an absolute insurer.[63]

"An employee should be furnished a safe place to do the work to which he is assigned." Godfrey v. Illinois Cent. R. Co. (La. 1906), 42 So. Rep. 571.

[62] 4 Thompson on Neg., § 3814; Bailey, Mas. Liab. Inj. Serv., p. 36.

[63] Bradley v. Chicago, etc., Ry. Co., 138 Mo. 293.

"Where the work which the employees are employed to perform is to make a reasonably safe place dangerous or an obviously dangerous place safe, the duty to care for the safety of the place is the employee's and not the employer's." American Bridge Co. v. Seeds, 144 Fed. Rep. 605.

"An employee is not bound to anticipate that a safe working place will be suddenly changed, without his knowledge, into an unsafe place by the employer setting in motion a defective and dangerous method of operation without giving the employee warning." Ball v. Megrath (Wash. 1906), 86 Pac. Rep. 382.

Removal of earth, from a railroad track or embankment, is generally held to be work which changes the place, within the rule holding that employees assume the risk of injuries therefrom. Van Derhoff v. New York Cent. R. Co., 84 N. Y. S. 650; 88 App. Div. 418; Griffin v. Railway Co., 124 Ind. 326; Naylor v. Railway Co., 53 Wis. 664; Simmons v. Ry. Co., 110 Ill. 344; Rasmussen v. Railway Co., 65 Iowa 236; Cully v. Northern Pac. R. Co., 35 Wash. 241; 77 Pac. Rep. 202.

Employees engaged in clearing away a wrecked train are engaged

§ 258. **Same — Railroad tracks, bridges and similar structures.**— A railroad company owes its employees the same duty of maintaining a reasonably safe track,[64] and to keep it free from obstructions,[65] or dangerous agencies,[66] that it does to furnish reasonably safe appliances or tools with which its employees are required to work, and for an injury from a failure to perform this duty a liability will result. It is accordingly held, in some jurisdictions, that a railroad company is liable for a failure to so construct its overhead structures and appendages, as to permit its employees on the track to perform the duties required of them with reason-

in making a dangerous place safe, and the rule as to a reasonably safe place does not apply. Baltimore & Ohio R. Co. v. Hunsucker (Ind.), 70 N. E. Rep. 556; Galow v. Chicago, etc., R. Co., 131 Fed. Rep. 242.

The work of laying a railroad track is such work as constantly changes the place, and hence the rule requiring a reasonably safe place does not apply to this kind of work. Meehan v. St. Louis, etc., Ry. Co., 114 Mo. App. 396; 90 S. W. Rep. 102.

The failure, by a railroad company, to provide a reasonably safe place for work, was held to give a cause of action, in the following late cases: Roche v. Denver, etc., R. Co. (Colo. App.), 73 Pac. Rep. 880; Hamilton v. Michigan Cent. R. Co. (Mich.), 97 N. W. Rep. 392; Richey v. Southern Ry. Co., 69 S. C. 387; 48 S. E. Rep. 285; Texas & N. O. R. Co. v. Kelly (Texas), 80 S. W. Rep. 1073.

For injury to an employee from falling in a hole in floor he was required to pass over while at work, and resulting liabilty of company, see Burke v. Manhattan Ry. Co., 96 N. Y. S. 516; 109 App. Div. 722.

[64] Baltimore, etc., Ry. Co. v. Rowan, 104 Ind. 88; 3 N. E. Rep. 627; Bessex v. Railway Co., 45 Wis. 482.

The duty as to reasonably safe tracks does not apply to tracks in a railroad yard. St. Louis Nat. Stock Yards v. Burns, 97 Ill. App. 175.

[65] Georgia, etc., Ry. Co. v. Davis, 92 Ala. 300; 9 So. Rep. 252; Ross v. North. Pac. Ry. Co., 5 Dak. 308; 40 N. W. Rep. 590.

[66] Snow and ice permitted to accumulate along the track is held to be negligence on the part of the company. McClaren v. Chicago, etc., Ry. Co., 80 Wis. 280; 49 N. W. Rep. 963.

able safety;[67] the same rule is held to apply to structures or erections placed near the track, by which employees are apt to be struck in passing on cars or engines, in the performance of their duties, such as switch stands, cattle pens, sheds and the like, and in many States a liability will result for an injury from such a cause.[68]

But it is very generally held that an employee cannot recover for an injury from a low bridge, with which he is familiar and used to pass under, as the knowledge or opportunity for acquiring knowledge by the employee, will prevent his recovery for an injury from a cause open and obvious to him[69] and the same rule is held to apply to structures near the track, unless they are in such proximity as to be denominated negligence, on the employer's part, to maintain them at such place.[70]

[67] Houston, etc., Ry. Co. v. Oram, 49 Texas 341.

[68] Ross v. North Pac. Ry. Co., *supra;* Georgia, etc., Ry. Co. v. Davis, *supra.*

The United States Supreme Court held it negligence, as a matter of law, for a company to maintain a spout, attached to a tank, so near the track as to be a menace to the employees, when it might have been maintained at a safe distance. Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64; 48 L. Ed. 96.

[69] Baylor v. Railroad Co., 40 N. J. L. 23; Baltimore, etc., R. Co. v. Strickler, 51 Md. 47; Wallace v. Central, etc., Ry. Co., 63 Hun 632; 18 N. Y. S. 280; Brossman v. Railroad Co., 113 Pa. St. 490; 6 Atl. Rep. 226; Illick v. Railway Co., 67 Mich. 632; 35 N. W. Rep. 708; Howard v. Railroad Co., 24 Am. & Eng. Ry. Cas. 458.

Where reasonable care has been bestowed upon a bridge and railroad track, the company will not be liable for an injury to a brakeman from a train going through the trestle. St. Louis, etc., R. Co. v. Hill, 94 S. W. Rep. 914; Dolan v. Sierra Ry. Co., 135 Cal. 435; 67 Pac. Rep. 686. But see, Galveston H. N. R. Co. v. Newport (Texas), 65 S. W. Rep. 657.

[70] Gould v. Railway Co., 66 Iowa 590; 24 N. W. Rep. 227; Flanders v. Ry. Co., 51 Minn. 193; 53 N. W. Rep. 544.

There is, generally, no liability for maintaining necessary erections near the track, if due warning or notice thereof has been given. Mobile & Ohio R. Co. v. Vallowe, 214 Ill. 124; 73 N. E. Rep. 416;

§ 259. **Same — Injuries from defective bridges.**— While a railroad company is not generally held responsible for an injury from a low bridge, properly constructed,[71] or for ice

Chattanooga El. Ry. Co. v. Moore (Tenn.), 82 S. W. Rep. 478; Fearns v. New York, etc., R. Co., 186 Mass. 529; 72 N. E. Rep. 68.

The duty to furnish a reasonably safe track and roadbed cannot be delegated, and the employer is liable for an unsafe track, regardless of the employment of competent track men. Chicago & A. Ry. Co. v. Eaton, 194 Ill. 441; 62 N. E. Rep. 784; St. Louis, S. W. Ry. Co. v. Kelton (Texas), 66 S. W. Rep. 887; Jefferson & N. W. Ry. Co. v. Woods (Texas), 64 S. W. Rep. 830; Anderson v. Northern Pac. R. Co. (Mont.), 85 Pac. Rep. 884; Newton v. New York Cent., etc., R. Co., 183 N. Y. 556; 76 N. E. Rep. 1102; Mississippi Cent. R. Co. v. Hardy (Miss.), 41 So. Rep. 505; Galveston, etc., R. Co. v. Manns (Texas), 84 S. W. Rep. 354.

In the absence of notice employees have a right to assume that the track is safe. Western Ry. Co. v. Russell (Ala.), 39 So. Rep. 311.

The duty to furnish a reasonably safe track cannot be delegated by a railroad company. Mississippi Central R. Co. v. Hardy (Miss.), 41 So. Rep. 505; Jemnienski v. Lobdell Car Wheel Co. (Del.), 63 Atl. Rep. 935.

A company owes an employee the duty of maintaining its track in a reasonably safe condition for one loading cylinders into a derrick car and this is a different duty from that due those running trains on the track. Texas Central R. Co. v. George, 89 S. W. Rep. 1091.

An instruction which holds the railroad company to more than reasonable care, in the maintenance of its track and roadbed, is error. Norfolk & W. R. Co. v. Cromer's Exec., 99 Va. 763; 40 S. E. Rep. 54; Norfolk & W. R. Co. v. Poole's Admr., 40 S. E. Rep. 627; Van Blarcom v. Central R. Co. (N. J.), 64 Atl. Rep. 111. It is not bound to maintain a reasonably safe track, but only to use care to do so. Culver v. South Haven, etc., R. Co. (Mich.), 101 N. W. Rep. 663.

Although a track or roadbed is unsafe, if the company gives notice thereof, or ceases to use it, no liability will result for a subsequent injury thereon, although no repair thereof is made. St. Louis, I. M. & S. Ry. Co. v. Mize (Ark.), 95 S. W. Rep. 488; McAuley v. New York Cent. R. Co., 97 N. Y. S. 631; 111 App. Div. 117.

The duty of the employer as to furnishing a reasonably safe place, does not apply to laying of a railroad track, since the work is continuously changing the place. Meehan v. St. L. M. & S. E. Ry. Co., 114 Mo. App. 396; 90 S. W. Rep. 102.

[71] To give a cause of action for an injury therefrom, a low bridge

that the season of the year would naturally give warning might be hanging therefrom,[72] because of the open, obvious nature of the construction, with which the law would charge its employees, as well as all men with unimpaired means of observation, this rule does not obtain in the case of a defectively constructed bridge, which could have been ascertained to be defective by a reasonably careful inspection.[73] But to be responsible for an injury from the giving way of a bridge, the inherent weakness of the bridge must be shown to be the proximate cause of the injury[74] and if the bridge had been regularly inspected, before the railroad company will be held liable for an injury caused by the giving way of the bridge, it must be shown that the inspections made were not reasonably careful inspections, or, otherwise the falling of the bridge is not traced to any act of negligence on the defendant's part.[75]

must be shown to have been improperly constructed. Louisville & N. R. Co. v. Thomas, 87 Miss. 600; 40 So. Rep. 257.

A low bridge, in some of the cases, is held to constitute negligence, on the railroad company's part. Louisville & N. R. Co. v. Tucker's Admr. (Ky.), 65 S. W. Rep. 453; 23 Ky. L. R. 1929.

[72] A brakeman on a railroad is held in Johnson v. Boston & M. R. Co. (Vt.), 4 L. R. A. (N. S.) 856, to assume the risk of injury from a low bridge and ice hanging therefrom, which, to his knowledge, is a usual condition.

[73] Louisville, etc., R. Co. v. Tucker's Admr. (Ky.), 65 S. W. Rep. 453; St. Louis & S. R. Co. v. Hill (Ark.), 94 S. W. Rep. 914; Central R. Co. v. Alexander, 144 Ala. 257; 40 So. Rep. 424.

[74] "A railroad company was liable for the death of an engineer, killed in a wreck by the giving way of a bridge after the derailment of the train from another cause, only in case the bridge was so defective as not to be reasonably sufficient to support the train if it had remained upon the track." St. Louis & S. F. R. Co. v. Hill, 94 S. W. Rep. 914.

[75] No liability results from the giving way of a bridge, regularly inspected, unless such inspections can be shown to have been negligently conducted. St. Louis & S. F. R. Co. v. Hill (Ark.), 94 S. W. Rep. 914; Hamilton v. Louisiana, etc., Ry. Co. (La.), 41 So. Rep. 560.

A defective overhead bridge is a part of the defendant's "ways,"

§ 260. **Same — Obstructions on or near track.**— A quite frequent cause of injury to railroad employees is the presence, on or near the track, of such necessary structures or obstructions as the business of railroading require, as incidents to the operation of trains, or the business conducted by the railroads. These structures can properly be treated under the head of the appliances furnished by the employer, yet, as they are more frequently fixed parts of permanent structures, they are more generally considered as affecting the place of the employee's work. The duty to maintain a reasonably safe track is held to apply to obstructions placed by the railroad, on or near the track and unless due warning is given thereof, it is held negligence to erect spouts, posts or other obstructions in such proximity to the track as to cause injury to brakemen, in the ordinary discharge of the duties of the service.[76] But there would generally not be held to be a duty to warn employees of obstructions placed at a usually safe distance from the track;[77] if the erection

within the meaning of a statute regulating the "ways, works," etc., in Alabama. Central Ry. Co. v. Alexander, 144 Ala. 257; 40 So. Rep. 424.

[76] The company must keep its track in a reasonably safe condition, or warn its employees of dangers from obstructions it has placed on the track. Illinois Cent. R. Co. v. Leisure's Admr., 90 S. W. Rep. 269; 28 Ky. L. R. 768.

Spouts or posts or other obstructions, in such proximity to track as to cause injury to brakemen, are generally held to be negligence on the company's part. Choctaw, O. & G. R. Co. v. McDade, 112 Fed. Rep. 888; 50 C. C. A. 591; Pittsburg, etc., Ry. Co. v. Parish (Ind.), 62 N. E. Rep. 514; Chicago, etc., R. Co. v. Riley, 145 Fed. Rep. 137; Norfolk & West. Ry. Co. v. Cheatwood's Admr., 103 Va. 356; 49 S. E. Rep. 489; Lindsay v. Norfolk & S. R. Co. (N. C.), 43 S. E. Rep. 511.

The U. S. Supreme Court holds that it is negligence, as matter of law, for a railroad company to maintain an iron spout attached to a water tank, so near the track as to be dangerous to employees, when it could be so hung as to be reasonably safe. Choctaw, etc., R. Co. v. McDade, 191 U. S. 64; 48 L. Ed. 96; 24 Sup. Ct. Rep. 24.

[77] "If a mail crane was not located unnecessarily near defendant's

is maintained at a distance ordinarily sufficient to permit the easy passage of a man on the cars of ordinary size, it would be held a reasonably safe distance from the track,[78] for this would be exercising reasonable care under the circumstances, as it could not be anticipated by the employer that a brakeman would happen to be on the side of a car of unusual size, just when it happened to be passing such a place and if the injury could not reasonably have been anticipated, a failure

railroad track, defendant was not negligent in failing to warn its employees of its location and the danger incident thereto." Denver & R. G. R. Co. v. Burchard (Colo. 1906), 86 Pac. Rep. 749.

"The location of a switch stand in a railroad yard by a railroad company between two tracks, so close to one of them that the switch handle would strike the steps of passenger cars on another track, was a part of an engineering scheme in the construction of the railroad, and, in the absence of manifest errors in constructions patent to an ordinary observer, did not involve a question of negligence, to be passed on by a jury in an action for injuries to a switchman while using the switch." Chicago, M. & St. P. Ry. Co. v. Riley (U. S. C. C. A., Ill., 1906), 145 Fed. Rep. 137.

A switch stand, being constructed so close to a railroad track, that its handle may strike the steps of a passenger coach, is not necessarily negligence on the company's part, but as it is a part of the engineering features of the railroad, a jury is not ordinarily permitted to say such construction is negligence, when engineers swear that it is the same as usually constructed. Chicago, etc., Ry. Co. v. Riley, 145 Fed. Rep. 137.

[78] "It cannot be said as a matter of law that a water crane maintained to supply passenger engines with water at a station, placed so near the track as to be from eighteen and one-half to twenty-three and one-half inches from the side of a freight car operated on the track, is a safe distance from the track." Charlton v. St. Louis & S. F. R. Co. (Mo. 1906), 98 S. W. Rep. 529.

A brakeman who knows that his employer customarily kept a pile of rattan near the track, in its yard, and also knew the extra width of a car he was on and saw the pile of rattan ahead of him and the car was running slowly, is guilty of such negligence in failing to step off the car, as will preclude his recovery for a resulting injury. Flansberg v. Heuwood, etc., Co., 190 Mass. 125; 76 N. E. Rep. 599.

A railroad company is not required to place lights on mail cranes, where the engineers know of the cranes. Kenney v. Meddaugh, 118 Fed. Rep. 209; 55 C. C. A. 115.

to provide against it could not be held to be negligence.[79]

But not only is the railroad company bound to protect its employees from dangers caused by obstructions erected by it, but it is also under the duty of keeping the track reasonably free from obstructions placed thereon by others, or by natural forces, such as rock slides, caused by rains or other natural causes,[80] stock[81] and similar animate and inanimate obstructions so frequently causing the derailment of trains.

§ 261. **Fit and competent employees must be employed.**— It is just as essential for the employer to engage fit and com-

[79] A railroad company is not liable for an injury to a brakeman from striking a projection, or a bridge, while descending the side of a car, as the employer could not foresee that he would descend at this place. Krebbs v. Oregon, etc., Ry. Co., 40 Wash. 183; 82 Pac. Rep. 130.

[80] A railroad owes its employees the duty of keeping its track free from rock slides and landslides. Fisher's Admr. v. Chesapeake & Ohio R. Co., 52 S. E. Rep. 373.

"In an action by a brakeman for injuries received in switching cars by being struck by a chute, projecting from a warehouse, the evidence did not show by whom the chute was placed, or when it was so placed, or how long it had been there. It could have been there but a short time. *Held* insufficient as a matter of law to show negligence on the part of the company." Nashville, C. & St. L. Ry. v. Hayes, 99 S. W. Rep. 362.

[81] Under the employer's duty to keep the railroad track reasonably free from obstructions, it is held, in Missouri and New York, that a company is liable for the derailment of a train, by cattle or other stock, regardless of the duty to fence, required by law. Mendizabal v. New York Cent. R. Co., 85 N. Y. S. 896; 89 App. Div. 386; Donnegan v. Erhardt, 119 N. Y. 468; 23 N. E. Rep. 1051; 7 L. R. A. 527; Dickson v. Railroad Co., 124 Mo. 140; 27 S. W. Rep. 476; 25 L. R. A. 320; 46 Am. St. Rep. 429.

In Pennsylvania, Minnesota and other jurisdictions, the requirement of fences to prevent stock, is held not to be available, in case of an injury from a derailment, caused by stock on the track, in the absence of fences, by an employee of the company. Snyder v. Pennsylvania R. Co., 205 Pa. 619; 55 Atl. Rep. 778; Fleming v. Railroad Co., 27 Minn. 111; 6 N. W. Rep. 448; Atchison, T. & S. F. R. Co. v. Reesman, 60 Fed. Rep. 370; 19 U. S. App. 596; 9 C. C. A. 20; 23 L. R. A. 768.

petent employees and to use reasonable care in the employment of his employees, as it is that he use such care in the selection of his appliances and places for work, and for an injury to an employee from a failure in the discharge of this duty, the employer can be held answerable in damages.[82] Before negligence can be held to result from a breach of duty in this regard, however, it must appear that the incompetency of the employee was known, or ought to have been discovered, by reasonable care on the employer's part.[83] This may appear from proof of a series of incompetent acts, but one careless act alone is not usually sufficient to prove negligence in this particular.[84] The same may be true of acts or a series of acts of intoxication.[85] Where a series of such acts are shown it is usually held to be a question for the jury whether or not the employer had sufficient knowledge of the alleged incompetency,[86] provided notice is had by an agent of sufficient authority to make it equivalent to that of the employer himself.[87] For instance, proof of notice of the habitual drunkenness of an engineer, by the foreman of the employer's round house, was held to be notice to the employer himself;[88] notice to the employer of an engineer's

[82] Chicago, etc., Ry. Co. v. Moranda, 108 Ill. 576; McDermott v. Railway Co., 73 Mo. 516; Wabash Ry. Co. v. McDaniels, 107 U. S. 454; Northern Pac. Ry. Co. v. Herbert, 116 U. S. 655; Peaslee v. Railway Co., 152 Mass. 158; 25 N. E. Rep. 71; Blake v. Maine Cent. Ry. Co., 70 Me. 63; Mayes v. Railway Co., 63 Iowa 562; 14 N. W. Rep. 340; Keith v. Railway Co., 140 Mass. 175; 3 N. E. Rep. 28; Evansville, etc., Ry. Co. v. Guyton, 115 Ind. 450; 17 N. E. Rep. 101.

[83] Moss v. Railroad Co., 49 Mo. 167; Blake v. Maine Cent. Ry. Co., 70 Me. 63.

[84] Melville v. Railway Co., 48 Fed. Rep. 820; Huffman v. Railway Co., 78 Mo. 50; Baltimore, etc., Co. v. Neall, 65 Md. 438; 5 Atl. Rep. 338.

[85] Williams v. Railway Co., 109 Mo. 475; 18 S. W. Rep. 1098.

[86] Michigan Cent. Ry. Co. v. Gilbert, 46 Mich. 179; 9 N. W. Rep. 243; Bailey, Mas. Liab. Inj. Serv., p. 57.

[87] Reiser v. Pennsylvania R. Co., 152 Pa. St. 38; 25 Atl. Rep. 175.

[88] Williams v. Railway Co., 109 Mo. 475; 18 S. W. Rep. 1098.

continued breach of his rules, by giving control of his engine to his fireman;[89] and notice to a master mechanic of the incompetency of an employee under his control, is held to be notice to the employer of such incompetency.[90]

But before the employer will be held to have had notice of an employee's incompetency, it must generally be brought home to him, or to one who stands in his place. Notice to a train dispatcher of the incompetency of a station agent, who was not under his control, or subject to his orders, is not notice to the employer.[91] Before an employer can be held for negligence in failing to employ competent employees, the incompetency of the alleged employee must have been the approximate cause of the injury[92] and if the injured employee had known of such incompetency and continued in the service without complaint, he waived any recourse against the employer on this account and will be held, in law, to have assumed the risk of such incompetency.[93]

§ 262. **Duty to employ a sufficient number of employees.**— In the proper discharge of his duty toward his employees it is just as essential for the employer to engage a sufficient number of employees, as it is for him to employ competent employees or supply reasonably safe tools and appliances. The rule is therefore firmly established that for an injury due to a failure on the employer's part to engage a sufficient number of employees, he will be responsible, as for a breach

[89] Ohio, etc., Ry. Co. v. Collern, 73 Ind. 261.

[90] *Ante idem.*

[91] Rieser v. Pennsylvania Ry. Co., 152 Pa. St. 38; 25 Atl. Rep. 175.

[92] Kersey v. Kansas City, etc., R. Co., 79 Mo. 362; Johnson v. Pittsburg, etc., Co., 114 Pa. St. 443; 7 Atl. Rep. 184; Gulf, etc., Ry. Co. v. Schwab (Texas), 21 S. W. Rep. 706.

[93] Jackson v. Railway Co., 31 Kan. 761; 3 Pac. Rep. 501; Lake Shore, etc., R. Co. v. Knittal, 33 Ohio St. 468; Kansas Pac. Ry. Co. v. Peavey, 34 Kan. 472; 8 Pac. Rep. 780; United States, etc., Co. v. Wilder, 116 Ill. 109; 5 N. E. Rep. 92,

of his duty toward the injured employee the same as though he were remiss in any other particular duty imposed by the law.[94] Just what number of employees would be sufficient for a particular service, is determined in precisely the same way as the discharge of the employer's duty in other particulars, i. e., the usual and customary number of the given employment by reasonably prudent men in the same business.[95] Ordinary care is the same in all such duties and ordinary custom of the particular business is the test, varying, of course, according to the service to be performed. After employment of a sufficient number of competent employees and installing them in the proper places, the employer discharges his full duty toward his employees, so far as the employment of other employees is concerned and for any subsequent injury, due to the negligence of any such employees, he will not be held responsible,[96] but where the evidence is conflicting as to whether or not the force of men employed were adequate for the given service, it is usually held to be a question for the jury to determine, under proper instructions from the court.[97]

[94] Booth v. Boston, etc., R. Co., 73 N. Y. 38.

[95] Titus v. Railway Co., 136 Pa. St. 618; 20 Atl. Rep. 517; Washington, etc., Ry. Co. v. McDade, 135 U. S. 554; Laflin v. Railway Co., 106 N. Y. 136; 12 N. E. Rep. 599.

[96] Flike v. Boston, etc., Ry. Co., 53 N. Y. 550; Bailey, Mas. Liab. Inj. Serv., p. 70.

[97] In the recent case of Bokamp v. Chicago & A. Ry. Co. (100 S. W. Rep. 689), Judge Bland, for the Court of Appeals of Missouri, was considering the question of whether or not it was a question for the court or for the jury to determine if the force of men was adequate to assist in turning a heavy girder, by which the plaintiff was injured. He said:

"There is evidence tending to show the girder could have been prevented from turning over by placing two men at the opposite end to hold it while the men at the other end were raising it with bars. All the men present were engaged in raising the girder except McAlister, who, on Dent's order, stood in front ready to push out the old blocks and insert the new ones as soon as the girder should be

§ 263. **Duty to promulgate rules.**— The duty to adopt and promulgate reasonable rules for the control and conduct of the employer's business exists, in all cases where the business has become sufficiently extensive to demand it, in the exercise of reasonable care, for the protection of the employee.[98]

raised high enough to permit him to do so. On this evidence, we cannot say, as a matter of law, defendant furnished an adequate number of colaborers to assist in the performance of the work. The question was peculiarly one for the jury." Suppard v. Agnew, 191 Ill. 439; 61 N. E. Rep. 392.

In Kentucky, an employer is held liable for failure to employ a sufficient number of men to help unload steel shafts. Illinois Central R. Co. v. Langan, 76 S. W. Rep. 32; 25 Ky. L. R. 500. See, also, Smith v. Railway Co., 48 L. R. A. 392. But when inadequacy of help employed does not give cause of action, for unloading steel rails, see Haviland v. Railroad Co., 172 Mo. 115; Coyne v. Union Pac. R. Co., 133 U. S. 370; 33 L. Ed. 651; Texas & N. O. R. Co. v. Sherman (Texas), 87 S. W. Rep. 887.

[98] Corcoran v. Delaware, etc., Ry. Co., 126 N. Y. 673; 27 N. E. Rep. 1022; Morgan v. Hudson River, etc., Co., 133 N. Y. 666; 31 N. E. Rep. 234; Wolsey v. Railway Co., 33 Ohio St. 227; Lake Shore, etc., Ry. Co. v. Lavellay, 36 Ohio St. 221; Lewis v. Seifert, 116 Pa. St. 628; 11 Atl. Rep. 514; New York, etc., R. Co. v. Lyons, 119 Pa. St. 324; 13 Atl. Rep. 205; Luebke v. Railway Co., 63 Wis. 91; 23 N. W. Rep. 136; Hannibal, etc., R. R. Co. v. Kanaley, 39 Kan. 1; 17 Pac. Rep. 324; Ford v. Fitchburg, etc., Co., 110 Mass. 240; Hough v. Railway Co., 100 U. S. 213; Pittsburg, etc., R. Co. v. Henderson, 37 Ohio St. 549.

"While a railroad company is bound to promulgate rules for the government of its employees and to enforce their obedience, it is not absolutely required to adopt and promulgate a code of rules for the education of beginners prior to inducting them into its service." Louisville & N. R. Co. v. Vincent (Tenn. 1906), 95 S. W. Rep. 179.

"It is the duty of a railroad company to establish and enforce definite rules and regulations for the protection of its employees, and of employees to obey such rules, which, when known to them, are as law in the regulation of their conduct; but where oral instructions given as a rule of conduct are relied on in an action for the injury or death of an employee, and have a vital bearing on the rights of the litigants, their existence, meaning and import are matters for proof." Seaboard Air Line Ry. Co. v. Shanklin (U. S. C. C. A., Ga., 1906), 148 Fed. Rep. 342.

The plaintiff must show that such necessity exists, before negligence in this particular can be held to be shown, either by proof of what other men in the same business or in a business as extensive as that of the defendant, have done[99] and the defendant may meet this proof by evidence that he has pursued the same degree of care in promulgating rules as those of reasonable prudence in the same business have done.[1] It may be a question for the jury whether the business was of sufficient extent to demand a rule,[2] but the reasonableness of the rule is always a question of law for the court.[3] It is just as much the duty of the employer to promulgate a rule so that his employees will have notice thereof, as it is to make such a rule and in the absence of a promulgation thereof, the rule will not be effective.[4] But after proof of a proper promulgation, it will not be necessary to bring actual notice home to a given employee;[5] he is presumed to have

[99] Berrigan v. New York, etc., R. R. Co., 131 N. Y. 582; 30 N. E. Rep. 57.

[1] *Ante idem;* Bailey, Mas. Liab. Inj. Serv., p. 74.

[2] McGovern v. Railway Co., 123 N. Y. 289; 25 N. E. Rep. 373.

[3] Larow v. New York, etc., R. Co., 61 Hun 11; 15 N. Y. S. 384; Old Colony R. Co. v. Tripp, 147 Mass. 35; 17 N. E. Rep. 89; 33 Am. & Eng. R. Cas. 497; Bass v. Ry. Co., 36 Wis. 459; Hoffbauer v. Railway Co., 52 Iowa 342; 3 N. W. Rep. 121; Illinois Central R. Co. v. Whittemore, 43 Ill. 420.

For construction, by the court, of a rule providing for train orders, and how to be given, see Wallace v. Boston, etc., R. Co., 72 N. H. 504; 57 Atl. Rep. 913.

In Georgia (Prather v. Railway Co., 80 Ga. 427; 9 S. E. Rep. 530), it is held to be a jury issue, and the same is held, in New Jersey. State v. Overton; 24 N. J. L. 435.

[4] Bailey, Mas. Liab. Inj. Serv., p. 77, and cases cited; Parker v. Georgia, etc., Ry. Co., 83 Ga. 539; 10 S. E. Rep. 233; Central R. R., etc., Co. v. Ryles, 84 Ga. 420; 11 S. E. Rep. 499; Covey v. Hannibal, etc., Ry. Co., 27 Mo. App. 170.

A rule, not duly promulgated, is no rule, in Georgia. Little v. Southern Ry. Co., 120 Ga. 347; 47 S. E. Rep. 953.

[5] Alcorn v. Chicago, etc., Ry. Co., 108 Mo. 395; 16 S. W. Rep. 229; Parker v. Georgia, etc., Ry. Co., 83 Ga. 539; 10 S. E. Rep. 233.

notice of all rules shown to be effective and duly promulgated.[6]

But evidence of the effectiveness of a rule is just as essential as the original adoption of the rule[7] and if the employer has customarily permitted his employees to neglect the rule he invokes, he will be held to have himself abandoned the rule and waived the performance thereof by his employees.[8]

[6] Shenandoah Valley, etc., R. Co. v. Lucado's Admr., 86 Va. 390; 10 S. E. Rep. 423; La Croy v. New York, etc., R. Co., 132 N. Y. 570; 30 N. E. Rep. 391; Pilkington v. Railway Co., 70 Texas 226; 7 S. W. Rep. 805; Alexander v. Railroad Co., 83 Ky. 598. But see, *contra*, Atchison, etc., R. Co. v. Plunkett, 25 Kansas 188.

[7] Byrnes v. New York, etc., R. Co., 71 Hun. 209; 24 N. Y. S. 517; Covey v. Hannibal, etc., R. Co., 27 Mo. App. 170; Atchison, etc., R. Co. v. Plunkett, 25 Kan. 188.

[8] Barry v. Hannibal, etc., Ry. Co., 98 Mo. 62; 11 S. W. Rep. 308; Kansas City, etc., R. Co. v. Kier, 41 Kan. 661; 21 Pac. Rep. 770; Union Pac. R. Co. v. Springsten, 41 Kan. 724; 21 Pac. Rep. 774; Northern Pac. R. Co. v. Nichols, 50 Fed. Rep. 718; 4 U. S. App. 369; Whittaker v. Delaware, etc., R. Co., 126 N. Y. 544; 27 N. E. Rep. 1042.

But the mere fact that other employees have violated rules, will not excuse the injured employee for his violation, unless the employer had acquiesced in the other violations, so as to abrogate it. Sloan v. Georgia, etc., R. Co., 86 Ga. 15; 12 S. E. Rep. 179.

The company waives a rule that it has permitted to be customarily violated for a length of time that it ought to have known of such violation. Biles v. Seaboard Air Line Ry. Co., 139 N. C. 528; 52 S. E. Rep. 129.

It can have no effect if the employer has abandoned it, or failed to enforce it. Leduc v. Northern Pac. R. Co. (Minn.), 100 N. W. Rep. 108.

A conductor's knowledge that a rule is habitually violated, is held, in Arkansas, to be notice to the company. St. Louis, I. M. & S. Ry. Co. v. Caraway, 91 S. W. Rep. 749. But see Huggins v. Southern Ry. Co. (Ala.), 41 So. Rep. 856.

"Where it was contrary to the rules of a railroad for employees to go between cars in order to make couplings, a custom among the employees violative of the rule was not binding upon the road, unless it was known to the road, and acquiesced in, or had prevailed for so

§ 264. **Same — What railway duties require rules and what do not.**— It may be stated as a general rule that whenever the employer could have foreseen that an injury in any department of railway service, by the exercise of reasonable care on his part, in the adoption and promulgation of a rule, could have been avoided, then he will be held negligent in not adopting a rule governing the conduct of his employees in such department of the service.[9] In this connection, if it could have been anticipated, by reasonable diligence, that a rule would have prevented a given injury, the law will impose a duty, in such case, to frame and promulgate a rule, and it is immaterial whether the conditions making a rule necessary are old or new, it will be held negligence to fail to adopt the necessary rule.[10] As a failure to inspect cars or engines must inevitably bring about an accident, it is held

long a time that the road was bound to know it." Huggins v. Southern Ry. Co. (Ala. 1906), 41 So. Rep. 856.

A rule of an employer established for the safety of employees which is habitually violated to the knowledge of the employer, or vice-principals, or which has been frequently and openly violated for such length of time that the employer could by the exercise of ordinary care have known the facts, will be deemed abrogated in determining the question of negligence on the part of an employee violating it. Biles v. Seaboard Air Line Ry. Co., 55 S. E. Rep. 512.

"Where a rule is made by a railroad company for the furtherance of its own ends, and is persistently and generally ignored or violated without reprimand, it may be considered as having been abandoned, but not so as to rules designed solely for the safety of employees, which will be enforced, unless it is shown that the railroad company has insisted on a disregard of the rule in order to hasten the work." Texas & N. O. Ry. Co. v. Conway (Tex. Civ. App. 1907), 98 S. W. Rep. 1070.

[9] Bailey, Mas. Liab. Inj. Serv., pp. 72, 74; 4 Thompson on Neg., § 4135, *et sub.*

[10] Although the conditions are new to the employers, which require rules, if the conditions of the business require rules, to make it reasonably safe, they should be adopted. Hill v. Lake Shore, etc., Ry. Co., 22 Ohio Cir. Ct. R. 291; 12 O. C. D. 241; Louisville & N. R. Co. v. York, 128 Ala. 305; 30 So. Rep. 676.

negligence to fail to adopt a rule providing for inspection of such appliances,[11] and, as the coupling of cars is attendant with more or less risk, it is held to be negligence, in some States, to fail to adopt rules governing the method of coupling cars.[12]

But it is never held to be necessary to adopt rules to prevent causes not likely to produce an injury, or which, after adoption, would not afford reasonable protection to the employee.[13] Accordingly, it is held that rules are not necessary to prevent employees from leaving tools at a place not likely to cause injury;[14] to control the conduct of employees, beyond the scope of their authority;[15] to provide watchmen

[11] The absence of rules providing for the inspection or repair of cars, was held negligence in New Hampshire. Hill v. Boston, etc., R. Co., 72 N. H. 518; 57 Atl. Rep. 924; Chicago & A. R. Co. v. Bell, 111 Ill. App. 280; Moran v. Rockland, etc., R. Co., 99 Me. 127; 58 Atl. Rep. 676; Lane v. New York, etc., R. Co., 94 N. Y. S. 988; 107 App. Div. 166.

[12] It is held, in New York, to be negligence to fail to provide rules governing the coupling of cars in a railroad yard, where switching is constantly being done. Freemont v. Boston, etc., R. Co., 98 N. Y. S. 179; 111 App. Div. 831; Ryan v. Delaware, etc., R. Co., 99 N. Y. S. 794; 114 App. Div. 268. But if a rule is adopted, governing the running of engines in switch yards and the compliance therewith would have prevented the injury, no recovery can be had because additional rules were not adopted. Keating v. Manhattan R. Co., 97 N. Y. S. 137; 110 App. Div. 108; Huggins v. Southern Pac. R. Co. (Ala.), 41 So. Rep. 856; Southern Ry. Co. v. Holbrook, 124 Ga. 679; 53 S. E. Rep. 203.

[13] Rules are not required as to causes not likely to cause an injury, or which would not afford reasonable protection, when adopted. Koszlowski v. American Locomotive Co., 89 N. Y. S. 55; 96 App. Div. 40.

[14] As it is not to be anticipated that an engine hostler will leave an oil can on the foot board of an engine, it is not negligence to fail to have a rule against it. Wise Terminal Co. v. McCormick (Va.), 51 S. E. Rep. 731.

[15] There is no duty, on the employer's part, to adopt rules to control employees acting beyond the scope of their authority. Moran v. Rockland, etc., R. Co., 99 Me. 127; 58 Atl. Rep. 676.

to give warning of moving cars in railroad yards;[16] to prevent the starting of engines while cleaners are under same;[17] to regulate making of flying switches;[18] to provide the part of a train that a crippled car shall be carried in,[19] or to prevent car inspectors from riding to the place of work on cars to be inspected by them,[20] for the reason that in none of the instances cited could the employer, by the exercise of reasonable care, on his part, foresee that an accident and injury would result from a failure to provide a rule therefor.

[16] "Plaintiff was employed as a member of a yard gang of defendant's railroad, and at the time of his injury was picking up coal from between the tracks, when, as his back was turned, he was struck by a coal car in charge of a brakeman, which was being 'kicked' onto the siding. *Held*, that defendant was not guilty of negligence in failing to promulgate and enforce a rule requiring brakeman in charge of such cars, when approaching workmen in the yards, to have them under such control that they could be stopped in case a collision became imminent, or a rule requiring that some person be provided to watch for approaching cars and warn the yard gang of the danger; no evidence being offered as to the custom in other yards or as to the probable efficiency of such rules." Kascsak v. Central R. Co. of New Jersey, 101 N. Y. S. 211.

[17] No rule is required to prevent the starting of an engine, while a hostler is under it cleaning out the ash pans, as the mere presence of the man is sufficient, in itself, to prevent the starting of the engine, while he is under it. Lane v. New York Cent. R. Co., 86 N. Y. S. 947; 93 App. Div. 40.

[18] "The failure of a railroad company to make a rule regulating the making of flying switches was not negligence rendering it liable for the death of an employee caused by cars on the switch track at a point where its employees were not bound to anticipate his presence." Lord v. Boston & M. R. Co. (N. H. 1906), 65 Atl. Rep. 111.

[19] Negligence cannot be predicated upon the absence of a special rule providing for the part of a train that a "crippled" car ought to be carried in. Shuster v. Philadelphia B. & W. R. Co. (Del.), 62 Atl. Rep. 689.

[20] The failure of a company to provide a rule preventing car inspectors from riding to the inspection track on the cars to be inspected by them, is not negligence on the part of the company, so as to give a cause of action, in case of an injury to an inspector, while so riding. Shuster v. Philadelphia & B. W. R. Co. (Del.), 62 Atl. Rep. 689.

§ 265. **Same — Effect of violation of rule by employees.—** Where a given rule of the employer, regularly adopted and enforced, is violated by an employee, the effect of such violation of the rule, upon the right of recovery of an injured employee, depends largely upon the question of the materiality of the violation of the rule in producing the injury complained of. If the violation of the rule was the proximate cause of the injury and the injured employee himself was violating the rule, when injured, he is generally held to be guilty of contributory negligence, preventing a recovery.[21] Just what effect a violation of a rule of the employer, by a coemployee of the injured one, will have, is differently decided in different States. In some States, where the common law has been abrogated and the employer is liable for the negligence of coemployees of the injured employee, an injury from a violation of a rule of the employer, by a coemployee, will not relieve him from liability.[22] But in States where no such rule obtains, or where the common-law rule of liability exists, under which the employer is not liable for injuries due to negligent acts of coemployees of the injured employee, an injury due to a violation of a rule by a coemployee would give no cause of action against the employer.[23]

[21] Schwab v. Railway Co., 106 Mo. 368.

A switchman who knows of a rule that he must be provided with a lantern, while working in the yard, at night, is negligent if he fails to get a lantern from the supply at the wareroom of the employer and cannot shift the responsibility to his foreman. Howard v. Chesapeake & O. R. Co., 28 Ky. L. R. 891; 90 S. W. Rep. 950.

[22] The fact that a collision with a work train, by a special train, occurred because of the violation of a rule on the part of the brakeman, in flagging the special, will not relieve the company, in Texas. Gulf Colorado & S. F. R. Co. v. Hays, 89 S. W. Rep. 29. But see, *contra*, Spangler v. B. & O. R. Co., 213 Pa. 320; 62 Atl. Rep. 919.

Violation of a rule preventing placing of torpedoes near stations, was held to give a coemployee of the one violating the rule a cause of action, in Kentucky. Illinois Cent. R. Co. v. Burton, 79 S. W. Rep. 502; 25 Ky. L. R. 1916.

[23] No recovery can be had, in Pennsylvania, for an injury to an

§ 266. **Duty of inspection.**— While it is generally held, by the best-considered cases, that the employer is not required to inspect new appliances, bought from reputable manufac-

employee, by a collision, caused by the negligence of other employees, and while violating company rules. Spangler v. B. & O. R. Co., 213 Pa. 320; 60 Atl. Rep. 919.

"Where two trains are running close together, and under the rules of the company, requiring ten minutes between trains, and according to their interpretation by trainmen, it is not the duty of those in charge of the first train to send back a flagman until it is ten minutes late, an accident occurring by the rear train running into the first train within such time is not attributable to the negligence of those in charge of the first train, aside from any question of contributory negligence of the engineer of the rear train." Judgment (Civ. App.), 95 S. W. 660, reversed. International & G. N. R. Co. v. Brice (Texas), 97 S. W. Rep. 461.

"A rule provided for the protection of a train by a flagman going back a distance of thirteen telegraph poles, where he shall place one torpedo on the rail, and then continue at least fifteen telegraph poles from the rear of the train and place two more torpedoes on the rail, when he may return to within thirteen telegraph poles, and remain there until recalled; that when he comes in he will remove the torpedo nearest the train, but the two must be left on the rail as a caution to any following train. *Held* that, though such rule required the flagman to remain where he had placed the first torpedo until called in, the failure of the conductor of a freight train, who had put out torpedoes, to remain with them, did not constitute negligence, rendering the railroad company liable for injuries to a trackman by the explosion of a torpedo by a hand car on which he was riding; he having assumed, without reasonable grounds for so doing, when he saw the train standing, but did not see a flagman, that no torpedoes had been set." Murphy v. Galveston, H. & N. Ry. Co. (Tex. Civ. App. 1906), 96 S. W. Rep. 940.

In the following cases, the violation of a rule, requiring flag, by a car repairer, or other employee working on the track, around stationary cars, without exposing flag, or adopting other safeguard for protection, was held to preclude a recovery for an injury consequent upon such negligence. Renfro v. Chicago, etc., Ry. Co., 86 Mo. 302; Whitley v. Chicago, etc., Ry. Co., 109 Mo. App. 123; Harris v. Missouri Pacific Ry. Co., 40 Mo. App. 255; Harlan v. Railroad Co., 64 Mo. 480; Hallihan v. Hannibal, etc., Ry. Co., 71 Mo. 113; New York, etc., R. Co. v. Rapp (Ohio), 11 L. R. A. (N. S.) 413; Devoe v. New York, etc., R. Co., 75 N. Y. S. 136; 70 App. Div. 495; Snellen v. Kansas

turers,[24] this is not the rule as to tools, machinery or appliances subjected to continuous use in the business of the employer, where such use and the friction they are subjected to and the wear consequent upon such use is liable to render them unsafe, but as to all such, the duty is implied by the law that the employer will cause them to be properly inspected, in order to see that the proper repairs may be made.[25] The duty, of course, necessarily varies, according to the nature of the business and the character of the appliances used,[26] so that it is always necessary for the plain-

City, etc., R. Co. (Ark.), 102 S. W. Rep. 193; Southern Pacific R. Co. v. Pool, 160 U. S. 438; Aerkfetz v. Humphreys, 145 U. S. 418; Canadian Pacific R. Co. v. Elliott, 137 Fed. Rep. 904; State v. South Baltimore Car Co. (Md.), 58 Atl. Rep. 447; Latremoulle v. Railroad Co., 63 Vt. 336; 22 Atl. Rep. 656; 48 Am. & Eng. R. Cas. 265; Campbell v. Railroad Co. (Pa.), 2 Atl. Rep. 489; 24 Am. & Eng. R. Cas. 427; Cincinnati, etc., R. Co. v. Long, 112 Ind. 166; 13 N. E. Rep. 659; 31 Am. & Eng. R. Cas. 138; Lynch v. Boston, etc., R. Co., 159 Mass. 536; 34 N. E. Rep. 1072; Sahaibe v. Lake Shore, etc., R. Co., 97 Mich. 318; 56 N. W. Rep. 565; Chicago, etc., R. Co. v. McGraw, 22 Colo. 363; 45 Pac. Rep. 383; Louisville, etc., R. Co. v. Haning, 131 Ind. 528; 31 N. E. Rep. 187; 53 Am. & Eng. R. Cas. 452; Cypher v. Railroad Co., 149 Pa. St. 359; 24 Atl. Rep. 225; Sweeney v. Railroad Co., 11 Mont. 523; 29 Pac. Rep. 15; Peterson v. Chicago, etc., Ry. Co. (Mich.), 34 N. W. Rep. 260; Crowe v. New York, etc., R. Co., 23 N. Y. S. 1100.

[24] Richmond, etc., R. Co. v. Elliott, 149 U. S. 266; DeGraff v. Railway Co., 76 N. Y. 125; Ardesco Oil Co. v. Gilson, 63 Pa. St. 150; Smith v. Railway Co., 42 Wis. 520.

There is no obligation on the part of an employee to inspect the appliances furnished him by his employer. Texas Short Line R. Co. v. Waymire, 89 S. W. Rep. 452; Missouri, K. & T. R. Co. v. Lynch, 90 S. W. Rep. 511.

[25] Bessex v. Railway Co., 45 Wis. 481; Northern Pac. R. Co. v. Herbert, 116 U. S. 652; Brann v. Railway Co., 53 Iowa 595.

The duty of inspection is incidental to that to furnish a reasonably safe place and appliances and cannot be delegated, by rules, adopted with this object in view. Chicago Tr. Co. v. Sawusch, 119 Ill. App. 349; 218 Ill. 130; 75 N. E. Rep. 797; 1 L. R. A. (N. S.) 670.

[26] "For instance the wheels upon railroad cars, require more fre-

tiff to establish that the character of the appliance was such as to require timely inspections, or no such duty will be implied, but the presumption will obtain that the employer has properly discharged his duty toward his employee.[27] The duty of inspection, however, applies to the place where the employer keeps his employees at work,[28] as well as to the appliances used and for a failure to inspect either, if an injury results therefrom, there will be a liability upon the employers' part. After proper inspection, there is usually no liability, if the defect causing the injury was one which a proper inspection would not have disclosed,[29] but before an inspection is a sufficient avoidance of the charge of notice of a defective condition or state, where it has continued a length of time sufficient to imply notice thereof, in law, the employer must show a proper or reasonably careful inspection, for if an inspection was not made in such a way as to discover defects that might by reasonable care have been disclosed, it is the same as if none at all had been made.[30]

quent inspection, than the frame work, and also different in character." Bailey, Mas. Liab. Inj. Serv., p. 102.

[27] Laflin v. Buffalo, etc., R. Co., 106 N. Y. 140; 12 N. E. Rep. 599.

[28] Bessex v. Railway Co., 45 Wis. 482.

As to measure of care required of company towards its employees to prevent landslides and rocks from slipping upon roadbed, see Fisher's Admr. v. Chesapeake & O. R. Co. (Va.), 52 S. E. Rep. 373.

[29] Baldwin v. Railway Co., 68 Iowa 37; 25 N. W. Rep. 918; Bailey, Mas. Liab. Inj. Serv., p. 108.

[30] DeGraff v. Railway Co., 76 N. Y. 125; Grand Rapids, etc., R. Co. v. Huntley, 38 Mich. 546.

The fact of an inspection, by a competent inspector, was held not to relieve the company from liability for an injury to a brakeman, from a defective hand-hold, unless it is shown that it was a reasonably careful inspection. International, etc., R. Co. v. Hawes (Texas), 54 S. W. Rep. 325; Egan v. Dry Dock, etc., R. Co., 12 N. Y. App. Div. 556; 42 N. Y. S. 188. See, also, Cleveland, etc., R. Co. v. Ward, 147 Ind. 256; 45 N. E. Rep. 325.

It is negligence to fail to make such an inspection of appliances

§ 267. **Same — Hidden defects — Ordinary tools.**— While an inspection that is not made in a reasonably careful manner is the same as though no inspection at all had been made, where a given tool or a place is inspected in an approved or usual manner, it is generally held to be sufficient and no liability will result for an injury from a cause which was not disclosed by such inspection.[31] It is not generally required that simple, ordinary tools, such as hammers or mauls, should be inspected,[32] but wooden ladders and such appliances as

as a reasonably prudent person in the same business would make. Texas Short Line R. Co. v. Waymire (Texas), 89 S. W. Rep. 452.

The liability for an insufficient inspection is not affected by the fact that it was made by a coemployee of the injured one, for it is one of the nondelegable duties of the employer. Newton v. New York, etc., R. Co., 89 N. Y. S. 23; 96 App. Div. 81; Gulf, etc., R. Co. v. Larkin (Texas), 80 S. W. Rep. 94; Belt Ry. Co. v. Confrey, 111 Ill. App. 473; Leduc v. Northern Pac. R. Co. (Minn.), 100 N. W. Rep. 108; Lee v. St. Louis, etc., R. Co., 112 Mo. App. 372; 87 S. W. Rep. 12; Crawford v. United Ry. Co. (Md.), 61 Atl. Rep. 287.

The duty of inspection of appliances cannot be delegated, so as to avoid liability for an injury for an unsafe car or engine. Galveston, etc., Ry. Co. v. Busch (Tex.), 65 S. W. Rep. 681; Southern Pac. R. Co. v. Winton (Texas), 66 S. W. Rep. 477; Martin v. Wabash R. Co., 142 Fed. Rep. 650; 73 C. C. A. 646; Galveston, etc., R. Co. v. Smith (Texas), 93 S. W. Rep. 184; 98 S. W. Rep. 240; Missouri, K. & T. Ry. Co. v. Hagan (Texas), 93 S. W. Rep. 1014. But see Chicago & A. R. Co. v. Merriam, 95 Ill. App. 628.

Evidence that only one car wheel out of fifty was tested, or inspected, does not make a case of negligence, for failure to inspect, in the absence of proof that additional tests were necessary or usual, or that the wheel that caused the injury was not inspected or tested. Hoover v. Chicago R. I. & C. R. Co. (Texas), 89 S. W. Rep. 1084.

[31] Where an inspection is made in an approved and usual manner, it is generally held to be sufficient. Illinois Cent. R. Co. v. Coughlin, 132 Fed. Rep. 801; 65 C. C. A. 101; Gerstner v. New York, etc., R. Co., 178 N. Y. 627; 71 N. E. Rep. 1131.

An inspection on only one out of fifty car wheels is not negligence, in absence of evidence that the wheel causing the injury was not inspected. Hoover v. Chicago, etc., Ry. Co., 89 S. W. Rep. 1084.

[32] A simple, ordinary tool, or appliance, such as a hammer, or a

wear will make dangerous, are ordinarily required to be inspected,[33] in order that defects therein may be discovered and such repairs made as may be necessary to keep such tools or appliances in a reasonably safe condition for use.

Where there is shown to have been a defect in an appliance responsible for an injury, which a reasonably careful inspection would have disclosed, in the absence of evidence of a proper inspection, it will be presumed that no such inspection was made, or, if an inspection is shown to have been made of the appliance, that it was not an ordinarily careful inspection.[34] But there is no liability for an injury due to a latent defect or flaw in the material from which a given appliance is constructed, which was not discoverable by a reasonably careful inspection and in case of an injury from such a cause, it is generally held a sufficient defense for the employer to show that he caused a reasonably careful inspection of the appliance to be made and that the defect was

lantern globe, need not be inspected. Gulf, etc., Ry. Co. v. Larkin (Texas), 82 S. W. Rep. 1026; O'Brien v. Missouri, K. & T. Ry. Co. (Texas), 82 S. W. Rep. 319. But see as to a maul and hammer; Morris v. Eastern Ry. Co., 88 Minn. 112; 92 N. W. Rep. 535; Franklin v. Missouri, K. & T. R. Co., 97 Mo. App. 473; 71 S. W. Rep. 540.

"A machinist's hammer is a simple tool, which the employer is not required to inspect." Meyer v. Ladewig (Wis. 1907), 110 N. W. Rep. 419.

[33] "A thirty-five foot wooden ladder attached to a railroad water tank and only occasionally used by an employee, is not a common tool or appliance, within the meaning of the rule exempting the employer from the duty to inspect such appliances, on the presumption that those using them will, and should, first discover defects." Nichols v. Pere Marquette R. Co. (Mich. 1906), 108 N. W. Rep. 1016.

[34] An appliance which is found to be unsafe, where the defect therein would be shown by a careful inspection, it will be presumed that no such inspection was made, if it was not discovered. San Antonio, etc., R. Co. v. Lindsay (Texas), 65 S. W. Rep. 668; Southern Pac. R. Co. v. Winton (Texas), 66 S. W. Rep. 477. But see Healey v. Buffalo, etc., R. Co., 97 N. Y. S. 801; 111 App. Div. 618.

due to a latent, hidden cause, not apparent by a careful inspection.[35]

§ 268. **Same — Inspection of foreign cars.**— The risk of injury from foreign railroad cars, received by one railroad company, in the ordinary course of its business, from another, is one of the ordinary risks of the business of railroading, which employees of the receiving road assume.[36] "A railroad company receiving a loaded car from another is not under the obligation to make critical tests as to its safety or condition, with a view of being chargeable with negligence if all parts of such car, which appear, upon examination, to be in good condition, are not in such condition." [37] The basis of the employer's liability, as to foreign cars, rests upon the failure of his inspectors or agents to inspect such cars; not upon his implied duty to provide reasonably safe ap-

[35] For an injury from a defective brake rod, or other appliance, due to a latent flaw in the metal or material, which could not be discovered by a reasonably careful inspection, there is no liability. Alexander v. Pennsylvania Co., 201 Pa. 252; 50 Atl. Rep. 991; Chestnut v. Southern Ind. R. Co., 157 Ind. 509; 62 N. E. Rep. 32; Galveston, etc., R. Co. v. Busch (Texas), 65 S. W. Rep. 681; Galveston, etc., R. Co. v. Davis (Texas), 65 S. W. Rep. 217.

No liability results to an employee for an injury from a derailment, due to a rotten tie, unless negligent inspections can be shown. Hach v. St. Louis I. M. & S. Ry. Co., 117 Mo. App. 11; 93 S. W. Rep. 825.

"An employee cannot recover from a railroad company for injuries caused by the breaking of the handle of a hand car by reason of defects in that portion of the handle which is fastened in an iron socket, and which cannot be discovered without removing it from the socket, in the absence of proof of actual knowledge of the defect." Alves v. New York, N. H. & H. R. Co. (R. I. 1906), 65 Atl. Rep. 261; 27 R. I. 581.

[36] Thomas v. Railway Co., 109 Mo. 187; 18 S. W. Rep. 980; Kahn v. McNulta, 147 U. S. 238; Hathaway v. Railway Co., 51 Mich. 253; 16 N. W. Rep. 634; Baldwin v. Railway Co., 50 Iowa 680; Toledo, etc., Ry. Co. v. Black, 88 Ill. 112; Smith v. Potter, 46 Mich. 258; 9 N. W. Rep. 273; Kelly v. Abbott, 63 Wis. 309; 23 N. W. Rep. 890.

[37] Bailey, Mas. Liab. Inj. Serv., pp. 105, 106.

pliances for the service;[38] and, as in the case of his own cars, the employer sufficiently shows a compliance with his duty, as to foreign cars, when he shows proper inspections by a reasonably competent inspector.[39]

But while it is not incumbent upon the receiving company, on receipt of a car, to make expert tests to discover hidden defects in the construction, mechanism or materials of such car, still, it is bound to inspect foreign cars, just as it would and is required to inspect its own, after they have been in use. The duty devolves upon the company in the one case as much as in the other.[40]

§ 269. **Warning to inexperienced employees.**— While the employer is not bound to subject his employees, whom he knows to possess the ordinary experience of the business, to

[38] Kelly v. Abbott, *supra;* Keith v. New Haven, etc., Ry. Co., 140 Mass. 1758; 3 N. E. Rep. 28.

[39] Keith v. New Haven, etc., Ry. Co., *supra;* Macklin v. Railway Co., 135 Mass. 201.

[40] This is practically the language of the Supreme Court of Missouri, in Gutridge v. Railway Co., 94 Mo. 468; 7 S. W. Rep. 476.

The only duty toward a foreign car is a reasonable inspection, to ascertain if it is reasonably safe. Galveston, etc., R. Co. v. Parish (Texas), 93 S. W. Rep. 682.

A defective foreign car will give a cause of action, generally, whenever the defective car would have given a cause of action, if it belonged to the employer. Strauss v. New York, etc., R. Co., 87 N. Y. S. 67; 91 App. Div. 583; St. Louis S. W. Ry. Co. v. Corrigan (Texas), 81 S. W. Rep. 554.

An intermediate carrier is bound to inspect a car to ascertain that it is reasonably safe for delivery to such carrier, but it owes no duty to an employee of the ultimate consignee, in Missouri. Sykes v. St. Louis & S. F. R. Co., 178 Mo. 693; 77 S. W. Rep. 723.

"Where plaintiff, a railroad brakeman, on arriving at a station, was required to couple certain foreign cars on a track of another company, plaintiff's employer owed him a duty of exercising reasonable care to see that such foreign cars were not defective, and, if they were, to warn plaintiff of the danger." Texas & N. O. Ry. v. Conway (Tex. Civ. App. 1907), 98 S. W. Rep. 1070.

critical tests, to discover their knowledge of the dangers of the business, any more than he would be those who represent themselves, when employed, to possess such knowledge,[41] he is bound to disclose to inexperienced employees, or those whom he knows, or ought to know do not possess the requisite knowledge, the dangers of the business in which they have been, or are about to engage.[42] The rule applies particularly to children or minors, employed about dangerous machinery or places, when they have not the requisite experience to understand the danger of their situation.[43] If the minor is one of experience, however, the rule would not apply, but he would be held to assume, the same as an adult, the risk of dangers ordinarily incidental to the business [44] and the same is true as to obvious, open dangers,[45] for as to all such, the situation itself is sufficient warning, speaking as it would, a continuous warning to all.

No warning is generally required as to causes which it

[41] Pittsburg, etc., Ry. Co. v. Adams, 105 Ind. 152; 5 N. E. Rep. 187.

[42] Lyttle v. Chicago, etc., Ry. Co., 84 Mich. 289; 47 N. W. Rep. 573; Tagg v. McGeorge, 155 Pa. St. 368; 26 Atl. Rep. 671; DeGraff v. Railway Co., 76 N. Y. 132; Wynne v. Conklin, 86 Ga. 40; 12 S. E. Rep. 183.

[43] Crowley v. Pacific Mills, 148 Mass. 228; 19 N. E. Rep. 344; Railroad Co. v. Fort, 84 U. S. 555; McGowan v. LaPlata Min. & Sm. Co., 9 Fed. Rep. 861; Fox v. Peninsular Lead Works, 84 Mich. 676; 48 N. W. Rep. 203; Parkhurst v. Johnson, 50 Mich. 70; 15 N. W. Rep. 107.

[44] Alexander v. Railway Co., 83 Ky. 589; Mayes v. Railway Co., 63 Iowa 568; 14 N. W. Rep. 340; Dysinger v. Railway Co., 93 Mich. 646; 53 N. W. Rep. 825.

[45] Bailey, Mas. Liab. Inj. Serv., p. 126.

If the dangers and the means of avoiding them are apparent, there is no duty to warn, even an inexperienced employee. Chicago, R. I. & P. R. Co. v. Dauguard, 118 Ill. App. 67.

There is no duty to warn any class of employees, regardless of age, of those things which are apparent, or which they already know. Blair v. Heible (Mo.), 77 S. W. Rep. 1017; Trakal v. Heusner Co., 204 Ill. 179; 68 N. E. Rep. 399; Clark v. Missouri, K. & T. R. Co.,

could not have been foreseen would cause an injury; [46] where employees are familiar with the movement of trains, no warning thereof, is required,[47] but where the employees are so situated that the movement of trains cannot be observed by them, then notice ought to be given.[48] Whether employees

179 Mo. 66; 77 S. W. Rep. 882; Louisville & N. R. Co. v. Bouldin, 121 Ala. 197; 25 So. Rep. 903; Seery v. Gulf, etc., R. Co. (Texas), 77 S. W. Rep. 950; Chicago, etc., R. Co. v. Bell, 209 Ill. 25; 70 N. E. Rep. 754; Keith v. Wisconsin Cent. R. Co. (Wis.), 99 N. W. Rep. 217; Hofnauer v. White, etc., Co., 186 Mass. 47; 70 N. E. Rep. 1038; Cleveland, etc., Ry. Co. v. Haas (Ind.), 74 N. E. Rep. 1003.

[46] Before a failure to warn will justify a conclusion of negligence, the facts must show a condition where a warning was necessary. Chicago, etc., Ry. Co. v. Kimmel, 221 Ill. 547; 77 N. E. Rep. 936.

There is no obligation to warn employees of the danger of chipping steel, as it is an obvious risk of the business of hammering it. Atchison, etc., R. Co. v. Weikal (Kansas), 84 Pac. Rep. 720; Illinois Cent. R. Co. v. Young, 97 S. W. Rep. 1115.

And this is the rule as to unguarded machinery, in the absence of statute requiring it to be guarded. Smith v. Box Co., 193 Mo. 715; 92 S. W. Rep. 394.

[47] No warning is generally required of the movement of a train in a yard, where employees are familiar therewith. Southern Pac. R. Co. v. Pool, 160 U. S. 438; 40 L. Ed. 485; 16 Sup. Ct. Rep. 338; Aerkfetz v. Humphrey, 145 U. S. 418; Canadian Pac. R. Co. v. Elliott, 137 Fed. Rep. 904; Evans v. Wabash Ry. Co., 178 Mo. 514; Loring v. Railway Co., 128 Mo. 328; Campbell v. Illinois Cent. R. Co. (Iowa), 100 N. W. Rep. 30; Cardwell v. Gulf, etc., R. Co. (Texas), 88 S. W. Rep. 422.

[48] Where operatives of engine cannot see the conditions, a foreman of section or switching crew is negligent if he fails to give engineer or fireman warning. Kennedy v. Kansas City, St. J. & C. B. R. Co., 190 Mo. 424; 89 S. W. Rep. 370.

The backing of a freight train, on a siding, on which an employee was at work, without warning, was held negligence, in Kentucky. Southern Ry. Co. v. Otis' Admr., 78 S. W. Rep. 480; 25 Ky. L. R. 1686. See, also, Gulf, etc., R. Co. v. Cooper (Texas), 77 S. W. Rep. 263; Louisville & N. R. Co. v. Lowe, 80 S. W. Rep. 768.

The starting of a train, without warning to a brakeman coupling cars therein, is negligence, in Kentucky. Illinois Cent. R. Co. v. Jones' Admr., 80 S. W. Rep. 484.

"Where the superintendent of an employee working on a track saw the employee looking out for a train and told him it was all right, and

are entitled to take advantage of a failure to sound the whistle or bell, at public crossings, is decided differently, in different jurisdictions, some States holding that they are entitled to presume a compliance with the law by the employer,[49] while others hold that such provisions are not for the benefit of employees at all, but that they are charged with a knowledge of the movement of trains upon the employer's track, irrespective of statutory signals.[50]

the superintendent saw a train approaching one hundred and fifty feet away and gave no warning, he was guilty of negligence." Dunphy v. Boston Elevated Ry. Co. (Mass. 1906), 78 N. E. Rep. 479.

"Where a brakeman was subject to the orders of a railroad yard foreman, and was inexperienced and not supposed to be acquainted with the dangers of the situation, the mere fact that he showed a willingness to undertake a particular work by offering to do it did not relieve the foreman from the duty of not directing him to do it if ignorant of the manner of doing it and of the dangers." King v. Woodstock Iron Co. (Ala. 1904), 42 So. Rep. 27.

[49] A statute, requiring a whistle and bell, on approaching a road crossing, is held, in Kentucky, to give a right of action to a sectionman, where it was not given, when such warning, if given, would have prevented the injury. Illinois Cent. R. Co. v. McIntosh, 80 S. W. Rep. 494; Cahill v. Cincinnati, etc., R. Co., 92 Ky. 345; 18 S. W. Rep. 2; Louisville & N. R. Co. v. Survant, 44 S. W. Rep. 88; Louisville & N. R. Co. v. Bodine, 59 S. W. Rep. 740; Wilmuth's Admr. v. Illinois Cent. R. Co., 76 S. W. Rep. 193.

Where pedestrians are to be expected at the point where a track is used by foot men, it is incumbent upon the operatives of the engine to give timely warning. Cincinnati, etc., R. Co. v. Hill's Admr. (Ky.), 89 S. W. Rep. 523; 28 Ky. Rep. 530.

[50] A trackman, killed near a crossing, is held not entitled to take advantage of the statutory warning by whistle or bell, in Ohio. Norfolk & W. R. Co. v. Gesswine, 144 Fed. Rep. 56.

Failure to give warning by ringing bell or sounding whistle, is not negligence as to an employee, who knew a train was due. Fore v. Chicago & Alton R. Co., 114 Mo. App. 551; 89 S. W. Rep. 1034.

An employee in a yard, shoveling snow, has no right to rely upon warning of the approach of trains and he cannot recover if he is injured by an engine running without whistle or bell being sounded. Riccio v. New York, N. H., etc., R. Co., 189 Mass. 358; 75 N. E. Rep. 704.

§ 270. **Same — Warnings of cars and tracks to be given, when.**— As a warning is not usually required as to causes which could not be anticipated as likely to produce an injury, it is not required that the employer give notice of the things with which the employees are familiar, or can see for themselves, such as switch stands, or obvious obstructions near or adjoining the railroad track. Such things being obvious, it is not to be presumed that an employee will come in contact therewith, or receive an injury therefrom and hence no duty of warning as to such things is required.[51] Where, however, the employer has reason to know that such obstructions may cause injury; that his employees are not familiar therewith, or, if familiar, where the duties of the service are such as to require constant attention and an injury from such cause is reasonably to the apprehended, then warning ought to be given and a failure to give such warning, will be held negligence.[52]

And the same rule applies as to defects in or movements of cars; if the employees are familiar therewith, or the movement of the cars or trains are such that they can readily be seen and appreciated, no duty of warning exists,[53] but as

[51] No warning is ordinarily due from a cause not likely to be anticipated. Parish v. Missouri, K. & T. R. Co. (Texas), 76 S. W. Rep. 234; St. Louis, S. W. Ry. Co. v. Spivey (Texas), 76 S. W. Rep. 748; Clark v. Missouri, K. & T. R. Co., 179 Mo. 66; 77 S. W. Rep. 882.

No duty to instruct or warn employees of switch stands, culverts or obstructions, with which they are familiar. Denver & R. G. Co. v. Burchard (Colo.), 86 Pac. Rep. 749; Price v. Central of Ga. Ry. Co., 124 Ga. 899; 49 S. E. Rep. 683; 53 S. E. Rep. 455.

[52] For negligence in failing to warn train crews of lumber piles or similar obstructions, near railroad track, of which they are ignorant, see Bradburn v. Wabash R. Co. (Mich.), 96 N. W. Rep. 929; Illinois Ter. R. Co. v. Thompson, 210 Ill. 226; 71 N. E. Rep. 328; Northern Ala. R. Co. v. Mansell, 138 Ala. 548; 36 So. Rep. 459.

As to insufficient warning of obstructions near track, where the warning would not sufficiently advise employee of the exact location of the danger, see Bradburn v. Wabash R. Co. (Mich.), 96 N. W. Rep. 929.

[53] The mere fact of minority does not impose any greater degree

to youthful or inexperienced employees, or such as the employer should reasonably apprehend are unfamiliar with the dangers to be anticipated in the service, a warning reasonably sufficient to inform them of the probable danger should be given.[54]

of care upon the employer than would be imposed were the employee of full age. Decatur Car Mfg. Co. v. Terry (Ala.), 41 So. Rep. 839.

"A railroad company was not bound to notify an employee of the danger of being struck by cars as he was walking along its track, unless it ought to have anticipated that he would be there at the time he was struck and killed." Lord v. Boston & M. R. Co. (N. H. 1906), 65 Atl. Rep. 111.

[54] The employer is bound to warn youthful or inexperienced employees of the danger of handling engines or cars and the risks incident thereto. Gulf, etc., R. Co. v. Newman (Texas), 64 S. W. Rep. 790; Texas & Pac. R. Co. v. Utley, 66 S. W. Rep. 311.

A card, placed on either side of a crippled car, is usually the only notice thereof required. Shuster v. Philadelphia, etc., Ry. Co. (Del.), 62 Atl. Rep. 689.

As to an experienced employee, there is no duty on the part of a railroad company, moving cars in its railroad yards, to keep a watchman to give notice to its employees of such movement, or to give other warning by bell or whistle, for this is the object of constructing the tracks and this is the duty of the employees to so operate the cars and locomotives thereon.

Considering the existence of any such duty, on the part of railroad companies, the Supreme Court of the United States, in Aerkfetz v. Humphries (145 U. S. 418; 36 L. Ed. 758), Mr. Justice Brewer delivering the opinion, said: "We observe that the plaintiff was an employee and, therefore, the measure of duty to him was not such as to passengers or strangers. * * * There were no strangers whose presence was to be guarded against. The ringing of bells and the sounding of whistles on trains going and coming and switch engines moving forward and backward, would have simply tended to confusion. The person in direct charge had a right to act on the belief that the various employees in the yard, familiar with the continuously recurring movement of cars, would take reasonable precautions against their approach. * * * It cannot be said, under these circumstances, the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employees who had all the time knowledge of what was to be expected."

This decision is cited with approval, by the Missouri court, in the oft cited case of Loring v. Kansas City, etc., R. Co. (128 Mo., p. 359),

§ 271. **Obligation to repair appliances.**— To prevent injuries to employees from tools, machinery or appliances, made defective by the continuous friction and deterioration incident to the use in the given business, the employer is held, in law, to the duty of repairing appliances or machinery that have become defective by use.[55] In case of an injury due to a failure to repair a known defective appliance, or due

where Judge Gantt, for the court said: "If the law exacts of a traveler upon a highway the duty of looking and listening, *a fortiori*, it demands of an employee, familiar with the usages and dangers of a switch yard, that he look before he steps upon the track upon which his daily experience teaches him a train, or an engine, may pass at any moment."

An employee at work elsewhere than at a street crossing cannot complain of the engineer's failure to sound the bell or whistle at the crossing. Fore v. Chicago & A. R. Co., 114 Mo. App. 551; 89 S. W. Rep. 1034.

If the operatives of a train have reason to expect the presence of persons on the track, notice by whistle or bell ought to be given. Cincinnati & N. O. Ry. Co. v. Hill's Admr., 89 S. W. Rep. 523; 28 Ky. L. R. 530.

Where it is the established practice of a railroad company to run special trains without notice, sending out an engine with a snow-plow, without notice, in a storm, is not negligence, as to a trackman, injured by the engine. Olsen v. St. Paul, M. & M. R. Co., 38 Minn. 117; 35 N. W. Rep. 866.

A person who has rightfully entered a pay car, on the stopping of the train to which it is attached, is entitled to a reasonable time for the transaction of his business before the train is started and of a proper warning of the purpose or intent to start the train, to enable him to leave the car in safety, and for a failure to furnish him such opportunity, in case of injury, the company will be held liable, in damages. New York P. & N. R. Co. v. Coulbourn, 69 Md. 360; 18 Md. L. J. 823; 1 L. R. A. 541; 16 Atl. Rep. 208.

Where men are rightfully at work on a trestle, over which a railroad is operated, with a knowledge of the persons operating the railroad, who knew that the men are thereby placed in great danger, it is the duty of the company to operate and run its trains with care proportionate to the danger; and if it does not do so, it is negligent. Interstate T. R. C. R. Co. v. Fox (Kan.), 21 Pac. Rep. 797.

[55] Bailey, Mas. Liab. Inj. Serv., p. 33; St. Louis, I. M. & S. Ry. Co. v. Andrews (Ark.), 96 S. W. Rep. 183.

to an appliance so defective that in the exercise of ordinary care, by proper inspections, the defect could have been discovered, the employer will be answerable to the employee.[56]

But if the employee injured by a known defective appliance, at the time of his injury was engaged to place the appliance or tool in a proper condition for use, as where he was employed to repair it, the employer will not ordinarily be answerable for such an injury, for having undertaken the duty of repair, the employee will be held, in law, to assume the incidental risks attendant upon the duties to be performed, and if he is injured while making the repairs, he cannot generally recover for such an injury.[57]

The duty of repairing the appliances and places where the employees are required to work, however, is only ordinary care, and it is wrong to instruct the jury that it is the employer's duty to exert a high degree of diligence to keep a railroad track in repair,[58] as there is no greater degree of care required in this particular than in other specific duties imposed by the law upon the employer for the protection of his employees. Where, with knowledge of the railroad company, or its officers, however, a track has been permitted to accumulate cinders and clinkers, discharged from the engine, until it is in a dangerous condition for brakemen going between freight cars to make couplings, the employer will be responsible for an injury to a brakeman from stumbling over cinders, because of the failure to repair the track, or remove the cinders.[59] And where the track bolster, holding the circle of the crane to a steam shovel, had sunk, on account

[56] Baker v. Railroad Co., 95 Pa. St. 211.

[57] Bryant v. Railway Co., 66 Iowa 305; 23 N. W. Rep. 678; Carlson v. Railway Co., 21 Or. 450; 28 Pac. Rep. 497.

[58] Van Blarcom v. Central R. Co. (N. J.), 64 Atl. Rep. 111.

[59] St. Louis & S. F. R. Co. v. Ames (Texas), 94 S. W. Rep. 1112. This decision does not commend itself as in accord with the weight of authority, but seems to have been rendered by a court, anxious to recognize a liability.

of the rotten condition of the timber supporting it, and the employer's roadmaster, on discovering the defective timber, had only tightened certain bolts and continued to use the defective appliance, instead of repairing the machine, an employee, injured by the slipping of the chain from the circle, on account of the rotten condition of the timber thereof, was held entitled to recover.[60]

§ 272. **Duty to provide a reasonably safe system.**— The business of railroading being a more or less dangerous business, and complicated in its various details, it has been held, by some courts, that it is also an implied duty on the part of such employers to so systematize the business that it may be carried on in a reasonably safe manner, as distinguished from a mode or method of doing the business which would be held negligent.[61]

This duty is denied by eminent authority and it is sometimes stated that the employer can conduct his business in

[60] Southern R. Co. v. Wiley (Miss.), 41 So. Rep. 511.

The duty to repair appliances is just as imperative as the duty to inspect. Meehan v. Great North. Ry. Co., 101 N. W. Rep. 183; San Antonio, etc., Ry. Co. v. Hahl (Texas), 83 S. W. Rep. 27.

If a defect would have been apparent from a reasonably careful inspection, it is immaterial that the employer did not have actual notice thereof. Elliot v. St. Louis, etc., R. Co., 67 Mo. 272.

A failure, on the part of a railroad company, to keep its appliances in proper repair, was held to give a cause of action, in the following cases: Southern Ry. Co. v. Carson, 194 U. S. 136; 48 L. Ed. 907; Voelker v. Chicago, etc., Ry. Co. (a defective automatic coupler), 129 Fed. Rep. 522.

The company must keep its engines in repair and this duty extends to a step between the fireman's seat and the deck of the cab. Fry v. Great Northern Ry. Co. (Minn.), 103 N. W. Rep. 733; Smith v. Electric Co., 188 Mass. 371; 74 N. E. Rep. 664.

[61] Lockwood v. Chicago, etc., R. Co., 55 Wis. 50; 4 Thompson on Neg., § 4175, and cases cited; Austin v. Chicago, etc., R. Co., 93 Iowa 236; 61 N. W. Rep. 849; Hosic v. Chicago, etc., R. Co., 75 Iowa 683; 37 N. W. Rep. 963.

any manner that commends itself to him, so long as he is not negligent in the selection of appliances, places to work, employees or in some of the other specific matters detailed in preceding pages,[62] but since the employee in one department of a service as extensive as railroading cannot know or observe all the details of other departments of the business and to charge him with an assumption of the risk of injuries in such service would be sometimes unjust, it is perhaps the better rule to recognize a duty upon the part of the employer to use such reasonable care to systematize his business as is used by other employers in the same business.[63]

This does not mean that one company can be held negligent for not using the same system as some other company, where the business as conducted is reasonably safe, or that a company is held to the employment of the latest methods of the service, but only that reasonable care shall be used by the employer, or such system or method employed as is used by reasonably prudent employers.[64] For instance, if a company has a reasonably safe system of signaling in its switch yards, it cannot be held negligent for a failure to use a system of automatic signals,[65] nor can a tracklayer successfully complain of the method of laying a track, where a pinch-bar is used to push the track into position, as this is a reasonably safe method of doing the business and one usually employed, although there may be safer methods of doing the same work.[66]

[62] Bailey, Mas. Liab. Inj. Serv., pp. 14, 15, and cases cited.

[63] Keiley v. The Alliance, 44 Fed. Rep. 97; Breen v. St. Louis, etc., Co., 50 Mo. App. 202; Gassaway v. Georgia Southern Ry. Co., 69 Ga. 347; 4 Thompson on Neg., § 4176; Baxter v. Chicago, etc., R. Co., 104 Wis. 307; 80 N. W. Rep. 644.

[64] 4 Thompson on Neg., § 4175.

[65] McGregor v. Pennsylvania R. Co., 212 Pa. 482; 61 Atl. Rep. 1017.

[66] Gassaway v. Georgia Southern Ry. Co., 69 Ga. 347.

§ 273. **Same — Necessity for some system to prevent collisions.** — Railroading is such a hazardous business, in all its details, and the employees of one train, from the very nature of their service, can know so little about the movements of other trains on the tracks of their employer, that it is very generally held that the employer should adopt some system to avoid collisions between cars and engines and that trains should only be operated according to a fixed custom or system, which should be brought home to the knowledge of the operatives of the various trains.[67] It is, of course, not essential that any particular system should be adopted, or that of any particular company or section, but only that a reasonably safe system be used to avoid collisions between trains[68] and to prevent trains or cars from striking employees otherwise engaged than in the operation of trains.[69]

[67] It is held to be negligence for a railroad company to fail to adopt some system or method to prevent collisions between its trains where one train is ahead of time and disobeys orders and notice of its disobedience is brought home to the dispatcher, in time for him to have prevented the collision. Sante Fe Pac. R. Co. v. Holmes, 136 Fed. Rep. 66; 68 C. C. A. 634; 202 U. S. 438; 26 Sup. Ct. Rep. 676; 50 L. Ed. 1094.

[68] Some method should be provided by the employer, a railroad company, to prevent the collision of cars being set out on both a side track and the main track, by waiting a sufficient time for those on the main track to get far enough away, before shunting cars in on the side track. Struble v. Burlington, etc., R. Co. (Iowa), 103 N. W. Rep. 142; Smith v. Boston, etc., R. Co., 73 N. H. 325; 61 Atl. Rep. 359; Rosne v. Erie R. Co., 135 Fed. Rep. 311; 68 C. C. A. 155.

The method of having one of the brakemen on a train, used in a freight yard, to keep a lookout for employees on the track, is not essential, where other reasonably safe precautions are employed. Lewis v. Vicksburg, etc., R. Co., 114 La. 161; 38 So. Rep. 92.

[69] Where employees are seen walking on the track, or they are accustomed to use the track, it would be negligence for the employer to fail to adopt some means of avoiding striking them, or to have its trains slow down in such places. Martin v. Chicago & N. W. R. Co., 194 Ill. 138; 62 N. E. Rep. 599; Louisville & N. R.

It is held that it is not negligence to adopt a block system [70] or any particular number of telegraphic stations, at fixed distance from each other to regulate the running of trains; [71] it is generally sufficient to regulate the operation of trains by telegraphic orders, from a chief dispatcher, who bases his orders on information from local agents,[72] and,

Co. v. Simpson's Admr., 23 Ky. L. R. 1075; 64 S. W. Rep. 750; St. Louis, S. W. R. Co. v. Jacobson (Texas), 66 S. W. Rep. 111; Southern Ry. Co. v. Craig, 113 Fed. Rep. 76; Louisville & N. R. Co. v. Lowe (Ky.), 6 S. W. Rep. 736; Pennsylvania R. Co. v. Maroney, 22 Ohio Cir. Ct. 469; 12 O. C. D. 366; Galveston, etc., R. Co. v. Quay (Texas), 66 S. W. Rep. 219; Houston, etc., R. Co. v. Turner (Texas), 91 S. W. Rep. 562; Cason's Admr. v. Covington, etc., R. Co. (Ky.), 93 S. W. Rep. 19; 98 S. W. Rep. 304; Dunphy v. Boston El. Ry. Co. (Mass.), 78 N. E. Rep. 479; Mills v. Missouri Pac. R. Co. (Mo.), 94 S. W. Rep. 973; Houston, etc., R. Co. v. Fanning (Texas), 93 S. W. Rep. 344; Alecson v. Erie R. Co., 91 N. Y. S. 1029; 101 App. Div. 395; Peoples v. North Car. R. Co. (N. C.), 49 S. E. Rep. 87; International & G. N. R. Co. v. Jacobs (Texas), 84 S. W. Rep. 288.

[70] "Where, in an action for injuries to a brakeman by his foot becoming caught in an unblocked frog, there was undisputed proof that on some of the railroad systems in the State and elsewhere it was customary to leave frogs unblocked, and on others to block them, and the frogs on some parts of defendant's lines were blocked and on others not, and also that there was a fair difference of opinion among practical railroad men as to which was the safer practice, defendant's failure to block the frog in question did not constitute actionable negligence." Wabash R. Co. v. Kithcart (U. S. C. C. A., Iowa, 1906), 149 Fed. Rep. 108.

"A street railroad does not fail to furnish a sufficient block-light system, so as to be liable for injury to a motorman from collision with another car on the block, where it appears that the accident could not have happened had the motorman and conductor of the other car performed their duty of turning on the light before entering on the block." Berg v. Seattle, R. & S. Ry. Co. (Wash. 1906), 87 Pac. Rep. 34.

[71] A system of maintaining telegraph stations at such distances as is ordinarily safe for the proper running of its trains, is sufficient. Stewart v. Raleigh, etc., R. Co. (N. C.), 53 S. E. Rep. 877.

[72] The regulation of freight and passenger trains by telegraphic orders from a chief dispatcher, based on information reported by

generally, any system will be held sufficient which is in general vogue in railroading, or which is reasonably safe, if not the best or most approved system known to those skilled in the business, or, what is the same thing, if a negligent custom or system is discarded.[73]

§ 274. **Duty to protect employee from weather.**— It may well be doubted if there is any implied duty on the part of an employer to protect his employees from severe or inclement weather, in the absence of an assurance or promise so to do, as such obligation, to protect employees from injuries from natural causes, beyond the control of the employer, practically would make of him an insurer of the safety of his employees. Not only would the employee be held to assume the risk of injuries from inclement weather, because no negligence could be charged to the employer for a failure to control forces beyond his power, or a lack of knowledge of facts which the employee did not and could not, himself possess, but no liability would ordinarily result in such case, because the contributory negligence of the employee, in any case where negligence could properly be brought home to the employer, would also prevent a recovery by the employee.[74]

The general rule of nonliability for injuries from inclement weather, would not obtain, however, in a case where the severe condition of the weather was known by the employer and the exposure thereto was incurred by the employee upon an express promise or assurance of protection.

local agents of the movement of trains, is held to be a proper system for the regulation of trains. Northern Pac. Ry. Co. v. Dixon, 139 Fed. Rep. 737.

[73] Every railroad company must see to it that a negligent custom is not established in the conduct of its business. Pittsburg C. C., etc., R. Co. v. Nicholas, 165 Ind. 679; 76 N. E. Rep. 522.

[74] Crowley v. Appleton, 148 Mass. 98; 18 N. E. Rep. 675.

Accordingly in a Missouri case, where an employee was induced to shovel snow, in the night time, from a badly drifted track, upon the assurance that a warm car would be provided, near by, to enable him to warm in and the car was not provided and his feet were frozen, as a result of the exposure, he was held to have a cause of action sounding in tort.[75]

And in a Minnesota case, where an employee was sent out on the line of the defendant's road, in severe cold weather, to repair a wrecked caboose, nine miles from the nearest station, and the defendant knew that the plaintiff was illy provided with food, clothes or shelter and that he expected the defendant to send for him, a failure to do so as a result of which he was compelled to walk to the nearest station, and the exposure caused him to contract rheumatism, was held to render the defendant liable, for its negligence.[76] But before the employee could claim compensation from the employer for sickness, resulting from exposure, increasing a malady to which the employee was subject, his ignorance of the malady and the affect of the exposure would not alone entitle him to a verdict, but he would also have to show that the fact of the malady and the affect of the exposure thereon, was known to the employer, as well as the ignorance of the employee thereof.[77]

§ 275. **Duty in the employment of infants.**— In the absence of a statute preventing such employment, the mere employment of a minor, about dangerous work, without the parents's consent, is not negligence *per se,* so as to render the employer liable to the parent of such infant, in case of his injury or death.[78] Nor is it negligence *per se* for the employer to have a minor employee do a more dangerous

[75] Hyatt v. Hannibal & St. Joe R. Co., 19 Mo. App. 287.

[76] Schumaker v. St. Paul & D. R. Co., 46 Minn. 39; 48 N. W. Rep. 559; 12 L. R. A. 257.

[77] Crowley v. Appleton, 148 Mass. 98; 18 N. E. Rep. 675.

[78] Pennsylvania R. Co. v. Long, 94 Ind. 250; Texas & Pacific R.

class of work than that for which he was employed,[79] and in many States, even where there is a statute preventing the employment of infants of a certain age, the mere fact of such employment is not negligence sufficient to render the employer liable for an injury to an infant so employed.[80]

But the federal court has held that it is an act of negligence for a railroad company to employ, as a brakeman, an infant of such tender years as to be unable to understand the risks of the business, if his infancy is known to the company when he is employed and the contract is made without the consent of the parent.[81] A company that changes a minor employee from the business of shoveling to that of braking on the railroad, is prevented from setting up the lack of skill of such infant, as a defense to an action for an injury,[82] and, in some States, where a statute prevents the employment of infants, an injury to one employed in violation of the statute, is sufficient evidence of negligence to support a recovery for such injury.[83]

Co. v. Carlton, 60 Tex. 397; Texas & N. O. Ry. Co. v. Crowder, 61 Tex. 262.

[79] Anderson v. Morrison, 22 Minn. 274.

[80] Belles v. Jackson, 4 Pa. Dist. R. 194; Ash v. Verlenden, 154 Pa. St. 246; 26 Atl. Rep. 374; White v. Whitman Co., 58 Hun 381; 12 N. Y. Supp. 188; 131 N. Y. 631; 30 N. E. Rep. 236.

A railroad company that employs a minor, knowing him to be such, and of years not sufficient to enable him to understand the nature of the hazards to which he is exposed, will be liable for injuries to him received in such service; but if the company believed him to be of age, when employed, it would not be liable for his injury, or lack of experience in the business, although his parents had not consented to the employment. Goff v. Norfolk & Western R. Co. (C. C. W. D. Va.), 36 Fed. Rep. 299.

[81] Goff's Admr. v. Norfolk & Western R. Co., 36 Fed. Rep. 299.

[82] Goins v. Chicago R. I. & Pac. R. Co. 37 Mo. App. 221. But where railroad company was ignorant of infancy or there were facts to put it on inquiry see Yeull v. Sioux City & Pac. R. Co., 66 Iowa 346; 23 N. W. Rep. 736.

[83] Hicke v. Taffe, 99 N. Y. 204; 1 N. E. Rep. 685; 52 Am. Rep. 19; Cooke v. Lorance Co., 33 Hun 351; Flynn v. Erie Co., 12 N. Y. St. Rep. 88.

CHAPTER XII.

NEGLIGENCE OF INDEPENDENT CONTRACTORS.

§ 276. Who considered independent contractor.
277. Contractors distinguished from employees.
278. Owner not liable for negligence of contractor.
279. Acts of contractor's employees.
280. How existence of relation determined.
281. Franchise cannot be devolved upon contractor.
282. Where contractor performs nondelegable duty.
283. Railway company retaining control or supervision of work.
284. Where work is inherently dangerous.
285. Contract for performance of unlawful acts.
286. Where injury is caused by defective plans.
287. Acceptance of defective work by contractee.
288. Appliances furnished by railroad company.
289. Joint undertaking renders either party liable.
290. Status of contractor and subcontractor.
291. Tortious acts of contractor, generally.
292. Contract between construction company and railroad company.
293. Management of trains by construction company.
294. Injuries from frightening teams.
295. Injuries to passengers by independent contractor.
296. Injuries to travelers in streets.
297. Injuries to employees of contractor.
298. Negligence of railway surgeons.
299. Railroad hospital — Physicians company agents, when.
300. Contracts exempting railroad company from liability.

§ 276. **Who considered independent contractor.**— An employment is regarded as independent when the person renders service in the course of an occupation representing the will of an employer only as to the result of the work and not as to the means by which it is accomplished.[1] The reser-

[1] Chicago, etc., R. Co. v. Ferguson, 3 Colo. App. 414; Fink v.

vation to the employer of the privilege of supervising and inspecting the work of the contractor does not destroy or impair his character as an independent contractor, if the appliances and means of performing the work are furnished by the contractor,[2] and one to whom a railroad company has let a contract for the performance of certain work, without reserving any control over the persons employed in the work, is held to be an independent contractor and not an employee of the railroad company.[3]

As recently defined by the Missouri Supreme Court, an independent contractor is one who "undertakes to do a specific piece of work for another, without submitting himself to such other's control in the details of the work, save as to the result of the work."[4]

This is the definition usually given and from this it will be seen that if a person contracts to do a specific piece of work, furnishing his own employees and assistants and executing the contract in the performance of the labor, either entirely according to his own ideas, or in accordance with a plan furnished by the one for whose benefit the work is done, without being under the latter's supervision, as to the details of the contract, he is generally held to be a contractor and not an employee.[5]

Missouri, etc., Co., 82 Mo. 276; reversing 10 Mo. App. 61; Gayle v. Missouri Car, etc., Co., 177 Mo. 427; 76 S. W. Rep. 987; Bibb v. Norfolk, etc., R. Co., 87 Va. 711; 14 S. E. Rep. 163; 47 Am. & Eng. R. Cas. 651; Cunningham v. International, etc., R. Co., 51 Texas 503; Powell v. Virginia, etc., Co., 88 Tenn. 692; 13 S. W. Rep. 691.

[2] Bibb v. Norfolk, etc., R. Co., 87 Va. 711; 14 S. E. Rep. 163; 47 Am. & Eng. R. Cas. 651.

[3] St. Louis, etc., R. Co. v. Yonley, 3 Ark. 503; 14 S. W. Rep. 800; 45 Am. & Eng. R. Cas. 578.

[4] Gayle v. Missouri Car, etc., Co., 177 Mo. 427; 76 S. W. Rep. 987.

[5] Fink v. Missouri, etc., Co., 82 Mo. 276; Long v. Moon, 107 Mo. 334; 17 S. W. Rep. 810; Miller v. Minnesota, etc., R. Co., 76 Iowa 655.

But if, instead of working under a separate contract for the performance of the work, the employer either reserves the employment of the assistants, or the furnishing of the appliances, or otherwise interferes with the accomplishment of the details of the work, instead of leaving same to the judgment and discretion of the contractor, in performing the details of the work, the relation of employer and employee and not that of owner and contractor will be held to exist, for otherwise the nondelegable duties of the employer, in the duty of furnishing reasonably safe appliances and places of work, and a sufficient number of competent employees, could always be avoided by the delegation of work, by the piece, to an independent contractor.[6] If a contractor, therefore, is but exercising the usual corporate powers of a railroad company, as where a contractor undertakes to reconstruct a piece of the railroad track of a railroad company, and the details of the work and other matters are reserved to the railroad company, in part, he must be regarded as the agent and not the contractor of such company and the railroad company will be liable, so far as the general public is concerned, for his acts.[7]

[6] Fell v. Rich Hill, etc., Co., 23 Mo. App. 216; Rice v. Smith, 171 Mo. 331; 71 S. W. Rep. 123.

[7] Toledo, etc., R. Co. v. Conroy, 39 Ill. App. 351.

A contract to pay by the job is usually held to be strong evidence that the relation of employer and employee does not exist. Gayle v. Missouri Car, etc., Co., 177 Mo. 427; 76 S. W. Rep. 987.

The method of payment is always a circumstance to be considered in determining the exact relation existing. And where the work is paid for, in a lump sum, on completion, the fact that the work was to be performed to the satisfaction of the owner, will not make him liable for the injuries due to negligence of the contractor. Indiana, etc., Co. v. Gray, 19 Ind. App. 565; 48 N. E. Rep. 803; Miller v. Minnesota, etc., R. Co., 76 Iowa 655.

The proper inquiry always is, "Who had control of the execution of the work being performed?" Charlock v. Freel, 125 N. Y. 357; 26 N. E. Rep. 262.

§ 277. **Contractors distinguished from employees.**— The absence of the rule of agency, which renders the principal responsible for the act of the agent, within the scope of his employment, is the distinguishing feature between a contractor and an employee of a railroad company.

If a railroad company contracts for the construction of its road in such a manner that the contractor has a right to direct the details of the construction, and to control the mode in which the work is to be done, as well as the agencies employed, the company only reserving the right to insist that the work, when completed, shall conform to the terms of

The test for determining the character of the relation is not the method of payment alone, but whether the employee or contractor used his own means or methods for accomplishing the work, or that of the owner. Morgan v. Smith, 159 Mass. 570; 35 N. E. Rep. 101; Klages v. Gillett-Herzog Co., 86 Minn, 458; 90 N. W. Rep. 1116. See, also, Loehring v. Westlake Const. Co., 118 Mo. App. 163; 94 S. W. Rep. 747; Scharf v. Southern Ill., etc., Co., 115 Mo. App. 157; 92 S. W. Rep. 126.

The following is the definition given in the interesting article in Cyc, of an Independent Contractor: "An independent contractor is one who, carrying on an independent business, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer, as to the means by which the result is to be accomplished, but only as to the result of the work." 26 Cyc. Law & Proc., pp. 1546, 1547, and cases cited. See, also, Norfolk, etc., R. Co. v. Stevens, 97 Va. 631; 34 S. E. Rep. 525; 46 L. R. A. 367; Smith v. Simmons, 103 Pa. St. 32; 49 Am. Rep. 113.

"Where an employer assumes the relation of employer to the employees of one whom he has engaged to produce a given result, the duties and responsibilities which the law imposes on such a relation attach." Kansas City & O. Ry. Co. v. Loosley (Kan. 1907), 90 Pac. Rep. 990.

The mode of payment by itself is not a reliable test of the existence of the relation, as a man may be an independent contractor, although paid by the day or week, or a given profit above the actual cost of the work or structure. 26 Enc. Law & Proc., p. 1551; Morgan v. Smith, 159 Mass. 570; 35 N. E. Rep. 101; Wabash, etc., R. Co., v. Farver, 111 Ind. 195; 12 N. E. Rep. 296; 60 Am. Rep. 696; Karl v. Juniata County, 206 Pa. St. 633; 56 Atl. Rep. 78; New Orleans, etc., R. Co. v. Reese, 61 Miss. 581.

the contract, the railroad company would not be liable for an injury resulting from the negligence of such contractor or his employees, for he would lack the status of an agent, in the performance of the work, and would be engaged in his own behalf.[8] For the same reason, a person who contracts to grade the roadbed for a railroad, at a stipulated price, the work to be done entirely by himself and those employed by him, is an independent contractor and not an agent of the railroad company, although the contract may provide that the work shall be finally completed to the satisfaction of the company's engineer.[9]

But when the details of the contract are to be completed under the orders of the railroad company employing the person to do the work and according to the direction of the railroad company, and the contractor only undertakes, in general terms, to perform the work, and the railroad company reserves the right and power, not only to direct what shall be done, but how it shall be done, and to control the doing of it, while it is being done, then the contractor is held not to be an independent contractor, in a Texas case,[10] but is held to be the agent or employee of the railroad company, so as to bind it for the negligence of the contractor or his employees.

§ 278. **Owner not liable for negligence of contractor.**— The rule was firmly established, at common law, that an owner or employer was not liable for an injury due to the negligence of an independent contractor.

In a carefully considered case, decided over half a cen-

[8] Rome, etc., R. Co. v. Chasteen, 88 Ala. 591; 7 So. Rep. 94; 40 Am. & Eng. R. Cas. 559; Arasmith v. Temple, 11 Ill. App. 39.

[9] Rogers v. Florence, etc., R. Co., 31 So. Car. 378; 9 S. E. Rep. 1059; 39 Am. & Eng. R. Cas. 348.

[10] Texas, etc., R. Co., v. Dudley, 1 Texas Civ. App. 271.

tury ago in England, [11] the doctrine of *respondeat superior* which holds the employer responsible for the wrongful acts of his employees, performed within the usual scope of the employment, was denied as to the employer of a contractor or subcontractor, where the relation of employer and employee did not exist and this rule is now firmly established. In this case,[12] a railway company had entered into an inde-

[11] Knight v. Fox, 1 E. L. & E. R. 477; 20 L. J. (N. S.) Exch. 65; 14 Jur. 963, decided November 5, 1850.

[12] In Knight v. Fox, *supra*. Alderson B., said: "On the evidence, it appears that Cochran, when he did that negligent act, was acting as a subcontractor and did it on his own account. The defendants were not concerned in the matter and the plaintiff's action, should therefore, have been brought against him." And Pollock, C. J., also said: "No doubt, taking the case as it stands, you may, by rejecting some of the evidence, and perverting the rest, make out enough to persuade a jury to find for the plaintiff, sooner than let her go uncompensated for the injury she received. But it is otherwise, when you examine all the evidence; and here I may remark, that *when compensation is to come from the pockets of others, people are extremely liberal in awarding it.*" Human nature was the same in England, a half century ago, as evidenced by this expression of the learned Chief Justice, in this case, as it is in the United States to-day, and juries were then as prone to alleviate distress, in the guise of dispensing justice, as they are to-day. See, also, Quarnam v. Barnett, 6 M. & W. 499; Allen v. Hayward, 7 Q. B. 960; Rapson v. Cubitt, 9 M. & W. 710.

"A proprietor is not exonerated from liability for negligence in the doing of work let out to an independent contractor, unless he has used care to select a competent person as contractor." Mullich v. Brocker (Mo. App. 1906), 97 S. W. Rep. 549.

The owner, using due diligence in the employment of a reasonably careful contractor, who undertook to perform certain work in his own way, without being subject to the control of the owner, was held not liable for the negligence of the contractor, in the following cases: Steele v. Southeastern R. Co., 16 C. B. 550; 81 E. C. L. 550; Hobbitt v. London, etc., R. Co., 4 Exch. 254; Hole v. Sittingbourne, etc., R. Co., 6 H. & N. 488; 30 L. J. Exch. 81; 3 L. T. Rep. N. S. 750; Salliott v. King Bridge Co., 122 Fed. Rep. 378; 58 C. C. A. 466; 65 L. R. A. 620; Chicago, etc., R. Co. v. Ferguson, 3 Colo. App. 414; 33 Pac. Rep. 684; Leavitt v. Bangor, etc., R. Co., 89 Me.

pendent contract with A to construct a branch line of railroad for it. A contracted with B to erect a tubular bridge, as a parcel of the work. B had a surveyor, C, to whom he paid a fixed salary, by the year, to attend to his business, and after obtaining the contract for the bridge, B contracted with C to provide the necessary scaffolding, for which he was to receive the sum of 40£, irrespective of his salary, B to furnish the requisite materials, including lights. One of the poles of the scaffold rested on the highway, and owing to the want of sufficient light, to warn passers-by, D stumbled over the pole and was injured and subsequently additional lights were placed on the spot and B paid for them, but the court held that B was not liable for the injury to D, but that his remedy was against the contractor, C.

This decision, according to modern rules of law, would no doubt be decided the other way, as the liability of B would rest upon the neglect to furnish the lights, which he was obliged to furnish under the contract and to permit him to avoid liability, on the ground that C was an independent contractor, was equivalent to letting him set up his own wrong, in failing to do what he had agreed to do, in furtherance of his contract with C, as a result of which D sustained the injury sued for. In other words, the injury was due

509; 36 Atl. Rep. 998; 36 L. R. A. 382; Charlebois v. Gogebic, etc., R. Co., 91 Mich. 59; 51 N. W. Rep. 812; King v. New York, etc., R. Co., 66 N. Y. 181; 23 Am. Rep. 37; Stewart v. California, etc., Co., 131 Cal. 125; 63 Pac. Rep. 177; 52 L. R. A. 205; North Chicago R. Co. v. Dudgeon, 69 Ill. App. 67.

In Bush v. Steinman (1 B. & P. 404), and Sly v. Edgley (6 Esp. 6), which were followed by a few decisions in this country, the owner was held liable for the negligence of the contractor, but these decisions were subsequently overruled and this is not now the law in either England or America. Boswell v. Laird, 8 Cal. 469; 68 Am. Dec. 345; Morgan v. Bowman, 22 Mo. 538; Hoff v. Shockley, 122 Iowa 720; 98 N. W. Rep. 573; 101 Am. St. Rep. 289; 64 L. R. A. 538; Reedie v. London, etc., R. Co., 4 Exch. 244; 20 L. J. Exch. 65; 26 Enc. Law & Proc. (Cyc.) 1553.

proximately to the neglect of B, not to that of C, in some detail of the contract which he was to perform.

§ 279. **Acts of contractor's employees.**— The rule of *respondeat superior* applies only to cases where the relation of employer and employee exists and it does not apply as between an owner and the employees of an independent contractor.[13] In the absence of some authority to bind the owner, the employees of an independent contractor would not be held to possess such authority, as matter of law, any more than any other third parties, for as to such owner, with whom there is no privity whatever, it would be doing violence to legal principles to recognize any implied power to bind one who is not in any way responsible for their acts.

One is therefore not responsible for injuries occasioned by the acts of employees of one who has contracted to do a piece of work by the job.[14] A railroad company is not liable for an injury to a passenger due to a negligent act of the employees of an independent contractor,[15] and if a company by contract engages one to perform certain work, without reserving any control over the details of the work, the mere fact that an employee of such company assists in the work of the contractor, where he is subject to the control of the contractor and not of the company, in the performance of such work, will not be sufficient to render the company liable for an injury due to the negligence of the contractor, for the contractor and not the general employer is responsible for the acts of such employee, while he is acting for him and the relation of employer and employee would be held to exist between them.[16]

[13] Bibb v. Norfolk, etc., R. Co., 87 Va. 711; 14 S. E. Rep. 163; 47 Am. & Eng. R. Cas. 651; Carter v. Berlin, etc., Co., 58 N. H. 52.

[14] Clark v. Vermont, etc., R. Co., 28 Vt. 103.

[15] Daniel v. Metropolitan, etc., R. Co., 3 C. P. 591; 37 L. J. C. P. 280.

[16] Powell v. Virginia Const. Co., 88 Tenn. 692; 13 S. W. Rep. 691.

§ 280. **How existence of relation determined.**— If all the facts necessary for the determination of the relation of the parties are undisputed, or are conceded by the parties to the cause, it is the duty of the court, as matter of law, to determine whether one is an independent contractor, or an employee of a railroad company.[17] But where the facts are disputed, or are not conceded by the parties to the cause, the court should leave it to the jury, under proper instructions, to determine the issue and say whether one occupied the relation of a contractor or that of an employee.[18] This rule was applied, in a Missouri case,[19] where there was a conflict in the evidence of the owner's power to discharge the alleged contractor, and the Supreme Court held that where the evidence upon the right of the employer to discharge the employee was disputed, the court should leave it to the jury to find whether or not the employee was the agent of the owner, or an independent contractor.

A mere reservation by the employer of the right to demand the discharge of the contractor's employees, without a right to employ employees for the contractor, or a right to demand the employment of a sufficient force in kind and quantity to speedily accomplish the work, will not render the employer liable. 26 Enc. Law & Proc. 1552; McKinley v. Chicago, etc., R. Co., 40 Mo. App. 449; Cuff v. Newark, etc., R. Co., 35 N. J. L. 17; 10 Am. Rep. 205; Thomas v. Altoona, etc., R. Co., 191 Pa. St. 361; 43 Atl. Rep. 215.

But if the contractee reserves the right to discharge any of the contractor's employees, this will make him an employer, in Missouri. Larson v. Metropolitan, etc., R. Co., 110 Mo. 234; 19 S. W. Rep. 416; 16 L. R. A. 330; 33 Am. St. Rep. 439.

[17] Gayle v. Missouri Car, etc., Co., 177 Mo. 427; 76 S. W. Rep. 987; White, Personal Injuries in Mines, 539, and cases cited.

When an issue is raised and there is any dispute in the evidence, the issue should be submitted to the jury. Sacker v. Waddell (Md.), 56 Atl. Rep. 399; Cratt v. Albemarle, etc., Co., 132 No. Car. 151; 43 S. E. Rep. 597; Brennan v. Merchant, etc., Co., 205 Pa. 258; 54 Atl. Rep. 891.

[18] Gayle v. Missouri Car, etc., Co., 177 Mo. 427; 76 S. W. Rep. 987, and cases cited, *supra*.

[19] Gayle v. Missouri Car, etc., Co. *supra*.

However, the question whether or not a person is an independent contractor is a question of law for the court, where the duties and relation of the parties is evidenced by a written contract and the determination of the relation existing depends upon a mere construction of such contract, for the construction of a written instrument, as a general rule, is always a duty of the court, not of a jury.[20]

§ 281. **Franchise cannot be devolved upon contractor.**— A railway company cannot devolve upon an independent contractor the exercise of its franchise granted to it by the State, and if it attempts to do so, as where it undertook to permit a construction company to carry passengers generally for hire,[21] it remains liable for the acts of the contractor, in the exercise of its franchise rights, to the same extent as if it had itself occasioned the injuries sustained, by its own negligence.

It is held to be against the public policy of the State granting the charter to a railroad company, to permit it to devolve the important rights and duties upon another, not standing in such relation to the State as to make him responsible to it for a misuse of the charter privileges granted to the railroad company.[22]

But if the act causing the injury is one that does not

[20] Rogers v. Florence, etc., R. Co., 31 So. Car. 378; 9 S. E. Rep. 1059; 39 Am. & Eng. R. Cas. 348.

The issue whether or not one was an independent contractor or an employer, was held to be one of law for the court, subject to the existence of disputed facts, to be determined by the jury, in Emmerson v. Fay, 94 Va. 60; 26 S. E. Rep. 386.

[21] Chattanooga, etc., R. Co. v. Whitehead, 89 Ga. 190; 15 S. E. Rep. 44; Wisconsin, etc., R. Co. v. Ross, 142 Ill. 8; 31 N. E. Rep. 412; Lowell v. Boston, etc., R. Co. (by Shaw, C. J.), 23 Pick. (Mass.) 24.

[22] Balsley v. St. Louis, etc., R. Co., 119 Ill. 68; 5 Thompson on Cor., §§ 5584, 5585, 6293, and cases cited.

require the performance of the important charter rights granted to the railroad company by the State, for the non-exercise or wrongful exercise of which the charter of the company could be forfeited by the State, the railroad company will not be responsible for the wrongful acts of the contractor.[23]

And where the injury is to an employee of a railroad company, that has leased the roadbed, track and rolling stock of another railroad, the current of authority, in the absence of a statute imposing such liability on the lessor, is to the effect that the lessee alone will be responsible to the employee for such an injury, for the employee is required to look to his own employer for compensation for his injuries, as no duty would be implied by law, on the part of the lessor company, which has assumed no duties toward him at all.[24]

[23] Alabama, etc., R. Co. v. Williams, 92 Ala. 277; 9 So. Rep. 203; Sanford v. Pawtucket, etc., R. Co., 19 R. I. 537; 35 Atl. Rep. 67; 33 L. R. A. 564; 4 Am. & Eng. R. Cas. (N. S.) 318.

[24] Buckner v. Richmond, etc., R. Co., 72 Miss. 873; 18 So. Rep. 449; East Line, etc., R. Co. v. Culberson, 72 Texas 375; Virginia, etc., R. Co. v. Washington, 86 Va. 629; 43 Am. & Eng. R. Cas. 688.

"Where an injury to a third person results from the failure of the employer to perform a duty which he owes to such party, he cannot avoid his liability by letting the performance of the work to another." St. Louis, etc., R. Co. v. Madden (Kan. 1908), 93 Pac. Rep. 586.

Railroad companies have been held incapable of delegating their franchises and consequently liable for the acts of a contractor or lessee, arising from an attempt to exercise franchise rights, in the following cases: Boyd v. Chicago, etc., R. Co., 217 Ill. 332; 75 N. E. Rep. 496; 108 Am. St. Rep. 253; Metropolitan R. Co. v. Dick, 87 Ill. App. 40; North Chicago R. Co. v. Dudgeon, 184 Ill. 476; 56 N. E. Rep. 796; Solomon R. Co. v. Jones, 30 Kansas 601; 2 Pac. Rep. 657.

But this rule is not without cases denying its application. Kansas Central R. Co. v. Fitzsimmons, 18 Kansas 34. And if the contract is for the contractor to construct a railroad and not to operate it, it is not an exercise of the franchise rights of the company. Boyd v. Chicago, etc., R. Co., 217 Ill. 332; 75 N. E. Rep. 496;

§ 282. **Where contractor performs nondelegable duty.**— It may be confidently stated, as a general proposition, that where the law devolves a specific duty upon the railroad company, either in the capacity of a carrier, or as an employer, it cannot avoid a liability for a failure to discharge this duty in the capacity where the law imposes it, by delegating the performance of such a duty to an independent contractor, for to permit it to do so would be to let it take advantage of its own illegal act.[25]

The law places upon the carrier of passengers, for hire, the highest degree of care to provide safe appliances and vehicles for the transportation of passengers received by it and it cannot avoid this duty by delegating these public duties to an irresponsible independent contractor.[26]

A railroad company owes the duty to the public to keep its tracks and roadbed free from obstructions caused by standing cars, or other objects, likely to effect collisions, resulting in the injury of its passengers or employees and if it fails to do so, and permits stationary cars to stand where a collision is caused and injuries consequently effected, it cannot avoid the liability therefor, by the defense that the work of unloading the cars was delegated by it to an independent contractor, or lessee, whose employees' negligence was directly responsible for the injuries sustained.[27]

108 Am. St. Rep. 253; Atlanta, etc., R. Co. v. Kimberly, 87 Ga. 161; 13 S. E. Rep. 277; 27 Am. St. Rep. 231; Sanford v. Pawtucket R. Co., 19 R. I. 537; 35 Atl. Rep. 67; 33 L. R. A. 564; Cunningham v. International, etc., R. Co., 51 Texas 503; 52 Am. Rep. 632.

[25] Fowler v. Sacks, 7 Mackey (D. C.) 507; 7 L. R. A. 649.

[26] 1 Thompson on Neg., § 665, and cases cited; Texas Midland R. Co. v. Griggs (Texas), 106 S. W. Rep. 411. A carrier that uses a station under the control of its lessee, impliedly agrees with its passengers that it is reasonably safe for the purpose and it cannot escape liability for an injury from the defective condition of the station, because of the terms or conditions of such a lease. Kuhlen v. Boston, etc., R. Co. (Mass.), 79 N. E. Rep. 815.

[27] Montgomery Gas Co. v. Montgomery, etc., R. Co., 86 Ala. 372;

§ 283. **Railway company retaining control or supervision of work.**— A railroad company is responsible for the negligence of workmen, although they are actually employed by an individual who has contracted to construct a portion of the railroad for a stipulated sum, where the work is being done, under the direction and supervision of the railroad company itself.[28] Where the railroad company retains control over

5 So. Rep. 735. See, also, Texas, etc., R. Co. v. Juneman, 71 Fed. Rep. 939; 30 U. S. App. 541; 18 C. C. A. 349; Sanford v. Pawtucket R. Co., 19 R. I. 537; 35 Atl. Rep. 67; 33 L. R. A. 564; 4 Am. & Eng. R. Cas. (N. S.) 318.

In an action for injuries sustained in falling into an excavation on depot grounds, evidence *held* insufficient to show that the relation of independent contractor occupied by the contractors to the railroad company under the contract for doing the work was changed by a practical construction of the contract so as to constitute the contractors employees of the railroad company. Louisville & N. R. Co. v. Cheatham (Tenn. 1907), 100 S. W. Rep. 902.

For the violation of a statutory duty to construct stock guards on railroad right of way and a liability resulting therefrom, although the performance was delegated to an independent contractor, see Houston, etc., R. Co. v. Meador, 50 Texas, 77.

But where the statutory duty is imposed upon the company "or" a contractor and the neglect to perform it is that of the contractor, the owner could not be held liable. Koch v. Fox, 71 N. Y. App. Div. 288; 75 N. Y. Supp. 913.

A railroad company has been held incapable of avoiding liability by the delegation of nondelegable duties to an independent contractor, in the following cases: Lowell v. Boston, etc., R. Co., 23 Pick. (Mass.) 24; 34 Am. Dec. 33; Southern Ohio R. Co. v. Morey, 47 Ohio St. 207; 24 N. E. Rep. 269; City, etc., R. Co. v. Moore, 80 Md. 348; 30 Atl. Rep. 643; 45 Am. St. Rep. 345; Montgomery, etc., R. Co. v. Smith (Ala.), 39 So. Rep. 575; Taylor, etc., R. Co. v. Warner, 88 Texas 642; 32 S. W. Rep. 868; Carrico v. West Virginia R. Co., 39 W. Va. 86; 19 S. E. Rep. 571; 24 L. R. A. 50; Texas, etc., R. Co. v. Juneman, 71 Fed. Rep. 939; 18 C. C. A. 394.

Nor is it essential that the duty be imposed by statute, for if the law imposes the duty, it cannot be delegated, whether it is imposed by statute or not. Covington, etc., Co. v. Steinbrock, 61 Ohio St. 215; 55 N. E. Rep. 618; 76 Am. St. Rep. 375.

[28] Lowell v. Boston, etc., R. Co., 23 Pick. (Mass.) 24; Eaton v. European, etc., R. Co., 59 Me. 520. But see, Clark v. Hannibal, etc.,

the mode and manner of doing the work, the relation of independent contractor does not exist, and the employer is liable for an injury to a third person, due to the carelessness or wrongful act of the contractor, while he is engaged in the performance of the work for the railroad company.[29] If the railroad company undertakes to direct the manner of performing the work, or provides any of the instrumentalities, it then owes to the contractor and to his employees, the exercise of ordinary care in selecting such appliances and will be liable for an injury resulting from a failure to use such care.[30] And where the railroad company had employed another company to construct its railroad for it, under the terms of a contract which would not render it liable for the negligence of the contractor, but after abandonment of the contract by the contracting company, it took charge of the work and supervised it to completion, it would be liable for an injury due to the negligent manner of constructing the track or roadbed.[31] And the same result would follow an injury to an employee of the contractor, on a train, operated by the railroad company, for the use of the contractor's employees, for in operating the train and manning it with its own employees and agents the railroad company would assume the corresponding obligation of seeing that reasonable care was used to make it safe, as it would be the only one who could be legally held for injuries due to the negligent management of such train.[32]

R. Co., 36 Mo. 202; Stone v. Chesire, etc., R. Co., 19 N. H. 427.

[29] Hughes v. Cincinnati, etc., R. Co., 39 Ohio St. 461; 15 Am. & Eng. R. Cas. 100; McMasters v. Pennsylvania R. Co., 3 Pittsb. (Pa.) 1.

[30] Roddy v. Missouri Pacific Ry. Co., 104 Mo. 234; 15 S. W. Rep. 1112.

[31] Savannah, etc., R. Co. v. Phillips, 90 Ga. 829; 17 S. E. Rep. 82; Atlanta, etc., R. Co. v. Kimberly, 87 Ga. 161.

[32] Chicago, etc., R. Co. v. Clark, 26 Neb. 645; 42 N. W. Rep. 703; 38 Am. & Eng. R. Cas. 192.

But the retention of supervision of the work of a contractor, of itself, would not render the railroad company liable for an injury resulting from the negligence of the contractor, where the railroad company had not in any way interfered with the independent action of the contractor in the doing of the work.[33] Nor would the railroad company be liable for an injury to a third person, due to the negligence of the contractor, where it had retained control over the manner of doing a specified portion of the work only and the injury resulted in the manner that the contractor had performed some other portion of the work.[34] And the mere right to insist that the work shall be completed subject to the satisfaction of the railroad company's engineer, will not render the railroad company liable for an injury due to the negligence of the contractor, although the engineer retains the right to insist upon the discharge of the objectionable employees of the contractor, for this would not amount to a retention of general supervision or control of the work being done, by the railroad company, or its agent.[35]

[33] Larson v. Metropolitan R. Co., 110 Mo. 234; 19 S. W. Rep. 416.

[34] Hughes v. Cincinnati, etc., R. Co., 39 Ohio St. 461; 15 Am. & Eng. R. Cas. 100.

[35] McKinley v. Chicago, etc., R. Co., 40 Mo. App. 449; Cuff v. Newark, etc., R. Co., 35 N. J. L. 17; Burmeister v. New York, etc., R. Co., 15 J. & S. (N. Y.) 264.

The right to control, as distinguished from the actual control of the contractor, is the test generally recognized in determining the relation of the parties. Hedge v. Williams, 131 Cal. 455; 63 Pac. Rep. 721; 32 Am. St. Rep. 366; Linnehan v. Rollins, 137 Mass. 123; 50 Am. Rep. 287. If the contractee retains the right of control it is immaterial that he left some of the details to the contractor, but if the method of attaining the result is left to the contractor, and only the result is to be in accordance with the stipulated plans of the contractee, the contractor is alone liable. Pickens v. Decker, 21 Ohio St. 212; 8 Am. Rep. 55; Parrott v. Chicago, etc., R. Co., 127 Iowa 419; 103 N. W. Rep. 352; Miller v. Merritt, 211 Pa. St. 127; 60 Atl. Rep. 508; O'Neill v. Blase, 94 Mo. App. 648; 68 S.

§ 284. **Where work is inherently dangerous.**— The general rule that a railroad company is not liable for the negligence of an independent contractor, does not apply where the resulting injury is one that might have been anticipated, as a direct or probable consequence of the performance of the work contracted for.[36] In a well-considered Arkansas case,[37] Judge Hemingway states this rule as follows: "If one employs another to perform a work which, from its nature,

W. Rep. 764; Louisville, etc., R. Co. v. Tow (Ky.), 63 S. W. Rep. 27; 66 L. R. A. 941.

The liability of an employer for the acts of his employees grows out of and is measured by the control of the former over the latter; and for the want of such control, the principal will not ordinarily be liable for the acts or neglect of the employees of a contractor or subcontractor. Gulf, etc., R. Co. v. Flake, 1 Texas Civ. App. 99; Pawlett v. Rutland, etc., R. Co., 28 Vt. 297; Reedy v. London, etc., R. Co., 4 Exch. 244.

It is not necessary that one who engages a contractor should take control over all features of the work to render him liable as employer to the contractor's employees, but the fact that he possesses a limited control will not entail such a liability if the contractor is left free to exercise his own will as to the means of accomplishing the result. Kansas City & O. Ry. Co. v. Loosley (Kan. 1907), 90 Pac. Rep. 990.

A right to supervise as to the result of the contractor's work, as distinguished from a right of control of the details of the work will not render the contractee liable. Hughes v. Cincinnati, etc., R. Co., 39 Ohio St. 461; McKinley v. Chicago, etc., R. Co., 40 Mo. App. 449; Omaha, etc., R. Co. v. Hargadine, 5 Neb. 418; 98 N. W. Rep. 1071; Eaton v. European R. Co., 59 Me. 520; 8 Am. Rep. 430; Boyd v. Chicago, etc., R. Co., 217 Ill. 332; 75 N. E. Rep. 496; 108 Am. St. Rep. 253; Pearl v. West End R. Co., 176 Mass. 177; 57 N. E. Rep. 339; 49 L. R. A. 826; 79 Am. St. Rep. 330; St. Louis, etc., R. Co. v. Knott, 54 Ark. 424; 16 S. W. Rep. 9.

[36] Southern Ohio R. Co. v. Morey, 47 Ohio St. 207; 24 N. E. Rep. 269; 7 L. R. A. 701; 43 Am. & Eng. R. Cas. 97.

[37] St. Louis, etc., R. Co. v. Yonley, 53 Ark. 503; 14 S. W. Rep. 800; 45 Am. & Eng. R. Cas. 578; Cooley, Torts, p. 646; Bower v. Peate, 16 Moak's Eng. R. 374; Callahan v. Chicago, etc., R. Co., 23 Iowa 562.

is necessarily dangerous * * * the employer cannot escape liability for the injury thereby done. In such cases, the injury flows from the doing of the act, as its natural consequence, and not from the manner in which the act is done."

This rule is based upon the interest of the general public and the concern of the State over the lives and limbs of its citizens, when the business of the contractor is likely to result in an injury to any considerable number of people. In such cases, the owner is not permitted to exempt himself from liability for injuries to the public, by employing an independent contractor, but will remain liable for such injuries as result, if inherently dangerous work is permitted to be proceeded with, in a manner likely to cause such injury, to the same extent as though the owner did the dangerous work himself.[38]

§ 285. **Contract for performance of unlawful acts.**— Where a contractor is employed to do an unlawful act, a person injured by such unlawful act or by any result of it, may recover damages from either the contractor or the employer, for the injuries sustained.[39]

[38] White, Per. Inj. in Mines, § 546, and cases cited. But see, Smith v. Benick, 87 Md. 610; 41 Atl. Rep. 59; 42 L. R. A. 277.

Where the work contracted for itself creates the danger, owner held liable, in Downey v. Low, 22 App. Div. 460; 48 N. Y. S. 207; Clowdis v. Fresno, etc., Co., 118 Cal. 315; 50 Pac. Rep. 373; Williams v. Fresno, etc., Co., 96 Cal. 14; 30 Pac. Rep. 961; 31 Am. St. Rep. 172; Wertheimer v. Saunders, 95 Wis. 573; 70 N. W. Rep. 824; 37 L. R. A. 146; Chicago, etc., Co. v. Meyers, 168 Ill. 139; 48 N. E. Rep. 66.

The running of frequent railroad trains over a grade crossing in a crowded street is a business fraught with such danger to travelers that the railroad company cannot delegate to an independent contractor the operation of gates thereat and so escape liability for negligence of the gate tender. Boucher v. New York & R. Co. (Mass. 1907), 82 N. E. Rep. 15.

[39] Houston, etc., R. Co. v. Van Bayless, 1 Texas Civ. App. 247.

When the laying of a railroad track necessitates the digging up of a highway and the obstruction of it with earth and materials, the obstruction so formed is a public nuisance, unless properly guarded and the railroad company will be liable for the injuries caused thereby, when the work is done under a permit issued to it, although the work is actually done by an independent contractor.[40]

But, as a general rule, a railroad company will not be liable for an injury resulting from a nuisance, created by the negligence of an independent contractor, in constructing its railroad, where it retains no control over the contractor, except to see that the railroad is built according to contract.[41] In a Vermont case,[42] a horse was frightened at a steam shovel, being operated near a highway and ran away, throwing the plaintiff out of the buggy and injuring him. In the trial of the case, it appeared that the railroad company had contracted for the loading of certain ballast and that an independent contractor was operating the steam shovel at the time of the injury to the plaintiff. The trial court instructed

[40] Woodman v. Metropolitan R. Co., 149 Mass. 335; 21 N. E. Rep. 482; 38 Am. & Eng. R. Cas. 484; Taylor v. Dunn, 80 Texas 652; 16 S. W. Rep. 732.

[41] Atlanta, etc., R. Co. v. Kimberly, 87 Ga. 161; 13 S. E. Rep. 277; 47 Am. & Eng. R. Cas. 307.

[42] Bailey v. Troy, etc., R. Co., 57 Vt. 252.

Where the work is of an unlawful character or is so inherently dangerous as to amount to a nuisance, in case of a resulting injury, the employer of the contractor is held liable in the following cases: Woodman v. Metropolitan, etc., R. Co., 149 Mass. 335; 21 N. E. Rep. 482; 14 Am. St. Rep. 427; 4 L. R. A. 213; Wiggin v. St. Louis, 135 Mo. 558; 37 S. W. Rep. 528; St. Paul, etc., Co. v. Ware, 16 Wall. 566; 21 L. Ed. 485; Mullins v. Siegel, etc., Co., 183 N. Y. 129; 75 N. E. Rep. 1112; Williams v. Fresno, etc., Co., 96 Cal. 14; 30 Pac. Rep. 961; 31 Am. St. Rep. 172; Braisted v. Brooklyn, etc., R. Co., 46 N. Y. App. Div. 204; 61 N. Y. S. R. 674; Johnston v. Phœnix Bridge Co., 169 N. Y. 581; 62 N. E. Rep. 1096; Berg v. Parsons, 156 N. Y. 109; 50 N. E. Rep. 957; 41 L. R. A. 391; 66 Am. St. Rep. 542; Burbank v. Bethel, etc., Co., 75 Me. 373; 46 Am. Rep. 400.

the jury that a verdict might be returned against the railroad company, on account of the illegal nature of the work being done, but this was held to be error by the higher court, and it was decided that it was not an unlawful work, in itself, but only became so, when negligently done by the contractor and that the railroad company was not liable, unless it directed the work and retained supervision of the manner in which it was performed.

§ 286. **Where injury is caused by defective plans.**— Another exception to the rule of nonliability of a railroad company, for an injury resulting from the work of an independent contractor, in which the railroad company does not reserve the right to interfere and does not interfere or control the contractor, is in the case of an injury occurring through a defective plan or method prescribed or furnished by the railroad company itself and which the independent contractor has simply carried out, in the performance of the work under the contract. It is accordingly held that where the work of the contractor was in accord with plans and specifications of the employer and that the adherence to these plans so furnished, was the proximate cause of the injury, the railroad company would be liable therefor and could not avoid responsibility by the defense that the work was done by an independent contractor.[43]

But even when the work was carried out according to plans or methods prescribed by a railroad company, and this is the cause of the injury to an employee or third person, while the contractor is engaged in performing the work under the contract, if the plans were prepared by a skillful

[43] Jones v. Philadelphia Traction Co., 185 Pa. St. 75; 39 Atl. Rep. 889; Lancaster v. Connecticut, etc., Co., 92 Mo. 460; 5 S. W. Rep. 23; 1 Am. St. Rep. 739; Atlanta, etc., R. Co. v. Kimberly, 87 Ga. 161; 13 S. E. Rep. 277; 26 Am. St. Rep. 231; Koch v. Sackmann, etc., Co., 9 Wash. 405; 37 Pac. Rep. 703.

engineer or expert and due care was used in the selection of such expert to prepare the plans, then there would be no liability on the part of the employer, unless there was some interference in the plans on his part or in the work being done, as a result of which the injury was occasioned.[44]

§ 287. **Acceptance of defective work by contractee.**— Although a railroad company would not be responsible for an injury growing out of the original inherent dangerous nature of the work, plant or roadbed, constructed by an independent contractor, if it could not be regarded as a nuisance to the public, as this is essential to hold the contractee liable for an injury to a third person thereon, yet if, when finally completed, the work contracted for is so dangerous as to threaten injury to all who may come in contact with it and the railroad company, with knowledge of the fact, accepts the dangerous construction or work of the contractor, it will thereby be held to ratify and adopt the wrongful act of the contractor, to the extent of rendering it liable for an injury caused by such a nuisance.[45]

Hence it is, that where a dangerous railroad crossing over a highway is constructed by an independent contractor for the railroad company whose track crosses such highway, although it had nothing to do with the original construction of such a dangerous road crossing, yet if, after it adopts it and accepts it from the contractor, it continues to use it and because of the inherently dangerous nature of the crossing a third person, rightfully using the crossing, sustains a fatal injury thereon, the railroad company cannot avoid liability

[44] White v. Green (Texas), 82 S. W. Rep. 329; Burke v. Ireland, 26 N. Y. App. Div. 487; 50 N. Y. Supp. 369; 26 Cyc. Law & Proc. (Cyc.) 1559.

[45] Berberich v. Ebach, 131 Pa. St. 165; 18 Atl. Rep. 1008; Khron v. Brock, 144 Mass. 516; 11 N. E. Rep. 748; 1 Thompson on Neg., § 664, and cases cited.

for such an injury, by reason of the defense of an independent contract, under which such crossing was contructed, but by acceptance and user of the crossing in its dangerous condition, it will so far be held to adopt and ratify the wrongful act of the contractor, as to render it liable therefor.[46]

§ 288. **Appliances furnished by railroad company.**— The relation of employer and employee continues, not only so long as the employer reserves any control or supervision over the manner of doing the work, but also when he agrees to furnish the agencies or instrumentalities by which it is effected.[47]

The proposition is illustrated by a Missouri case,[48] where a railroad company had contracted for the movement of all its freight from a certain station, by the ton, and it agreed to furnish the cars and engines to be used and to keep them in repair. The plaintiff, at the time of his injury, was engaged in unloading and removing cars at an elevator and the injury was caused by running cars against those in which he was at work, without warning to him of the movement of the cars. Although the cars moved were under the control of the contractor's employees, it was held that they were employees of the railroad company, on account of the peculiar wording of the contract under which the work was being done, and the railroad company was liable for the injury.

A similar holding obtained, in a Massachusetts case,[49] where a railroad company furnished a defective derrick,

[46] *Ante idem;* Taylor, etc., R. Co. v. Warner, 88 Texas 642; 32 S. W. Rep. 868.

But see, *contra,* Atlanta, etc., R. Co. v. Kimberly, 87 Ga. 161; 13 S. E. Rep. 188.

[47] Shearm & Redf. on Neg., §§ 76, 77; Wood on Mas. & Serv. § 281; Fell v. Rich Hill, etc., Co., 23 Mo. App. 216.

[48] Speed v. Atlantic, etc., R. Co., 71 Mo. 303, 308.

[49] Conlon v. Eastern R. Co., 135 Mass. 195; 15 Am. & Eng. R. Cas. 99.

for use by a contractor and the plaintiff sustained injuries by the falling of the derrick.

But where a railroad company makes a contract for the construction of its road, or the performance of other work, and it is left entirely to the contractor to furnish the machinery or appliances to be used, the railroad company would not be liable for an injury to a person from the use of appliances furnished by the contractor,[50] and even though the railroad company itself furnished the appliances which caused the injury, if the injury was due to a failure to repair the appliances and this duty and the entire control thereof devolved upon the contractor, the railroad company would not be liable for an injury caused from a failure to repair the given appliances on the part of the contractor or its employees.[51]

§ 289. **Joint undertaking renders either party liable.**— Under the familiar rule that either of two joint wrongdoers can be held liable for an injury resulting from the wrongful acts of the two while engaged in some joint enterprise, a railroad company that enters into an arrangement whereby it jointly undertakes to carry out a piece of work, in connection with a contractor, is held liable for an injury to an employee of such contractor while engaged in furtherance of the joint undertaking, provided the injury results from the negligence of either of the two while engaged in the joint undertaking.[52]

[50] Chicago City R. Co. v. Hennessy, 16 Ill. App. 153.

[51] King v. New York, etc., R. Co., 66 N. Y. 181; 23 Am. Rep. 37. See, also, White, Per. Inj. in Mines, § 543, and cases cited. Omaha, etc., Co. v. Hargadine (Neb.), 98 N. W. Rep. 1071.

The mere fact that an employer furnishes some of the materials or appliances for the use of the employee or contractor, will not, of itself, make such contractor an employee, or render the employer liable for his negligence. Carter v. Berlin, etc., Co., 58 N. H. 52; 42 Am. Rep. 572; Smith v. Simmons, 103 Pa. St. 32; 49 Am. Rep. 113; Emmerson v. Fay, 94 Va. 60; 26 S. E. Rep. 386.

[52] Gayle v. Missouri Car, etc., Co., 177 Mo. 427; 76 S. W. Rep. 987.

In a Missouri case,[53] a railroad company furnished cars to be used by a quarry company that owned a switch connecting with the railroad track of the railroad company. The railroad company furnished a car with a defective brake and while using it on the switch of his employer, an employee of the quarry company sustained an injury for which suit was instituted. At the trial the railroad company contended that it owed such employee no duty at all, but the Supreme Court of the State said, on this contention: "We think each of these contracting parties owed to the other and his employees, the duty of properly discharging his part of the *joint undertaking,* in respect to any matter exclusively devolving upon him. Pickle had nothing to do with selecting and providing the cars. That duty was entrusted entirely to the defendant. They were intended for the use of Pickle and his servants, in discharging his part of the contract, and we think the obligation rested upon the defendant to use ordinary care to provide such as would be reasonably safe for such use."

§ 290. **Status of contractor and subcontractor.**— A contract between a contractor and a person undertaking the performance of a part of the work under a subcontract, may or may not establish the relation of independent contractor or employer and employee between the original contractor and such subcontractor, according to the terms and conditions of the contract.

The same tests for determining the existence of the relation apply between such original contractor and subcontractor that apply between the owner and the independent contractor and if the subcontractor undertakes to accomplish

[53] Roddy v. Missouri Pacific Ry. Co., 104 Mo. 235; 15 S. W. Rep. 1112; 24 Am. St. Rep. 333; 12 L. R. A. 746. See, for criticism of this rule, as applied to the peculiar facts of this case, White, Per. Inj. in Mines, § 540, note and citations.

the given result, by means of his own appliances and methods and by the work of his own employees, without regard to the control or supervision of the contractor such subcontractor alone and not the contractor, would be responsible for personal injuries resulting from the neglect of the employees engaged in the work.[54]

But if from the evidence showing the exact relation existing between the parties, it appears that the contract between the original and the subcontractor was not entered into in good faith, but to avoid the liability for neglect of the employees engaged in the work being carried on, or if the work was controlled in the details or the appliances furnished by the original contractor, then the contractor would be personally liable for the injuries resulting from the neglect of the employees of the subcontractor and he would not be held to occupy the status of an independent contractor to such original contractor.[55]

§ 291. **Tortious acts of contractor generally.**— Where no duty is imposed by contract or statute upon a railroad company, to build its railroad in any particular manner, it may contract for the construction of its road and the contract will not be held to be a delegation of its charter privileges, so as to render it liable for the unauthorized wrongs committed by the contractor or his employees, while engaged in the

[54] Green v. Soule, 145 Cal. 96; 78 Pac. Rep. 337; Powell v. Virginia, etc., Co., 88 Tenn. 692; 13 S. W. Rep. 691; 17 Am. St. Rep. 925; Larson v. American, etc., Co., 40 Wash. 224; 82 Pac. Rep. 294; 111 Am. St. Rep. 904; Richmond v. Sitterling, 101 Va. 354; 43 S. E. Rep. 562; 65 L. R. A. 445.

[55] Klages v. Gillett-Herzog Mfg. Co., 86 Minn. 458; 90 N. W. Rep. 1116; 26 Enc. Law & Proc. (Cyc.) 1552.

A construction company, under contract to construct a railroad roadbed, let a contract for grading a part of the road to a contractor, who sublet a part of it to a third person under a contract requiring the work to be performed under the supervision of the en-

work.[56] Where a company lets a contract to another to do a particular piece of work for it, reserving no control over the work, except the right to require it to conform to a particular standard when completed, the company will not be liable for the negligence of the party to whom the contract is let [57] and it is under no duty to take precautions against his possible negligence.[58]

When a competent contractor is selected and the work of constructing a railroad is entrusted to him, without the reservation of any control except as to the final result, the contractor being at liberty to select his own means and methods for doing the work, the contract does not create the relation of employer and employee, so as to render the railroad company liable for the neglect of the contractor, or his em-

gineer of the construction company, who was empowered to discharge employees of the third person, and to notify him to increase the force of men if necessary, and authorizing the contractor to concel the contract, and requiring the third person to save the contractor harmless from all damages that might be caused to the third person during the prosecution of the work, and giving the option to the contractor to pay directly to the laborers employed by the third person the wages due them. *Held*, that the contract between the contractor and the third person did not create the relation of employer and employee, but the third person was an independent contractor, and his employees could not, on receiving injuries, sue the contractor therefor. Good v. Johnson (Colo. 1907), 88 Pac. Rep. 439.

[56] Atlanta, etc., R. Co. v. Kimberly, 87 Ga. 161; 13 S. E. Rep. 277; 47 Am. & Eng. R. Cas. 307; Murtfelt v. New York, etc., R. Co., 102 N. Y. 703; 7 N. E. Rep. 404; 34 Hun 632; 25 Am. & Eng. R. Cas. 144.

[57] New Albany, etc., Co. v. Cooper, 131 Ind. 363; 30 N. E. Rep. 294; Hughes v. Cincinnati, etc., R. Co., 39 Ohio St. 461; 15 Am. & Eng. R. Cas. 100; Southern Ohio R. Co. v. Morey, 47 Ohio St. 207; McCafferty v. Spuyton-Duville, etc., R. Co., 61 N. Y. 178; Wabash, etc., R. Co. v. Farver, 111 Ind. 195; 12 N. E. Rep. 296; 31 Am. & Eng. R. Cas. 134; Roddy v. Missouri Pacific Ry. Co., 104 Mo. 234; 15 S. W. Rep. 1112.

[58] Daniel v. Metropolitan, etc., R. Co., 5 H. L. Cas. 45; 20 W. R. 37; 40 L. J. C. P. 121; 24 L. T. 815.

ployees, for resulting injuries either to third parties, or employees or passengers of the railroad company.[59]

But the courts will not permit a railroad company to delegate to a contractor any of the chartered rights or privileges granted to it by the legislature, as a corporation, so as to exempt it from liability for an injury that would otherwise accrue, from the ordinary exercise of its chartered powers, as a railroad corporation, the exercise of which, by the railroad company itself, are essential to its existence.[60] And if the company, after its line of road is finally constructed, enters into a contract for the movement of its cars or trains, by a contractor, with the right to employ his own motive power and employees necessary to move such cars, it will nevertheless remain liable for an injury due to the negligent manner in which such cars are moved by the contractor, although such contractor reserves the independent control over such cars.[61]

§ 292. **Contract between construction company and railroad company.**— In a well considered decision in the State of Kansas,[62] the Supreme Court of that State determined the

[59] Chicago, etc., R. Co. v. Ferguson, 3 Colo. App. 414; 33 Pac. Rep. 684; Bibb v. Norfolk, etc., R. Co., 87 Va. 711; 14 S. E. Rep. 163; 47 Am. & Eng. R. Cas. 651; Powell v. Virginia Const. Co., 88 Tenn. 692; 13 S. W. Rep. 691.

[60] Cunningham v. International, etc., R. Co., 51 Texas 503.

[61] Philadelphia, etc., R. Co. v. Hahn (Pa.), 12 Atl. Rep. 479; 32 Am. & Eng. R. Cas 24.

[62] St. Louis, etc., R. Co. v. Willis, 38 Kansas 330; 16 Pac. Rep. 728; 33 Am. & Eng. R. Cas. 397. In deciding this case, Simpson, C., for the court, said: "The contractual relation between the Ellsworth Railroad Company and the construction company excludes all consideration of the question of the one being the agent of the other. The *status* of the construction company is fixed by positive and express agreement as that of an independent contractor." See, also, Atchison, etc., R. Co. v. Davis, 34 Kansas 202; 25 Am. & Eng. R. Cas. 305; Hittie v. Republican Valley R. Co., 19 Neb. 620; 29 Am. & Eng. R. Cas. 586; Kansas Central R. Co. v. Fitzsimmons,

status occupied by a construction company and a railroad company, and the liability of the railroad company for an injury due to the negligence of the construction company.

The railroad company had contracted with the construction company for the survey and location of its line of railroad and the construction company had obligated itself to survey and locate the line of railroad, to procure the right of way, build the railroad roadbed, tracks, bridges, side tracks, and to equip the same with engines and cars, in accordance with the plans and specifications attached to the contract. This contract was held to render the construction company an independent contractor, and the railroad company was held not to be liable for an injury occasioned by a defective track, or for injuries due to the negligence of employees on a train laden with construction materials, on a part of the line constructed by the construction company and being run by it, and which had not yet been inspected or accepted by the railroad company, in accordance with its contract with the construction company before its liability should attach. Nor would the fact that some of the same persons were officers and agents in both the construction company and in the railroad company, be a circumstance of sufficient weight to change the rule of nonliability of the railroad company for an injury due to the negligence of the construction company, under such a contract.[63]

18 Kansas 34; Philadelphia, etc., R. Co. v. Hahn, 32 Am. & Eng. R. Cas. 24; Murfeld v. New York, etc., R. Co., 25 Am. & Eng. R. Cas. 144; Hughes v. Cincinnati, etc., R. Co., 15 Am. & Eng. R. Cas. 100; Cunningham v. International, etc., R. Co., 51 Texas 503; West v. St. Louis, etc., R. Co., 63 Ill. 545; Salter v. Mersereau, 64 N. Y. 138; Eaton v. European, etc., R. Co., 59 Me. 520; Carman v. Steelville, etc., R. Co., 4 Ohio St. 399; Hunt v. Pennsylvania R. Co., 51 Pa. St. 475; Burke v. Norwich, etc., R. Co., 34 Conn. 474; Edmundston v. Pittsburg, etc., R. Co., 23 Am. & Eng. R. Cas. 423.

[63] St. Louis, etc., R. Co. v. Ritz (Kansas), 11 Am. & Eng. R. Cas. 35.

§ 293. **Management of trains by construction company.**—While a railroad is being constructed and is in the exclusive possession of and operated by the contractor for the construction of the road, the railroad company would not be liable for injuries inflicted by the contractor, in the management of the road, if it took no part in the operation of the trains thereon.[64] A railroad company, it has been decided, is not liable for an injury sustained while its road is being built and operated by contractors, if the contractors themselves own the engine and cars on which the accident happened, and the railroad company at the time had no control thereof.[65]

A railroad company which has entered into an agreement with a contractor to build a portion of its railroad, and whose engines, cars and other equipment used in construction work, are handled exclusively, under the direction and control of the contractor, will not be liable for damages sustained prior to the completion of the railroad, where the injury is due to the negligence of the contractor in the management and operation of such cars and engine.[66]

A company, calling for bids for the construction of a road, accepted a bid, and a contract, fixing a price for the work and providing for payment of employees by the company's check, was executed. The contractor had formerly been the company's foreman on other roads, and a third person, as foreman of the company, visited the road while the work was being done, and made suggestions, without attempting to control any of the contractor's employees. *Held*, that the contractor was as a matter of law an independent contractor and the company was not liable for any negligence of which he might be guilty in the course of his employment. Houghton v. Loma Prieta Co. (Cal. 1908), 93 Pac. Rep. 377.

[64] Kansas, etc., Co. v. Fitzsimmons, 18 Kansas 34; 15 Am. Ry. Rep. 220.

[65] Meyer v. Midland Pacific R. Co., 2 Neb. 319.

[66] Hittie v. Republican Valley R. Co., 19 Neb. 620; 28 N. W. Rep. 284; 29 Am. & Eng. R. Cas. 586; Miller v. Minnesota, etc., R. Co., 76 Iowa 655; 39 N. W. Rep. 188; 38 Am. & Eng. R. Cas. 234; Cunningham v. International R. Co., 51 Texas 503; Union Pacific R. Co. v. Hause, 1 Wyom. 27.

And this rule would apply, although the contractor is an incorporated company and operating the railroad, in its own behalf for traffic, since the liability of the railroad company would not attach until it came into the possession and control of the road.[67]

§ 294. **Injuries from frightening teams.**— Where an independent contractor, in charge of an engine or other appliance, so uses the same as to frighten a team, as a result of which the party in charge of it sustains an injury, the person or corporation employing such contractor will not be liable for the injury sustained, but the injured person will be compelled to look to the contractor alone for compensation for the injury.

In an Indiana case,[68] it was held that a railway company was not liable for an injury to a traveler on a highway, caused by the frightening of his horse, due to the negligence of a contractor in charge of a steam engine, in operating it near the highway, under a contract with the railway company, for the completion of certain work by the contractor, where the contractor had exclusive control of the engine and the manner in which it was being used.

And this is in accord with other cases, where it is held that a railway company is not liable for an injury, due to the frightening of horses, when the contractor is in exclusive control of the appliance or agency which causes the fright of the horses, and the railway company has no control thereof.[69]

[67] Kansas, etc., R. Co. v. Fitzsimmons, 18 Kansas 34; St. Louis, etc., R. Co. v. Willis, 38 Kansas 330; 16 Pac. Rep. 728; 33 Am. & Eng. R. Cas. 397.

[68] Wabash, etc., R. Co. v. Farver, 111 Ind. 195; 12 N. E. Rep. 296; 31 Am. & Eng. R. Cas. 134.

[69] McCann v. Kings County R. Co., 46 N. Y. S. R. 327; 19 N. Y. Supp. 668.

In considering the liability of the railroad company, in the case

§ 295. **Injuries to passengers by independent contractor.**—A person who had been at work for an independent contractor and was riding on a pass furnished by the contractor, who had the control of a train and engine on a portion of a railroad not yet turned over to the railroad company, could not hold the railroad company liable for an injury due to a collision between the train on which he was riding and another train, but must look solely to the contractor who had the control and management of the train in charge, for damages resulting from such an injury.[70]

But in an Oregon case,[71] it was held that if a railroad company permits an independent contractor who had a portion of the road in course of construction, to use the same for

of Wabash, etc., R. Co. v. Farver, *supra*, the court said: "It would not do to say that the operation of a portable engine, near a public highway, necessarily resulted in creating a nuisance, when it is according to daily experience during certain seasons of the year, to see steam threshing engines in operation on every hand and often necessarily close to public highways. Road engines propelled by steam and portable engines operated by steam have become familiar in every agricultural community. To declare that their use near, or their passage over a public highway, constituted a nuisance, would be practically to prohibit their use in the manner in which they are customarily employed and moved from place to place. It must be supposed that horses of ordinary gentleness have become so familiar with these objects as to be safe, when under careful guidance. It is nowhere denied that Williams was employed to furnish and superintend the running of his engine, to the end that the water might be pumped out of the way, so as to admit of the prosecution of the work in which the railway company was engaged. * * * In respect to his engine and its control, and his liability for its negligent use, the latter was as much an independent contractor when pumping water for the railway company, as when sawing wood and threshing wheat for persons in the neighborhood." 31 Am. & Eng. R. Cas., pp. 137, 138.

[70] Scarborough v. Alabama Midland R. Co., 94 Ala. 497; 10 So. Rep. 316.

[71] Larkin v. Williamette Valley R. Co., 13 Oregon 436; 11 Pac. Rep. 68; 57 Am. Rep. 25; 26 Am. & Eng. R. Cas. 611. But see, Cunningham v. International, etc., R. Co., 51 Texas 503.

purposes of general traffic, this is such a use of the franchise of the railroad company as would render it liable for an injury to a passenger riding on such portion of the road and injured as a result of the negligence of the employees of the construction company.

And if a railroad company enters into an arrangement with some other carrier, although each is to use its own appliances, for the continuous transportation of persons for hire, it is held that the railroad company would be liable, by reason of this joint traffic arrangement, for an injury to a passenger on the portion of the road operated by the connecting carrier.[72]

§ 296. **Injuries to travelers in streets.**— Where a railroad company, with authority to construct a railroad track in a public street or highway, does the work by an independent contractor, in case of an injury to a traveler on the highway, caused by the negligence of an employee of such contractor, in laying down loose iron rails, in advance of the workmen engaged in constructing the track, the independent contractor would be liable for the result of such negligence, but in the absence of some control over the means of laying the track, the railway company would not be responsible for such an injury.[73]

A like result will follow upon an injury to a traveler on a public street, caused by a rock negligently left in the highway by the employees of a subcontractor of a railway company, building abutments in the street for the use of the railroad track, and as there is no privity of contract between

[72] Kessler v. New York, etc., R. Co., 61 N. Y. 538; Isaacson v. New York, etc., R. Co., 94 N. Y. 278; Buxton v. Northeastern R. Co., 3 Q. B. 549. But see, Poole v. Delaware, etc., R. Co., 35 Hun (N. Y.) 29.

[73] Fulton County R. Co. v. McConnell, 87 Ga. 756; 13 S. E. Rep. 828.

the railroad company and the subcontractor, there would be no liability on the part of such railroad company for the injury, but the contractor whose employees negligently caused the injury would alone be answerable therefor.[74]

§ 297. **Injuries to employees of contractor.**— In the absence of some one or more of the exceptions to the general rule that there is no liability on the part of the contractee, for injuries to employees of the contractor, due to the latter's negligence, a railroad company cannot be held liable for an injury to employees of a contractor, injured as a result of the negligence of such contractor or by that of his coemployees.

In a well-considered Virginia case,[75] an employee of an independent contractor was at work on a bridge over which trains were being operated by the railroad company, during the repairs thereon by the independent contractor. An engine of the railroad company, on proper signal from the foreman of the contractor, in passing over the bridge, broke down a span of the bridge on which the plaintiff's intestate, an employee of the contractor, was at work and killed him, and in the suit to recover for his death from the railroad company, the court held that there was no liability.

A similar rule was announced in a Pennsylvania case,[76] and because of the absence of any contractual relation existing between the employee of the contractor and the railroad company employing such contractor, this may be stated as the general rule.

A railroad company was held exempt from liability for an

[74] Pawlet v. Rutland R. Co., 28 Vt. 297. See, also, Hackett v. Western Union Tel. Co., 80 Wis. 187; 49 N. W. Rep. 822.

[75] Bibb v. Norfolk, etc., R. Co., 87 Va. 711; 14 S. E. Rep. 163; 47 Am. & Eng. R. Cas. 651.

[76] Hunt v. Pennsylvania R. Co., 51 Pa. St. 475.

injury to an employee of a contractor, in a Georgia case,[77] where the employee was injured on an embankment which his employer was filling in, by the negligent running of a car over a track furnished by the railroad company. But of course if the car which caused the injury had been run by the employees or agents of the railroad company, instead of by those of the contractor, then the railroad company could not have avoided the liability, for the negligence would have been that of the company itself, by or through the wrong ful act of its own employees, acting within the scope of their duties.[78]

§ 298. **Negligence of railway surgeons.**— As a general rule, where a railway company furnishes a physician or surgeon or a staff of surgeons, at a hospital, supplied with medicines and surgical instruments and nurses, for the medical care and treatment of passengers and employees, although such surgeons may be upon the pay roll of the railway company and the medical assistants and medicines are furnished by the company, such surgeons or physicians are so far regarded as independent contractors, in the care and treatment of the sick or injured passengers or employees placed in their care, as to be alone responsible for their negligence or malpractice, where reasonable care and caution has been exercised in their employment and the railroad company will not be lia-

[77] Central, etc., R. Co. v. Grant, 46 Ga. 417; 11 Am. Ry. Rep. 427.

[78] McNeil v. Crucible Steele Co., 207 Pa. St. 493; 56 Atl. Rep. 1067; White, Per. Inj. in Mines § 541, and cases cited.

A contractor for the construction of a freight house, for a railway company, used corrosive sublimate to preserve the timbers used. An employee using such preservative sustained injuries by an inhalation of the poisonous gases exhaled and it was held that his action must be against his employer and not against the railroad company. West v. St. Louis, etc., R. Co., 63 Ill. 545.

The owner or contractee was held not to be liable for injuries to

ble for damages resulting from the negligent treatment of patients entrusted to their care.[79]

Of course the rule would be different if the employer, instead of employing a reasonably skillful or careful practitioner, employed a known incompetent, negligent or drunken physician or surgeon, for under the rule of nonliability for the acts of an independent contractor, the employer is relieved only where he exercises reasonable care in the employment of an ordinarily careful or competent contractor.[80]

And if the injury to the injured employee or passenger is augmented by the negligence of a physician or surgeon, furnished by the employer or carrier, unless the passenger or employee was negligent in contributing to the increase of the injuries sued for, the railroad company could not take advantage of the negligence of its own physician or surgeon, to avoid liability for the original injury, thus augmented or increased by the intervening negligence of such a contractor, acting under its orders or employment.[81]

the employees of the contractor, in the following cases: Burke v. Norwich, etc., R. Co., 34 Conn. 474; Central, etc., R. Co., v. Grant, 46 Ga. 417; Boyd v. Chicago, etc., R. Co., 217 Ill. 332; 75 N. E. Rep. 496; 108 Am. St. Rep. 253; Hedge v. Williams, 131 Cal. 455; 63 Pac. Rep. 721; 82 Am. St. Rep. 366; Hunt v. Pennsylvania R. Co., 51 Pa. St. 475; Young v. New York, etc., R. Co., 30 Barb. 229; St. Louis, etc., R. Co. v. Willis, 38 Kansas 330; 16 Pac. Rep. 728.

[79] Pittsburg, etc., R. Co. v. Sullivan, 141 Ind. 83; 50 Am. St. Rep. 313; Quinn v. Nashville, etc., R. Co., 74 Tenn. 713; 45 Am. St. Rep. 767; Laubheim v. Royal Netherland Co., 107 N. Y. 228; 13 N. E. Rep. 781; 1 Thompson on Neg., § 633, p. 582, and cases cited.

[80] Brannock v. Elmore, 114 Mo. 55; 21 S. W. Rep. 451; 1 Thompson on Neg., § 677, and cases cited.

[81] St. Louis, etc., R. Co. v. Doyle (Texas), 25 S. W. Rep. 461; Thompson v. Louisville, etc., R. Co., 91 Ala. 496; 8 So. Rep. 406; 11 L. R. A. 146.

In St. Louis, etc., R. Co. v. Doyle, *supra*, the railway company was held not entitled to take advantage of the fact of a negligent amputa-

§ 299. **Railroad hospital — Physicians company agents, when.**— A railroad hospital association, which is organized by the officers of the railroad company to furnish medical and surgical treatment to the employees of the latter, in consideration of certain monthly payments made by them, is held, in a recent Missouri case,[82] not to be a charitable institution, within the rule of law which exempts such companies for the acts of its agents, in due course of their employment by the association.

In the case referred to, where the rules governing the management of the hospital association, made the chief surgeon of such association and his assistants, the chief surgeon and local division surgeons of the railroad company, which latter company retained stipulated sums from the wages of its employees, to cover treatment received in the hospital, it was held that the hospital association and all its physicians and surgeons were employees and agents of the railroad company, and that the latter company was liable for a failure of the physicians of the hospital association, to properly treat the patients submitted to their care, by the railroad company.[83]

tion of the leg of the injured person, where the employee was himself guilty of no negligence in submitting to the operation.

[82] Phillipps v. St. Louis, etc., R. Co. (Mo.), 111 S. W. Rep. 109.

[83] In the above case, an employee of the railroad company, placed in its hospital for treatment, for mental alienation, was permitted to escape and his undressed lifeless body was found on a railroad track, where he had been struck by the cars. The railroad company was held liable for the death of the deceased, and in the course of the opinion, in passing on the liability of the railroad company for the neglect of the hospital assistants in allowing the deceased to escape, Judge Graves, for the court, said:

"The relationship between these two corporations is an important one, and not confined to this case alone. To our mind it is immaterial as to the true character of the hospital association as indicated by its charter provisions. It has, however, but few, if any, of the earmarks of a voluntary benevolent association. Nor are there any earmarks of a public charity. What is received is paid for by the

§ 300. **Contracts exempting railroad company from liability.**— The subject of the right of a railroad company to exempt itself from liability is the cause of a great many statutes in the United States, which are elsewhere discussed, and the courts of the different States, in the absence of such statutes hold to divergent views, as to the right of a railroad

recipients. Under the weight of authority it cannot be held to be a charitable institution. Haggerty v. Railway Co., 100 Mo. App. 424; 74 S. W. Rep. 456; Coe v. Washington Mills *et al.*, 149 Mass. 543; 21 N. E. Rep. 966; Brown v. La Societe Francaise, 138 Cal. 475; 71 Pac. Rep. 516; Miller v. Railway Co. (C. C.), 65 Fed. Rep. 305; Texas & Pac. Coal Co. v. Connaughton, 20 Tex. Civ. App. 642; 50 S. W. Rep. 173. So that the rule that exempts such institutions from liability, as announced in Murtaugh v. St. Louis, 44 Mo. 480, does not apply. Nor are institutions of the character of the one disclosed by this record exempted from liability by the mere employment of competent servants. They must go further and competently treat the patients received. In such case they occupy the position of ordinary physicians and surgeons and are bound by the same rules, which are too familiar for repetition here. If they undertake to furnish the treatment, not as a charity, they stand in no different light from the ordinary physician. But this question is really beside the issues in this case. No one can read this record without concluding that, if the thin corporate shell of the hospital association is broken, the yolk therein contained is the defendant. * * * So that it becomes unnecessary in this case to break the extremely thin and attenuated corporate shell of the hospital association, and expose to open view the yolk therein contained. The hospital association, whether it in fact be a separate corporate entity, or in fact the defendant itself, masquerading under an assumed name, is at least the agent and employee of the defendant to perform these particular services. The defendant pays its said agent $500 annually, and in addition it requires of its employees that they pay to it the remainder, and by it such sum is paid to the agent for these services. To say the least, this hospital association, together with all its surgeons and physicians, are but agents of defendant, and made so by express words in rule 13, *supra*. The negligence of these agents is the negligence of the defendant. As said in the case of Orcutt v. Century Bldg. Co., 201 Mo. 424; 99 S. W. Rep. 1062; 8 L. R. A. (N. S.) 929, the defendant holds the purse strings of the hospital association. Not a dollar does it get, save through defendant. Defendant pays for itself $500, and the remainder is paid by the tribute which defendant levies upon its

company to exempt itself from liability for the negligence of its employees, by special contract.[84]

Where the duty owing by the railroad company is to the general public, since it would not be permitted to avoid the performance of such a duty directly, it could not do so by delegating it to some third party or independent contractor and a contract exempting it from liability for the negligent performance of such a duty, will not be enforced by the courts where the rights of third persons are involved.[85]

But ordinarily the contractor and not the contractee is the one held liable in law for injuries to the employees of the contractor, since there is no privity of contract between the contractor's employees and the contractee and in the absence of a statute changing this common-law rule, a railroad company would not be responsible for an injury to an employee of the contractor, when the contract specified for the exemption of the railroad company from liability and the act causing the injury could be chargeable to the personal negligence of the railroad company.[86]

employees, which is collected and paid through defendant. The hospital system is a worthy one, and a well-taken, advance step; but, under the record in this case, such hospital association is but the agent of the defendant." Phillipps v. St. Louis, etc., R. Co., 211 Mo. 419; 111 S. W. Rep. 112, 113.

[84] See Chapter, *Statutes Abrogating Common Law.*

[85] St. Paul, etc., Co. v. Ware, 6 Wall. (U. S.) 566; 21 L. Ed. 485; Tibbett v. Knox, etc., R. Co., 62 Me. 437; Ominger v. New York, etc., R. Co., 4 Hun (N. Y.) 159; Erie v. Caulkins, 85 Pa. St. 247; 27 Am. Rep. 642.

[86] Central, etc., R. Co. v. Grant, 46 Ga. 417; Boyd v. Chicago, etc., R. Co., 217 Ill. 332; 75 N. E. Rep. 496; 108 Am. St. Rep. 253; Bibb v. Norfolk, etc., R. Co., 87 Va. 711; 14 S. E. Rep. 163.

CHAPTER XIII.

INJURIES TO INFANT EMPLOYEES.

§ 301. How minority affects right of recovery.
302. Infant representing himself of age.
303. Employment in violation of parent's instruction.
304. Damages for death of infant.
305. Measure of parent's recovery for injury or death of.
306. Infant's recovery for death of parent.
307. Employment about dangerous machinery.
308. When warning is required.
309. What warning sufficient.
310. What risks are assumed by infants.
311. Same — Risks beyond scope of employment.
312. Injuries from negligence of coemployees.
313. Contributory negligence of infants.
314. Releases by infant employees.

§ 301. **How minority affects right of recovery.**— An infant is often more capable of understanding the risks of his employment than a man older in years, but of less experience, and the mere fact of an employee's infancy, without more, unless the infant is of such tender years as to render him unable to appreciate the risks of the business, will not exempt the infant from the effect of his own negligent conduct, or relieve him from an appreciation and assumption of the ordinary risks of the business, with which he is familiar.[1] The mere fact of infancy, therefore, does not affect the duty of the employer, where it is not such as to render him incompetent to appreciate and understand the dangers of the service. Of course, if the infant, because of his infancy, does not understand the risk of the business, or if his experience is

[1] Alabama M. R. Co. v. Marcus, 115 Ala. 389; 22 So. Rep. 135.

such that he ought to be warned, or informed, this duty obtains on the part of the employer, but further than this the same obligations obtain toward an infant employee that obtain toward those of more mature years.[2]

[2] Carter v. Baldwin, 107 Mo. App. 229; 81 S. W. Rep. 204; Smith v. Irwin, 51 N. J. L. 507; 18 Atl. Rep. 852.

But if an infant is employed in violation of parent's instructions the parent can recover, even if he was injured by the negligence of another fellow employee. Texas, etc., R. Co. v. Hervey (Tex.), 89 S. W. Rep. 1095.

Infancy can never take the place of negligence or supply the necessity for a relation from which a duty would spring. Atlanta, etc., Ry. Co. v. West, 121 Ga. 641; 49 S. E. Rep. 711; 67 L. R. A. 701.

Infancy alone will not give a cause of action, if the infant understood the dangers of the work and unless negligence can be predicated against the employer, no liability is shown. McGinnis v. Canadian So. R. Co., 49 Mich. 466; 13 N. W. Rep. 819; 8 Am. & Eng. R. Cas. 135; Viets v. Toledo, etc., R. Co., 55 Mich. 120; 20 N. W. Rep. 818; 18 Am. & Eng. R. Cas. 11.

A railroad company is held liable, if it knowingly employs an infant and he is injured, through its negligence, but not if it had no notice of his infancy and it was not negligent. Goff v. Norfolk & W. R. Co., 36 Fed. Rep. 299; Grand Rapids, etc., R. Co. v. Showers, 71 Ind. 451; 2 Am. & Eng. R. Cas. 9; Gulf, etc., R. Co. v. Redeker, 75 Texas 310; 12 S. W. Rep. 855; 41 Am. & Eng. R. Cas. 296; Pennsylvania R. Co. v. Long, 94 Ind. 250; 15 Am. & Eng. R. Cas. 345; Gulf, etc., R. Co. v. Jones, 76 Texas 350; 13 S. W. Rep. 374.

The contract of an infant employee, agreeing to be bound by the rules of the employer, was supported and enforced, in Texas. Texas, etc., R. Co. v. Carlton, 60 Texas 397; 15 Am. & Eng. R. Cas. 350; Texas, etc., R. Co. v. Crowder, 61 Texas 262. See, also, Pennsylvania R. Co. v. Yost, 104 Pa. St. 26; Houston, etc., R. Co. v. Miller, 51 Texas 270.

A minor who has arrived at years of discretion may make a valid contract of employment, without his parent's consent, and the right of the parent to recover for his injury will depend upon the duties that exist by reason of the relation of employer and employee. Texas, etc., R. Co. v. Carlton, 60 Texas 397; 15 Am. & Eng. R. Cas. 350; Texas, etc., R. Co. v. Crowder, 61 Texas 262; Pennsylvania R. Co. v. Yost, 104 Pa. St. 26; Houston, etc., R. Co. v. Miller, 51 Texas 270. But if the employee had not reached years of discretion, so as to understand and guard against the dangers of the employment, the relation of employer and employee would not exist, so as to deny a

§ 302. **Infant representing himself of age.**— A minor, who, with knowledge of a rule preventing the employment of infants in such a hazardous business as railroading, falsely represents that he is of age in order to obtain employment, is held to be judged, in law, by the same rules as would apply to an adult employee, and this is especially true if his age and appearance are such as to indicate that he had reached his majority, for his own fraud, having brought about his employment, the employer ought not to be charged with the same degree of care as if he had knowingly employed an infant, in the first instance.[3]

But the fact that a minor misrepresented his age, in his application for employment, would not render him a mere trespasser, or deny to him the same care and protection that any other employee would be entitled to receive, but the employer would be held to the same degree of care and no more, than he would owe to an adult employee.[4]

recovery for his death due to the negligence of his coemployees. Hamilton v. Galveston, etc., R. Co., 54 Texas 556; 4 Am. & Eng. R. Cas. 528.

If the employer knows of the infant's minority, it is his duty to obtain the consent of the parent to the employment. Gulf, etc., R. Co. v. Redeker, 75 Texas 310; 12 S. W. Rep. 855; 41 Am. & Eng. R. Cas. 296; Missouri Pacific Ry. Co. v. King, 2 Texas Civ. App. 122; 20 S. W. Rep. 1014; 23 S. W. Rep. 917; Goff v. Norfolk, etc., R. Co., 36 Fed. Rep. 299; Grand Rapids, etc., R. Co. v. Showers, 71 Ind. 451; 2 Am. & Eng. R. Cas. 9; Pennsylvania R. Co. v. Long, 94 Ind. 250; 15 Am. & Eng. R. Cas. 345; Gulf, etc., R. Co. v. Jones, 76 Texas 350; 13 S. W. Rep. 374; Louisville, etc., R. Co. v. Willis, 83 Ky. 57; Soldanels v. Missouri Pacific Ry. Co., 23 Mo. App. 516.

[3] Lake Shore, etc., Co. v. Baldwin, 10 O. C. D. 333; Brown v. Ry. Co., 68 N. H. 518.

[4] Marbury, etc., Co. v. Westbrook, 121 Ala. 179.

Where the infant has misrepresented his age, the employer is not liable for an injury occasioned by such lack of majority. McDermott v. Iowa Falls R. Co. (Iowa), 47 N. W. Rep. 1037.

In the case of young and inexperienced employees it is the duty of the employer to take notice of the age and inexperience of the employees and to use ordinary care to protect them from risks they cannot properly appreciate. Fisher v. Delaware, etc., Co., 153 Pa. St. 379;

§ 303. **Employment in violation of parent's instruction.**— If an employer engages the services of a minor in a dangerous business, in violation of the parent's instructions and the infant is injured in the course of his service, the employer would be liable in damages, without proof of other act of negligence than the employment of the child in the forbidden service, unless it could be shown that the infant was injured as a result of his own wrongful act.[5] In Texas, in a recent case, it is even held, that for an injury to a minor, in a forbidden employment, such as railroading, the company would be liable for an amount corresponding to the parent's loss of service, regardless of the contributory negligence of the minor or the act of his coemployees.[6] This rule, however, would hold the employer responsible for something he had not done, and recognizes a liability, on the ground of negligence, regardless of the rule of proximate and remote cause. It would seem that the sounder rule would only permit a recovery in cases where the injury was not due to the negligence of the injured employee himself. Of course, if the parent consents to the employment of his child in a hazardous business, he assumes all the risks reasonably incident thereto, including that of the child's own rashness or care-

26 Atl. Rep. 18; Kehler v. Schwenk, 151 Pa. St. 505; 25 Atl. Rep. 130. But if the employer has no notice of the nonage of the employee and there is nothing in his appearance to indicate that he is an infant, there is no especial duty to protect him. Youll v. Sioux City, etc., R. Co., 66 Iowa 346; 23 N. W. Rep. 736; 21 Am. & Eng. R. Cas. 589; McGinnis v. Canada Southern Co., 49 Mich. 466; Houston, etc., R. Co. v. Miller, 51 Texas 270; Curran v. Merchants, etc., Co., 130 Mass. 374.

[5] Carter v. Baldwin, 107 Mo. App. 229; 81 S. W. Rep. 204; Parsons v. Mo. Pac. Ry. Co., 94 Mo. 287.

[6] Texas & Pac. R. Co. v. Brick (Texas), 18 S. W. Rep. 947; Texas & Pac. R. Co. v. Hervey, 89 S. W. Rep. 1095.

The mere fact of employing an infant as brakeman, without consent of parent, will not establish a liability, in case of an injury in the course of the employment. Texas, etc., R. Co. v. Crowder, 61 Texas 262.

lessness, and he could not recover for a loss of services for injury to his child, where the injury was sustained about a dangerous service and the infant knew of a safer way to do the work.[7]

§ 304. **Damages for death of infant.**— The English statute,[8] providing for the survival of actions for death, through negligence, has been adopted, or similar legislation enacted, in most of the United States, and by these statutes, generally, the right of action is given to the wife, parent or child. The party or parties competent to sue for the death of an infant, depends wholly upon the particular provisions of the statute of the State where the death occurred and if no right of action is given by the statute of the State in which the death or injury causing death, occurred, no cause of action will generally be held to have survived.

In most of the United States, however, the right of action is given to the parents of a minor child [9] and in many of the States statutes have been passed, applying especially to death caused by the negligence of carriers, which give an action, independently of general damage acts.[10] The parties com-

[7] East & W. R. Co. v. Sims, 80 Ga. 807; 6 S. E. Rep. 595; McCool v. Lucas, etc., Co., 30 W. N. C. 251; 24 Atl. Rep. 350.

If notice of infancy is had, then the employer should obtain the consent of the parent or guardian, before placing an infant in a dangerous business. Gulf, etc., R. Co. v. Redeker, 75 Texas 310; 12 S. W. Rep. 855; 41 Am. & Eng. R. Cas. 296; Missouri Pac. R. Co. v. King, 2 Texas Civ. App. 122; 20 S. W. Rep. 1014; Hamilton v. Galveston, etc., R. Co., 54 Texas 556; 4 Am. & Eng. R. Cas. 528.

But if infant is employed without notice of infancy, employer will not be liable, in absence of negligence. Youll v. Sioux City, etc., R. Co., 66 Iowa 346; 23 N. W. Rep. 736; 21 Am. & Eng. R. Cas. 589; McGinnis v. Canadian Southern Co., 49 Mich. 466.

[8] Lord Campbell's Act, 9 & 10 Vict., ch. 93, §§ 1 & 2.

[9] Ala. Code, 1896, § 25 (2587); Mass. Laws, 1897, ch. 565; Burns Rev. St. Ind. 1901, § 7085; Sess. Laws Colo. 1903, ch. 77; R. S. Mo. 1899, § 2864; Sess. Laws Mo. 1905, pp. 136, 137.

[10] Laws Mo. 1905, pp. 136, 137.

petent to sue for the death of an infant, are, generally, his parents, or, if married, the wife or children.[11] Where the statute gives a right of action, first, to the husband or wife, next, to the minor child or children and lastly, to the parents of a minor child, unless the infant is of such tender years as to make it impossible for him to leave a wife or children surviving him,[12] a petition by the parents, which did not show that the deceased was unmarried and childless, would be fatally defective.[13]

§ 305. **Measure of parent's recovery for injury or death of.**— The basis, in law, for the recovery by a parent, for the death of a minor child, in the absence of a different statutory basis for damages, is his or her common-law right to the services of the child during its minority. The law deals not with the affections or sentiments of the human family,

[11] See statutes cited above.

[12] Baird v. Citizens R. Co., 146 Mo. 265; 48 S. W. Rep. 78; Czezewzka v. Benton, etc., Ry. Co., 121 Mo. 201; 25 S. W. Rep. 911.

[13] Parker v. R. R. Co., 91 Mo. 86; Dulaney v. R. R. Co., 21 Mo. App. 597; Railroad v. Hine, 25 Ohio St. 629; McIntosh v. Mo. Pac. Ry. Co., 103 Mo. 131; Sparks v. Kansas City S. & M. R. Co., 31 Mo. App. 111.

An action by the father for loss of services of the infant is not defeated by the mere fact that he approved the employment. Soldanels v. Missouri Pac. R. Co., 23 Mo. App. 516; Louisville, etc., R. Co. v. Willis, 83 Ky. 57.

Contributory negligence of the infant will not affect the father's right to recover for loss of service, unless the father consented to his employment. If he did consent to his employment, however, the infant's negligence will bar a recovery by the father. Goins v. Chicago, etc., R. Co., 47 Mo. App. 173; Hunnicutt v. Georgia, etc., R. Co., 85 Ga. 195; 11 S. E. Rep. 580; Williams v. South & N. R. Co., 91 Ala. 635; 9 So. Rep. 77.

The measure of the parent's recovery, generally, is the loss of services, during minority of the child. Texas, etc., R. Co. v. Brick, 83 Texas 526; 18 S. W. Rep. 947; Gulf, etc., R. Co. v. Redeker, 67 Texas 190; 2 S. W. Rep. 527; Ft. Wayne, etc., R. Co. v. Beyerle, 110 Ind. 100; 11 N. E. Rep. 6; 28 Am. & Eng. R. Cas. 306.

but courts of justice, realizing the uncertainty of submitting to juries the measure of compensation for loss of the affection and intellectual enjoyment sustained by the death of the deceased, allow no money equivalent for the loss of other than the value of the services of the child, during its minority. A parent may have two sons, one past minority and the other less than the age when the law would emancipate him, and for the death or injury of the former, the courts would allow the parent no compensation, while, for the injury or death of the latter, a substantial remuneration would be afforded, based upon the loss to the parent of the services of the minor child.[14] This seeming inconsistency is based upon the soundest principles, for to permit a jury to speculate, without limit, upon the value of the affection or services which a child might render a parent during the probable existence of the child, would be to base a verdict upon speculative damages alone, for no accurate basis for the calculation could be submitted to them. After the child arrives at its majority, the law would give the child the proceeds of its own services, and beyond this period, the chances of the parent surviving it, the child's willingness or unwillingness to support or contribute to the parent, are mere matters of conjecture which are far too vague to enter into an estimate that is merely compensatory.[15]

§ 306. **Infant's recovery for death of parent.**— Where the statute giving the right of action for the death of the parent is only compensatory and not of a penal nature, giving a fixed sum for every death resulting from a violation of its provisions, the infant suing for the death of his parent would only be entitled to recover for such loss as the infant would

[14] This is the illustration given by the Supreme Court of Missouri in Parsons v. Mo. Pacific Ry. Co., 94 Mo. l. c. 296.

[15] This is the reasoning of the court in State v. Baltimore & Ohio R. Co., 24 Md. 84.

sustain during his minority.[16] The law only imposes the burden upon the parent of sustaining and educating the child until it reaches its legal majority and then it is entitled to its own services and is supposed to support and maintain itself. Hence it is that a child suing for the death of his parent is held only entitled to recover such compensation as he would have received from the parent during his minority, considering the ability of the parent to render intellectual and moral training and his probable contribution for the support, education and maintenance of the child during its minority.[17] Further than this, under statutes which are merely compensatory, the law allows no recovery.

§ 307. **Employment about dangerous machinery.**— At common law the employer is not compelled to guard dangerous machinery,[18] but independently of statute imposing such a duty, he might be held liable for permitting an employee too young to understand the danger of such work, to be or remain in his service about dangerous gearing or revolving machinery or set screws, whereby an injury was sustained.[19]

In many States statutes have been passed, making it unlawful to employ infants of tender years at work in close proximity to dangerous machinery. Such legislation for the

[16] 3 Sutherland Dam. 283–284; 2 Sedgwick Dam. (8 ed.), § 577; Railroad v. Weldon, 52 Ill. 290; Railroad v. Austin, 69 Ill. 426.

[17] Kelly v. Railroad, 48 Fed. Rep. 663; Goss v. Mo. Pac. Ry. Co., 50 Mo. App. 626; Schaub v. Ry. Co., 106 Mo. 74; McPherson v. Ry. Co., 97 Mo. 259; Parsons v. Ry. Co., 94 Mo. 286; Railroad v. Wightman, 29 Gratt. 431.

[18] Blair v. Heible (Mo.), 77 S. W. Rep. 1017.

[19] Jancko v. West Coast, etc., Co., 34 Wash. 556; 76 Pac. Rep. 78; Chicago, etc., Co. v. Rainneger, 140 Ill. 334; 29 N. E. Rep. 1106; 33 Amer. St. Rep. 249; Sachau v. Miller, etc., Co., 123 Iowa 387; 98 N. W. Rep. 900; Carter v. Dubah, etc., Co. (La.), 36 So. Rep. 952; North. Ala., etc., Co. v. Beacham (Ala.), 37 So. Rep. 227; Meehan v. Atlas, etc., Co., 87 N. Y. S. 1031; 94 App. Div. 306.

protection of children and for the protection and regulation of child labor is most beneficent in its objects and the courts usually hold the employer liable without specific proof of other wrongful conduct than the mere employment of an infant and a consequent injury, in violation of the statute.[20] In other words, proof of an unlawful employment and a resulting injury is generally held *prima facie* evidence of negligence against the employer violating such a statute.

But in some of the States, the mere violation of such a statute, preventing the employment of infants of certain years, around dangerous machinery, will not, of itself, render the employer liable, unless his negligence was the approximate cause of such injury to the infant employee,[21] and, indeed, this is in accord with the general rule of pleading and practice in such cases and any other rule would subject the employer to an additional penalty not named in the

[20] Chicago, etc., Co. v. Reinneger, *supra.*

[21] Kutchera v. Goodwillie, 93 Wis. 448; 67 N. W. Rep. 729; Belles v. Jackson, 4 Pa. Dist. R. 194; Dunn v. McNamee, 59 N. J. L. 498; 37 Atl. Rep. 61; Higgins, etc., Co. v. O'Keefe, 79 Fed. Rep. 900; 51 U. S. App. 74; 25 C. C. A. 220; Evans v. Iron, etc., Co., 42 Fed. Rep. 519.

An infant assumes open, obvious risks, the same as an adult, after proper instruction, and also such risks as are incidental to the service, for these are incidents of the employment. DeGroff v. New York, etc., R. Co., 76 N. Y. 125; King v. Boston, etc., Corp., 9 Cush. (Mass.) 112; Evans v. Lake Shore, etc., R. Co., 12 Hun (N. Y.) 289; Goff v. Norfolk, etc., R. Co., 36 Fed. Rep. 299; Tillotson v. Texas, etc., R. Co., 44 La. Ann. 95; 10 So. Rep. 400; 53 Am. & Eng. R. Cas. 104; Sanborn v. Atchison, etc., R. Co., 35 Kansas 292; 10 Pac. Rep. 860; Goins v. Chicago, etc., R. Co., 37 Mo. App. 676.

But this rule does not apply to a child of tender years and the issue, as to such a child, is whether or not his years were sufficient for him to understand the danger of the employment, on the warning or instruction given him. Houston, etc., R. Co. v. Miller, 51 Texas 270; Fisk v. Central Pacific R. Co., 72 Cal. 38; 13 Pac. Rep. 144; Cook v. St. Paul, etc., R. Co., 34 Minn. 45; 24 N. W. Rep. 311; Wutilla v. Duluth Lumber Co., 37 Minn. 153; 33 N. W. Rep. 551; 5 Am. St. Rep. 832, a case which goes to the extreme.

statute and the law, being penal in its nature, usually ought to be strictly construed.

§ 308. **When warning is required.**— An infant engaging in a hazardous business, such as railroading, is entitled to warning or instruction as to the dangers in the service, which, on account of his youth or inexperience, he would not understand, and if the employer fails to give him adequate warning or instruction as to such dangers and he sustains an injury because of a lack of understanding of the cause of his injury, the employer would be liable to him in damages therefor.[22] The employer has a right to assume that his employees will do their duty, however, and will not be negligent and for this reason there is no duty to give warning as to the negligence of an employee's coemployees,[23] nor is he bound to give warning as to open, obvious dangers,[24] or those which he has reason to believe the employee already understands,[25] but the danger must be such a one, when coupled with the experience the employer knows the employee to possess, would lead him, as a reasonably prudent man, to believe that the em-

[22] Evans, etc., Co. v. Crawford (Neb.), 93 N. W. Rep. 177; Illinois Steel, etc., Co. v. Ruska, 200 Ill. 280; 65 N. E. Rep. 734; Waxahachie Oil, etc., Co. v. McLain (Texas), 66 S. W. Rep. 226; Orman v. Salvo, 117 Fed. Rep. 233; 54 C. C. A. 265; Dowling v. Allen, 102 Mo. 213; 14 S. W. Rep. 751.

[23] Smith v. Thomas, etc., Co. (N. J.), 54 Atl. Rep. 562; Klos v. Hudson River, etc., Co., 79 N. Y. S. 156; 77 App. Div. 566. But see Lindsay v. Tioga, etc., Co., 108 La. 468; 32 So. Rep. 464.

[24] Herbert v. Mound City, etc., Co., 90 Mo. App. 305; Kopf v. Monroe, etc., Co. (Mich.), 95 N. W. Rep. 72; Shine v. Cocheco Co., 173 Mass. 558; 54 N. E. Rep. 245; Worthington v. Goforth (Ala.), 26 So. Rep. 531; Ogle v. Mills, 130 N. Y. 458; Palmer v. Harrison, 57 Mich. 182; Tremantle v. North Star, etc., Co., 57 Minn. 52; Pratt v. Prouty, 153 Mass. 333; Coullard v. Tecumseh, etc., Co., 151 Mass. 85; Tankham v. Sawyer, 153 Mass. 485; Williamson v. Sheldon, etc., Co., 66 Vt. 427.

[25] Brundige v. Dodge, etc., Co., 183 Mass. 100; 66 N. E. Rep. 604; Gaudet v. Stansfield, 182 Mass. 451; 65 N. E. Rep. 850.

ployee was ignorant of, before warning or instruction will be required.[26]

§ 309. **What warning sufficient.**— To constitute a defense to an action for an injury to an infant, inexperienced employee, based upon a failure to give sufficient warning or instruction of the surrounding dangers or perils of the service, the warning or instruction must be of sufficient definiteness to fully apprise the infant of the dangers in the service, for otherwise it had as well not been given at all and would not constitute a defense to the action.[27] In case of a change in the service of an infant, from a department of the business not dangerous, to one attendant with great danger, the same instruction ought to be given as in the case of the original

[26] *Ante idem.*

An infant should be protected, by warning or otherwise, from dangers or risks that he does not appreciate. Fisher v. Delaware, etc., Co., 153 Pa. St. 379; 26 Atl. Rep. 18.

Where the circumstances are such that the employer ought to have known that the infant was not familiar with the hidden dangers of the service, warning or instruction should be given. Fisk v. Central Pac. R. Co., 72 Cal. 38; 13 Pac. Rep. 144; New Albany, etc., R. Co. v. Cooper, 131 Ind. 363; 30 N. E. Rep. 294; Pittsburg, etc., R. Co. v. Adams, 105 Ind. 151; 5 N. E. Rep. 187; 23 Am. & Eng. R. Cas. 408; Gulf, etc., R. Co. v. Jones, 76 Texas 350; 13 S. W. Rep. 374; Texas & Pac. R. Co. v. Brick, 83 Texas 598; 20 S. W. Rep. 511; Sims v. East, etc., R. Co., 84 Ga. 152; 10 S. E. Rep. 543.

Warning of dangerous character of place was held essential in the following cases: Hill v. Gust, 55 Ind. 45; Thrall v. Carme, 24 N. Y. S. R. 270; 5 N. Y. Supp. 244.

Instruction as to use of dangerous tools and appliances was held essential, in the following cases: Whitelaw v. Memphis, etc., R. Co., 16 Lea (Tenn.) 391; 1 S. W. Rep. 37; Ross v. Walker, 139 Pa. St. 42; 21 Atl. Rep. 157; Melchert v. Smith, etc., Co., 140 Pa. St. 448; 21 Atl. Rep. 755.

The question whether proper warning was given, or infant understood the dangers of his employment is for the jury. Pennsylvania R. Co. v. Long, 94 Ind. 250; 15 Am. & Eng. R. Cas. 345; Texas, etc., R. Co. v. Brick, 83 Texas 598; 20 S. W. Rep. 511.

[27] Giordano v. Brandywine, etc., Co. (Del.), 52 Atl. Rep. 332.

employment, if the infant is not experienced in the more dangerous department of the service, for the nature and character of the new employment, if different from that where the infant was previously employed, is, to all intents, a new employment, requiring additional instruction.[28]

For instance, in the handling of a dangerous machine or agency, the infant should be advised of the proper way to handle the machine or appliance and not only the safe manner of performing the service should be made known to him, but he should also be advised of the risk attendant upon the service and the danger or additional risk of performing the service in any other manner. If the service can be performed in two or more ways, one of which is comparatively safe and the other dangerous, the instruction should cover the relative safety of these methods, for otherwise the infant could not be held guilty of contributory negligence in performing the service in the more dangerous manner, of which he had not been advised.[29]

[28] Welsh v. Butts, 202 Pa. 59; 51 Atl. Rep. 591; Bibb Co. v. Taylor, 95 Ga. 615; 23 S. E. Rep. 188.

[29] Alabama, Collinsville, etc., Co. v. Pitts, 13 So. Rep. 135; Fox v. White Lead Works, 84 Mich. 676; 48 N. W. Rep. 203.

It is the duty to warn an infant, inexperienced employee as to dangers of place and appliances, that would be obvious to an adult, if his youth and inexperience is such as to impart notice of his want of knowledge thereof. And the instruction should include notice of the means to avoid the injury. Fisk v. Central Pacific R. Co., 72 Cal. 38; 13 Pac. Rep. 144; Pittsburg, etc., R. Co. v. Adams, 105 Ind. 151; 5 N. E. Rep. 187; 23 Am. & Eng. R. Cas. 408; Gulf, etc., R. Co. v. Jones, 76 Texas 350; 13 S. W. Rep. 374; Texas, etc., R. Co. v. Brick, 83 Texas 598; 20 S. W. Rep. 511; Whitelaw v. Memphis, etc., R. Co., 16 Lea (Tenn.) 391; 1 S. W. Rep. 37; Ross v. Walker, 139 Pa. St. 42; 21 Atl. Rep. 157.

But in the absence of such youth or inexperience sufficient to charge notice of an incapacity to appreciate obvious dangers, the duty of warning only applies as to latent, unseen dangers incurred in the employment. Rummel v. Dilworth, 131 Pa. St. 509; Melchert v. Smith Co., 140 Pa. St. 448; 21 Atl. Rep. 755; Sims v. East, etc., R. Co.,

§ 310. **What risks are assumed by infants.**— If an infant has sufficient experience and understanding to appreciate and understand the risk from doing his work in a certain way and the danger thereof is apparent, he will be held to have assumed the risk, to the same extent that an adult employee would do, even though there has been no warning or instruction as to the given risk.[30] The mere fact of infancy will not prevent an assumption of obvious and apparent dangers or risks in the service of the employer,[31] but to exempt the infant employee from the rule that open, obvious risks are assumed by all employees, it must appear that he had not sufficient understanding or years to know or appreciate what was thus obvious to him, or that, by the exercise of ordinary care by one of his years or experience he would not have discovered the peril that threatened him.[32] In the absence of such a showing, there could be no recovery by an infant of sufficient years and intelligence or capacity to perform the ordinary duties of a dangerous employment, because of an injury from an open, obvious risk of the service.

But proof of the mere knowledge of danger is not always held to defeat a recovery by an infant employee, of little or no experience in the business. The defense ought to be able to show not only that he knew of the danger of his employment, but also that he possessed sufficient intelligence and capacity or experience to appreciate the liability of the resulting injury. Hence, it is that a mere knowledge of a de-

84 Ga. 152; 10 S. E. Rep. 543; East, etc., R. Co. v. Sims, 80 Ga. 807; 6 S. E. Rep. 595.

[30] Hesse v. National, etc., Co., 66 N. J. L. 652; 52 Atl. Rep. 384; Jones v. Phillips, 39 Ark. 17; 43 Am. St. Rep. 264; Nugent v. Milling Co., 131 Mo. 241; 33 S. W. Rep. 428; Stuart v. Ry. Co., 163 Mass. 391; 40 N. E. Rep. 180; Railroad v. Frawley, 110 Ind. 18; 9 N. E. Rep. 594.

[31] Manchester, etc., Co. v. Polk, 115 Ga. 542; 41 S. E. Rep. 1015; Carter v. Baldwin, 107 Mo. App. 229; 81 S. W. Rep. 204.

[32] Manchester, etc., Co. v. Polk, 115 Ga. 542; 41 S. E. Rep. 1015.

fect in an appliance will not defeat a recovery by an infant on the ground of assumed risk, unless it is also shown that he knew also of the danger or risk to which he was subjected, by reason of such defect.[33] And as observed in a previous section, infants of less than the statutory age are not generally held to have assumed the risk of injury from the duties of their employment, because the age named in the statute is generally taken by the courts as the age when the infant will be held to have such intelligence or discretion to engage in the given employment and perform the duties.[34] It is, practically, a legislative determination that until he reaches that age he does not possess sufficient intelligence to understand the dangers of the obvious risks of the employment.

§ 311. **Same — Risks beyond scope of employment.**— The rule that a minor is held to assume those risks ordinarily incidental to his employment, and those which are obvious to him, in the ordinary discharge of his work, does not apply to dangers with which he is not familiar, or to those incidental to duties he may be asked to perform, beyond the scope of the general duties he was originally engaged to perform.[35] As to duties not incident to the usual employ-

[33] Welsh v. Butts, 202 Pa. 59; 51 Atl. Rep. 591; Hill v. Southern Pac. R. Co. (Utah), 63 Pac. Rep. 814; Brazil, etc., Co. v. Gaffney (Ind.), 4 L. R. A. 850; 21 N. E. Rep. 1102.

[34] Hickey v. Taafe, 32 Hun 7; Cooke v. LaLance, etc., Co., 33 Hun 351; Dresser, Emp. Liab., pp. 600, 601.

An infant, of proper years and discretion, assumes the risks of his employment, understood by him, the same as an adult. DeGraff v. New York, etc., R. Co., 76 N. Y. 125; King v. Boston, etc., R. Co., 9 Cush. (Mass.) 112; Goff v. Norfolk, etc., R. Co., 36 Fed. Rep. 299; Evans v. Lake Shore, etc., R. Co., 12 Hun (N. Y.) 289; Tillotson v. Texas, etc., R. Co., 44 La. Ann. 95; 10 So. Rep. 400; 53 Am. & Eng. R. Cas. 104; Sanborn v. Atchison, etc., R. Co., 35 Kansas 292; 10 Pac. Rep. 860; Goins v. Chicago, etc., R. Co., 37 Mo. App. 676.

[35] Foley v. California, etc., Co., 115 Cal. 184; 49 Pac. Rep. 42; Adolff v. Columbia, etc., Co., 100 Mo. App. 199, an able decision, by

ment of an infant, he is generally held to assume such dangers only as he may thoroughly understand, or those he would have derived knowledge concerning in the performance of his customary duties, and as to dangers arising from the increased hazards of the employment, about which he has received no instructions, he would not be held to have assumed the risk.[36] But of course there is no duty of instruction or warning as to dangers about which a minor is thoroughly conversant, and although asked to perform duties beyond the usual employment, if the increased dangers arising therein are thoroughly known to a minor and he knowingly engages in the performance of such additional service, he will be held to the same standard as if the dangers were incident to the service as customarily performed,[37] In the absence of evidence that plaintiff assented to the increased risk, by contract, either express or implied,[38] and, especially if the performance of the additional duties wherein the increased danger was incurred, was begun under a command or threat of discharge, it is generally left to the jury to determine whether or not, in obeying the command, the extra danger was assumed.[39]

Judge Goode; Roland v. Railroad, 20 Mo. App. 463; Devitt v. Railroad, 50 Mo. 302; Railway Co. v. Fort, 17 Wall. (U. S.) 553; Gardner v. Ry. Co., 150 U. S. 349; Railway v. Babcock, 152 U. S. 190; Railroad Co. v. Young, 49 Fed. Rep. 723; Farwell v. Railroad Co., 8 Allen. 441; Brewer v. Railroad, 124 N. Y. 59; Miner v. Railroad, 153 Mass. 398; Railroad v. Barber, 5 Ohio St. 541; Louisville, etc., R. Co. v. Conroy, 63 Miss. 562; Fogus v. Railroad, 50 Mo. App. 250; Patterson v. Railroad, 76 Pa. St. 412; Goldwaithe v. R. R., 160 Mass. 564; Richmond, etc., R. Co. v. Norment, 84 Va. 172; Railroad v. Adams, 105 Ind. 151.

[36] Brewer v. Tenn., etc., Co., 97 Tenn. 615; 37 S. W. Rep. 549; Railroad Co. v. Smith, 9 Lea 685; Telephone Co. v. Loomis, 87 Tenn. 504; 11 S. W. Rep. 356; Bailey's Mas. Liab. Inj. Serv., p. 208.

[37] Massie v. Peel Splint, etc., Co., 41 W. Va. 620; 24 S. E. Rep. 644.

[38] Miner v. R. R., 153 Mass. 398; Brewer v. R. R., 124 N. Y. 59.

[39] Adolff v. Columbia, etc., Co., 100 Mo. App. 209; Goldwaithe v.

§ 312. **Injuries from negligence of coemployees.**— The common-law doctrine that an employer was not responsible for the negligence of his competent employees, in case of an injury to a coemployee, as a fixed rule of law, in the absence of a statute erecting a different rule of liability, exempts the employer from liability for injuries to infants, as a result of the negligence of their coemployees, the same as to adult employees, for the implied contract of the common law, by which certain risks of the service are assumed by the employee, on entering into the contract of employment, applies to all who become employees, whether they have all reached their legal majority or not.[40] To hold otherwise would be manifestly inconsistent, for frequently employees less than their legal majority are often more competent and skilled in a given service than older men of less experience or ability

Ry. Co., 160 Mass. 564; Patterson v. R. R., 76 Pa. St. 412; Railway Co. v. Adams, 105 Ind. 151.

A railroad company is generally held liable to an infant for an injury received while obeying orders of a superior, without fault of the infant, as the risk in such cases is not assumed by the infant. Louisville, etc., R. Co. v. Frawley, 110 Ind. 18; 9 N. E. Rep. 594; 28 Am. & Eng. R. Cas. 308; Michigan Central R. Co. v. Smithson, 45 Mich. 212; 1 Am. & Eng. R. Cas. 101; Chicago, etc., R. Co. v. Bayfield, 37 Mich. 205; Galveston, etc., Co. v. Thompson, 76 Texas 235; 13 S. W. Rep. 60; Tennessee, etc., R. Co. v. Hayes, 97 Ala. 201; 12 So. Rep. 98.

A boy of tender years is not held to assume the risk of any other than obvious or known dangers. Houston, etc., R. Co. v. Miller, 51 Texas 270; Fisk v. Central P. R. Co., 72 Cal. 38; 13 Pac. Rep. 144.

Nor are risks assumed, while obeying orders outside scope of employment. Cook v. St. Paul, etc., R. Co., 34 Minn. 157; 24 N. W. Rep. 311; Woutilla v. Duluth, etc., Co., 37 Minn. 153; 33 N. W. Rep. 551; 5 Am. St. Rep. 832.

But merely placing a minor in a different position and employment is not such evidence of negligence as to render a company liable, in case of injury to such infant. Texas & P. R. Co. v. Carlton, 60 Texas 397; 15 Am. & Eng. R. Cas. 350.

[40] King v. Boston, etc., R. Co., 9 Cush. (Mass.) 112; Woodward Iron, etc., Co. v. Cook, 124 Ala. 343; Dresser, Emp. Liab., § 89, p. 400.

in the same employment would be.[41] But of course if the infant is employed in violation of a statute, or if his inexperience or lack of years is such that he would not understand the nature of the service or the ordinary risks of the business, he would not, as matter of law, be held to assume the dangers from the negligence of even competent employees, and where there were such mitigating circumstances, it would usually be left to the jury to determine whether, under the facts of a given case, the infant should be charged with the assumption of such a risk.[42]

§ 313. **Contributory negligence of infants.**— The rule is well established that the same standards do not apply in the case of an infant of tender years and an adult, so far as the doctrine of contributory negligence is concerned, for, as said by the Georgia Supreme Court: "No court can hold that childhood and manhood are bound to observe the same degree of diligence." [43] In the case of an infant, where the contributory negligence of the plaintiff is interposed, the test is, was the act such as might have been expected from a child of the knowledge, age and discretion of the plaintiff, considering his experience and other facts and cir-

[41] White, Per. Inj. in Mines, § 516, p. 570, and cases cited.

[42] Adolff v. Columbia, etc., Co., 100 Mo. App. 209; Goldwaithe v. Railroad Co., 160 Mass. 564; Patterson v. Railroad, 76 Pa. St. 412.

For liability of employer, for injuries to infants, while they were obeying specific orders, see Carter v. Baldwin, 107 Mo. App. 217; 81 S. W. Rep. 204; Louisville, etc., R. Co. v. Frawley, 110 Ind. 18; 9 N. E. Rep. 594; 28 Am. & Eng. R. Cas. 308; Chicago, etc., R. Co. v. Bayfield, 37 Mich. 205; Jones v. Lake Shore, etc., R. Co., 49 Mich. 573; 8 Am. & Eng. R. Cas. 221; Galveston Co. v. Thompson, 76 Texas 235; 13 S. W. Rep. 60. But see, *contra*, Hogan v. Northern Pacific R. Co., 53 Fed. Rep. 519; 53 Am. & Eng. R. Cas. 384; Capper v. Louisville, etc., R. Co., 103 Ind. 305; 21 Am. & Eng. R. Cas. 525; Cole v. Chicago, etc., R. Co., 71 Wis. 114; 33 Am. & Eng. R. Cas. 274.

[43] Railway Co. v. Young, 81 Ga. 416.

cumstances in connection with the injury.[44] To hold an infant to the same degree of care or diligence that an ordinarily prudent person of mature years would exercise, would be manifestly improper.

The mere infancy of the plaintiff, however, will not excuse him from the result of his own want of care, and where an infant is capable or experienced in the business wherein he received the injury and for this reason is chargeable with contributory negligence at all, it is held in some States that the same degree of care will be exacted from him as would, under the same circumstances, be required of an adult employee.[45] But generally, where the age of the infant is such as to make it a debatable question whether or not he possessed sufficient intelligence or experience to know or appreciate the danger he encountered, as a result of his own act, the question would be held a jury issue, to be determined with reference to his age, capacity and experience and knowledge of the particular danger.[46]

[44] Gardner v. Ry. Co., 150 U. S. 349; Railway Co. v. Babcock, 152 U. S. 190; Brewer v. Railroad, 124 N. Y. 59; Fogus v. Railroad, 50 Mo. App. 250; Goldwaithe v. Railroad, 160 Mass. 564; Railroad v. Adams, 105 Ind. 151; Adolff v. Columbia, etc., Co., 100 Mo. App. 209; Patterson v. Railroad, 76 Pa. 412; Miner v. Railroad, 153 Mass. 398; Day v. Citizens, etc., Co., 81 Mo. App. 471; Pueschell v. K. C., etc., Co., 79 Mo. App. 459; Foley v. Cal. etc., Co., 115 Cal. 184; 49 Pac. Rep. 42.

[45] Graney v. St. L. I. M. & S. Ry. Co., 140 Mo. 89; Spillane v. Railroad Co., 135 Mo. 414; Payne v. Railway Co., 136 Mo. 562; Ridenhour v. Railroad, 102 Mo. 270.

[46] Adolff v. Columbia, etc., Co., 100 Mo. App. 209; Railroad v. Adams, 105 Ind. 151; Goldwaithe v. Railroad, 160 Mass. 564; Fogus v. Railroad, 50 Mo. App. 250; Brewer v. Railroad, 124 N. Y. 59; Miner v. Railroad, 153 Mass. 398.

Contributory negligence by an infant is equally as good a defense as if he were an adult, but his actions are to be gauged according to his years and not judged as if he were an adult. St. Louis, etc., R. Co. v. Valarius, 56 Ind. 511; 18 Am. Ry. Rep. 116; Umback v. Lake Shore, etc., R. Co., 83 Ind. 191; 8 Am. & Eng. R. Cas. 98.

§ 314. **Releases by infant employees.**— A release executed by an infant for damages for personal injuries sustained by him, while engaged in the service of another is not different from any other contract entered into by him, but as in the case of any other contract or agreement made by a person not *sui juris,* a release by an infant is voidable and may be set aside by him, at any time, after he arrives at his majority.[47] Nor is a compromise or settlement entered into by his next friend sufficient to estop him from proceeding with his damage suit, unless such compromise or settlement is effected with the consent and endorsement of the court.[48] In a Massachusetts case,[49] the next friend, who had been appointed by the court, to prosecute an action for an infant, attempted, without the concurrence of the court, to effect a settlement of the cause, by accepting less than the amount claimed in the petition. The settlement was held of no effect by the court, because it was not brought to the attention of the court, or approved by an entry of record. A similar holding was announced in an Alabama case,[50] wherein it was held that a

Whether or not an infant has been guilty of contributory negligence defeating an action for an injury received by him, is, ordinarily, a question for the jury, as it is to be determined by the evidence and inferences therefrom, measured in the light of the employee's age and capacity to appreciate his surroundings and the dangers of his employment. Flynn v. Erie, etc., Co., 12 N. Y. S. R. 88; International, etc., R. Co. v. Hinzie, 82 Texas 623; 18 S. W. Rep. 681; St. Louis, etc., R. Co. v. Valarius, 56 Ind. 511; 18 Am. Ry. Rep. 116; Umback v. Lake Shore, etc., R. Co., 83 Ind. 191; 8 Am. & Eng. R. Cas. 98; Williams v. South, etc., R. Co., 91 Ala. 635; 9 So. Rep. 77; Hunnicutt v. Georgia, etc., R. Co., 8 Ga. 195; 11 S. E. Rep. 580; Goins v. Chicago, etc., R. Co., 37 Mo. App. 676; 47 Mo. App. 173; Hamilton v. Galveston, etc., R. Co., 54 Texas 556; 4 Am. & Eng. R. Cas. 528; Texas, etc., R. Co. v. Bricks, 83 Texas 598; 20 S. W. Rep. 511; Pennsylvania R. Co. v. Long, 94 Ind. 250; 15 Am. & Eng. R. Cas. 345; Kehler v. Schwenk, 144 Pa. St. 348; 22 Atl. Rep. 910.

[47] Dresser, Emp. Liab., p. 138.

[48] Tripp v. Gifford, 155 Mass. 108.

[49] Tripp v. Gifford, 155 Mass. 108.

[50] Tennessee, etc., R. Co. v. Hays, 97 Ala. 201.

confession of judgment even, by the next friend, would not be legal, unless approved by the court. But if the court concurs in the settlement made by either a guardian or next friend, such settlement will generally be upheld.[51]

[51] Burke v. Burke, 170 Mass. 499.

A release, by a parent, of all sums to which the minor may be entitled in case of injury, only operates to release the parent's damages during the minority of the child and not the infant's right for the injury to himself. International, etc., R. Co. v. Hinzie, 82 Texas 623; 18 S. W. Rep. 681.

CHAPTER XIV.

RISKS ASSUMED BY EMPLOYEES.

§ 315. Basis of rule of assumption of risks.
316. Volunteers generally held to assume risks.
317. Dangers from employer's negligence assumed in some States.
318. Risks assumed by minors.
319. Risks from destructive natural sources assumed.
320. Where work changes the place.
321. Risks incident to employment are assumed.
322. Scope and extent of rule.
323. Illustrations of incidental risks assumed.
324. Injuries from low bridges, when assumed.
325. Injuries from properly constructed tracks, switches and cattle guards.
326. Risks from structures near track, assumed, when.
327. Risks from handling machinery, assumed, when.
328. Risks from movement of trains in company yards assumed.
329. Risks from excessive speed assumed, in some States.
330. Flying switch — Shunting cars.
331. Jerks from taking up slack assumed.
332. Risks from improperly loaded cars.
333. Collisions with cattle or teams.
334. Injuries from use of snow plows — Bucking snow.
335. Dangers in coupling cars.
336. Known and obvious risks.
337. Presumed to know what could be observed.
338. Risks from open defects in cars assumed, when.
339. Injuries from lifting cars, rails, etc., assumed.
340. Working after notice of defect and knowledge of danger.
341. Notice with dangers connected with place of work, assumed, when.
342. Dangers from open culverts assumed, when.
343. Notice of defects in machinery and appliances, assumed, when.
344. Employee with equal knowledge assumes risks.
345. Extra risks assumed, when.
346. Extra risks from defective bridges, assumed, when.
347. Extra risks from operation of cars, assumed, when.

§ 348. Extra dangers in use of defective cars, assumed, when.
349. Dangers outside scope of employment, assumed, when.
350. Dangers from obeying orders of coemployees, assumed, when.
351. Risks assumed, notwithstanding promise of repair.
352. Risks assumed by car and track repairers.
353. Various injuries due to caving earth banks assumed.
354. Risks from negligence of coemployees, assumed, at common law.
355. Additional risks from inclement weather assumed.
356. Obvious dangers from violation of statutes, assumed, in some States.
357. Risks of accidents are assumed.
358. Selecting more dangerous way.

§ 315. **Basis of rule of assumption of risks.**— The rule that an employee is held, in law, to assume the risk of dangers incident to his employment and those which arise from the acts of those not under the immediate control or supervision of the employer, is said to be based upon the particular *status* of the relation and also to depend upon the implied contract of employment, that the employee will assume such incidental risks as arise out of the service to be performed, as ordinarily conducted by reasonably careful men in the same business.[1] This doctrine is no exception to the rule of *respondeat superior,* for as to risks assumed by the employee, there is lacking the essential of a breach of duty owing by the employer, which must obtain in the case of a liability under the rule *respondeat superior,* and hence the rule of assumption of known or incidental risks, not dependent upon the employer's negligence, is rather a rule of law, based upon the relations of the parties and having for its object the protection of property rights, than a mere rule of policy or expediency, adopted by the courts, for the protection of

[1] Priestley v. Fowler (3 Mees & W. 1), decided in 1837, is the first reported case wherein an employee — then called a servant — attempted to hold his employer — master — for damages for a personal injury, received in the course of the employment. The liability in personal injury actions has been so extended and distorted, since this

the employer.[2] The mere demand of a large class engaged in industrial pursuits, for the repeal of this beneficent rule of the common law, or the enactment of laws in accordance with such demands, in popular Governments, by the law-making power, always subservient to public sentiment, does not militate against the justness or wisdom of the rule, or demand any defense for the existence of the law, but rather indicates the digression of law-making bodies from the ideals of the courts, the protection of individual and property rights, for the demands for more popular laws, or laws more consistent with the interests of the larger classes. A just rule of law should be enforced to protect the rights of the most unpopular citizens equally with those enjoying the largest share of the public confidence, not only because such citizens are frequently more deserving, but because the law is no respecter of persons. The rule that an employee assumes, in law, the dangers that are known to him, or those that are apparent or incidental to the business, as ordinarily and carefully conducted, is a rule of the common law, based upon the wisdom and precedents of the ages. It is therefore a property right of the employer that should not be frittered away, either by legislatures or the courts.[3]

able decision was rendered, that a perusal of the case is interesting in the extreme, to modern lawyers. Dresser's Emp. Liab., p. 2.

[2] Dresser, in his work on Employer's Liability, says the rule is based upon "policy." Dresser's Emp. Liab., p. 7. It is rather based upon a sound principle, which has been sacrificed and set aside by one of policy, or expediency, growing out of modern industrial evils and issues.

[3] Judge Bailey, in his excellent work on "Master's Liability," recognizes the rule of assumption of risk as a property right that ought to be enforced by the courts, the same as any other well settled rule of law, based upon principle. Bailey's Mas. Liab. Inj. Serv., p. 27. See Justice Shaw's great opinion in the leading and early case, Farwell v. Boston, etc., R. Co., 4 Metc. (Mass.) 49, 55.

The doctrine of assumption of risk is that the contract of employment expressly or impliedly undertakes that the employer shall only

§ 316. **Volunteers generally held to assume risks.**— Where one has no interest in the work of a railroad employee, but volunteers to assist in the duties of the employee, he is generally held to have assumed all the risks incident to the work he has so undertaken and cannot hold the railroad company liable if he is injured while so doing.[4] In Minnesota, a bystander, called by a brakeman, to assist in switching cars and injured while so engaged, was held to assume the risk;[5] one trying to signal a train to stop, at the request of a watchman, was held to assume the risk of injury while so engaged, in Michigan,[6] and a boy, getting on an engine at the request of a fireman, in Pennsylvania,[7] was held to be a mere volunteer in the work of taking water, so that he would assume the risk of injury, while so engaged, whether he should be regarded as a mere stranger or an employee.

§ 317. **Dangers from employer's negligence assumed in some States.**— It is held, in some States,[8] that where the employer

be responsible for personal injuries to his employees, where his negligence causes such injuries, and the employees assume the open, obvious dangers of their employment. Narramoore v. Cleveland, etc., Ry. Co., 96 Fed. Rep. 298; 37 C. C. A. 499; 48 L. R. A. 68.

The basis of the doctrine of assumption of risks is discussed, by the Supreme Court of Kansas, in the recent case of Atchison, etc., Ry. Co. v. Bancord, 71 Pac. Rep. 253.

[4] Eason v. Sabine, etc., R. Co., 65 Texas 577.

[5] Church v. Chicago, etc., R. Co., 50 Minn. 218; 52 N. W. Rep. 647.

[6] Blair v. Grand Rapids, etc., R. Co., 60 Mich. 124; 26 N. W. Rep. 855; 24 Am. & Eng. R. Cas. 430.

[7] Flower v. Pennsylvania R. Co., 69 Pa. St. 210.

[8] Where a railroad company is habitually negligent in a certain respect, an employee who remains in the service, with notice of such negligence, assumes the risk thereof. Arenschield v. Chicago R. I. & P. R. Co., 128 Iowa 677; 105 N. W. Rep. 200.

An injury from the employer's negligence is held assumed, in Texas, on proof that the employer was customarily negligent and that the employee knew it, but failed to complain thereof. Gulf, etc., R. Co. v. Hulett, 92 S. W. Rep. 454.

is customarily negligent in the selection of dangerous or unsafe appliances or places for work, and the employee injured as a result thereof had worked with such appliances, or in such place, without complaint, after notice of the danger, the employee would be held to assume the risk, notwithstanding the negligence, as the producing cause of the danger occasioning the injury.

And the same rule would apply in the case of the employment of incompetent or customarily negligent employees, and if an employee is injured because of the employment of incompetent employees, or because of a failure to employ a sufficient number of employees to carry on the business, if the injured employee, after notice of the negligence in this particular, remained in the service without complaint, he will be held to have assumed the risk.[9]

§ 318. **Risks assumed by minors.**— Where a minor was instructed and cautioned about a danger incident to his employment,[10] or he understood the danger,[11] or it was so open and obvious that one of his years and experience could not but see and appreciate the danger,[12] he is held to assume the risk, the same as an adult. The law presumes that an infant will notice patent and obvious dangers, such as one of his years could not fail to discern,[13] but if the risk is such a one

[9] The danger of an injury from working with an insufficient force of men, was held assumed, in Slavens v. Northern Pac. R. Co., 97 Fed. Rep. 255; 38 C. C. A. 151; Tuttle v. Railway Co., 122 U. S. 189; Southern Pac. R. Co. v. Seley, 152 U. S. 145.

A known risk from failure to employ sufficient men was held assumed, in Seery v. Gulf, etc., Ry. Co. (Texas), 77 S. W. Rep. 950.

But see, *contra*, Illinois Central R. Co. v. Langan (Ky.), 76 S. W. Rep. 32.

[10] Williams v. Belmont, etc., Co., 55 W. Va. 84; 46 S. E. Rep. 802; Carter v. Baldwin, 107 Mo. App. 217; 81 S. W. Rep. 204.

[11] Cohen v. Hamblin, etc., Co., 186 Mass. 544; 71 N. E. Rep. 948.

[12] Carter v. Baldwin, 107 Mo. App. 217; 81 S. W. Rep. 204.

[13] Bender v. New York, etc., Co. (N. J.), 61 Atl. Rep. 388; Merrifield v. Maryland, etc., Co., 143 Cal. 54; 76 Pac. Rep. 710.

that a person of his immature years or experience would not appreciate the danger, then he will not be held to have assumed the risk thereof.[14] And if there is a statute in force in the jurisdiction where the injury occurred, preventing the employment of infants of the age of the injured employee in the business in which he received the injury, this is generally held to be a legislative determination that a person of his age could not appreciate the risk of the employment and he will not be held to have assumed the risk.[15]

§ 319. **Risks from destructive natural sources assumed.**— The risk from injuries from natural destructive sources is presumed to be known by all men and the consequent dangers from such sources are so far held to be chargeable to all persons of ordinary intelligence, that if an employee in the possession of his faculties is injured from such causes, he is without a remedy against his employer.[16] One author illustrates this proposition, with the expression that, "all men are taken to understand that fire will burn and water drown."[17] Risks naturally arising from the work being done are generally held to be assumed by the employee, as a matter of law, whether they are visible or invisible, known

[14] Henderson v. Kansas City, 177 Mo. 477; 76 S. W. Rep. 1045; Babb v. Oxford, etc., Co., 99 Me. 298; 59 Atl. Rep. 290.

[15] Merino v. Lehmaier, 173 N. Y. 530; 66 N. E. Rep. 572; 4 Thompson on Neg., § 4686, and cases cited.

A minor, capable of understanding the dangers surrounding his employment, assumes the risk, the same as an adult does. Decatur Car Wheel Co. v. Terry (Ala.), 41 So. Rep. 839; Evans, etc., Co. v. Crawford (Neb.), 94 N. W. Rep. 814.

[16] Bailey's Mas. Liab. Inj. Serv., p. 152; Buswell's Per. Inj., § 204, p. 341; Minnier v. Sedalia, etc., R. Co., 167 Mo. 99; Bradley v. Chicago, etc., R. Co., 138 Mo. 293; Swanson v. Ry. Co. (Minn.), 70 N. W. Rep. 978; Reiter v. Winona, etc., Co. (Minn.), 75 N. W. Rep. 219; Watson v. Coal, etc., Co., 52 Mo. App. 361.

[17] Buswell, Per. Inj., § 204, p. 341.

or unknown.[18] For instance, an injury from a body subject to the natural law of gravitation, which the employee or his coemployees had subjected to such a force, would be a risk of the service with which he would be chargeable in law with knowledge and he could not hold his employer responsible for such an injury.[19] It is therefore held, very generally, that if an employee is injured by the caving of a railroad cut or ditch in which he is at work with his coemployees, that he cannot recover for such an injury, in the absence of some specific act of negligence on the part of his employer;[20] but one decision of the courts of Illinois would seem to base a liability upon an injury from such a natural cause and thus hold the employer for damages caused by natural forces alone.[21] This is not the general rule governing the employer's liability in such cases.[22]

§ 320. **Where work changes the place.**— The rule requiring the employer to furnish a reasonably safe place for the employee to work does not apply, where the nature of the work is such as to continuously change the place and make a new place for the work, but, in such case, the employee assumes the risk of injury from any change in the place of

[18] Linton Coal, etc., Co. v. Persons, 15 Ind. App. 69; 43 N. E. Rep. 651; Pennsylvania, etc., R. Co. v. Witte, 15 Ind. App. 583; 43 N. E. Rep. 319.

[19] See White, Pers. Inj. in Mines, § 185, p. 198, and cases cited.

[20] Deceased stood between the steam shovel and the gravel wall of a railroad cut; there was no evidence that his duties required him at this point and his death from caving in of the pit was held to be an assumed risk of his service. Beker's Admr. v. Lexington, etc., R. Co. (Ky.), 89 S. W. Rep. 149.

[21] Lasalle v. Kostka, 190 Ill. 130; 60 N. E. Rep. 72.

[22] White, Per. Inj. in Mines, § 185, p. 198, and cases cited.

An employee engaged to shore up a bank of earth, which was obviously unsafe, until properly shored, assumed the risk of the work, from the bank falling on him. Henson v. Armour, etc., Co. (Mo.), 88 S. W. Rep. 166.

work, arising from the prosecution of the work.[23] Where an employee in a railroad cut undermines the bank of earth and thereby puts in operation the familiar law of gravitation, and the earth bank, subjected to such natural law, by the breaking of the particles that hold the earth in place, falls and injures the employee, it could not be said that the employer should respond in damages for such an injury, as this would be to make of him an absolute insurer of the judgment of his employees.[24]

But if the injury is due to the defective condition of the earth bank and could be traced to the wrongful act or negligence of the employer, then the rule of nonliability would not apply, and the employee could recover damages for such an injury.[25]

§ 321. **Risks incident to employment are assumed.**— The rule of law is well established that one capable of contracting, by entering into a contract of employment with a railroad company, thereby assumes, as a condition of his contract, all the risks and hazards ordinarily and usually incident to such employment, and he will be presumed to have contracted with reference to such risks and hazards.[26] Another way of stat-

[23] Bradley v. Chicago, etc., R. Co., 138 Mo. 293; 39 S. W. Rep. 763; Reiter v. Winona, etc., Co. (Wis.), 75 N. W. Rep. 219; Allan v. Logan, 37 Pac. Rep. 496.

[24] Rasmussen v. Chicago, etc., R. Co., 21 N. W. Rep. 583; Watson v. Kansas, etc., Co., 52 Mo. App. 366; Olsen v. McMullen, 24 N. W. Rep. 318; Brown v. Chattanooga, etc., R. Co. (Tenn.), 47 S. W. Rep. 415; Bradley v. Chicago, etc., R. Co., 138 Mo. 293; 39 S. W. Rep. 763.

[25] Larson v. Pittsburg, etc., Co., 71 Mo. App. 512; Carter v. Baldwin, 107 Mo. App. 217; 81 S. W. Rep. 204.

[26] O'Neal v. St. Louis, etc., R. Co., 3 McCrary (U. S.), 423; 9 Fed. Rep. 337; Woodworth v. St. Paul, etc., R. Co., 5 McCrary (U. S.), 574; 18 Fed. Rep. 282; Louisville, etc., R. Co. v. Orr, 91 Ala. 548; 8 So. Rep. 360; Southwestern, etc., Co. v. Woughter, 56 Ark. 206; 19 S. W. Rep. 575; Brown v. Central Pac. R. Co. (Cal.), 12 Pac. Rep. 512; Herbert v. Northern Pac. R. Co., 3 Dak. 38; 13 N. W. Rep. 349; 8

ing the same rule, with a possible legal exception, is, that unless it is otherwise stipulated in the contract,[27] one who enters into an employment, from its nature hazardous, is presumed to do so with a knowledge of the dangers incident

Am. & Eng. R. Cas. 85; East Tenn., etc., Co. v. Perkins, 88 Ga. 1; 13 S. E. Rep. 952; Chicago, etc., R. Co. v. Lonergan, 118 Ill. 41; 7 N. E. Rep. 55; 28 Am. & Eng. R. Cas. 491; St. Louis, etc., R. Co. v. Corgan, 49 Ill. App. 229; Louisville, etc., R. Co. v. Hanning, 131 Ind. 528; 31 N. E. Rep. 187; 53 Am. & Eng. R. Cas. 452; St. Louis, etc., R. Co. v. Irwin, 37 Kansas 701; 16 Pac. Rep. 146; Dandie v. Southern Pac. R. Co., 42 La. Ann. 686; 7 So. Rep. 792; Coolbroth v. Maine C. R. Co., 77 Me. 165; 21 Am. & Eng. R. Cas. 599; Cumberland, etc., R. Co. v. State, 44 Md. 283; Yeaton v. Boston, etc., R. Co., 135 Mass. 418; 15 Am. & Eng. R. Cas. 253; Irvine v. Flint, etc., R. Co., 89 Mich. 416; 50 N. W. Rep. 1008; 53 Am. & Eng. R. Cas. 210; Bengston v. Chicago, etc., R. Co., 47 Minn. 486; 50 N. W. Rep. 531; New Orleans, etc., R. Co. v. Hughes, 49 Miss. 258; Schroeder v. Chicago, etc., R. Co., 108 Mo. 322; 18 S. W. Rep. 1094; 53 Am. & Eng. R. Cas. 436; Craig v. Chicago, etc., R. Co., 54 Mo. App. 523; Hanley v. Grand Trunk R. Co., 62 N. H. 274; Disher v. New York, etc., R. Co., 41 Hun (N. Y.) 637; 114 N. Y. 619; 21 N. E. Rep. 415; McNeil v. New York, etc., R. Co., 71 Hun (N. Y.) 24; Wild v. Oregon, etc., R. Co., 21 Oregon 159; 27 Pac. Rep. 954; Galveston, etc., R. Co. v. Garrett, 73 Texas 262; 13 S. W. Rep. 62; Missouri Pac. R. Co. v. Watts, 63 Texas 549; 22 Am. & Eng. R. Cas. 277; Norfolk, etc., R. Co. v. Cottrell, 83 Va. 512; 3 S. E. Rep. 123; 31 Am. & Eng. R. Cas. 235; Riley v. West Virginia R. Co., 27 W. Va. 145; Steffen v. Chicago & N. W. R. Co., 46 Wis. 259; 50 N. W. Rep. 348.

Incidental risks, in a recent case, in Illinois, were said to be such as were "usual," or common, frequent, or customary. "Ordinary" risks were said to be such as frequently recurred. Chicago, etc., R. Co. v. Leach, 104 Ill. App. 30.

Injuries from sparks and cinders are incidental risks assumed by railroad employees. Duree v. Chicago, etc., R. Co. (Iowa), 92 N. W. Rep. 890.

An incidental risk may include extraordinary dangers, if arising in the regular or ordinary course of the business. Chicago, etc., R. Co. v. Wild, 109 Ill. App. 38; Weed v. Chicago, etc., Ry. Co. (Neb.), 99 N. W. Rep. 827; Ryan v. Third Ave. R. Co., 86 N. Y. S. R. 1070; 92 App. Div. 306.

[27] Cumberland, etc., R. Co. v. State, 44 Md. 283; 45 *id.* 229.

to such service and he assumes the risks of its ordinary hazards.[28]

This rule is applied, without exception, so far as adult employees are concerned, for the presumption is that they have sufficient intelligence to comprehend the dangers incident to the service in which they engage,[29] but in the case of young or inexperienced employees, the rule is subject to the exception that it is the employer's duty to instruct or warn such employees of the dangers of the employment, whenever he may know or ought to know that the employee was ignorant of them.[30]

§ 322. **Scope and extent of rule.**— All ordinary and incidental risks are assumed by employees and it is error to limit the risks assumed to such only as threaten "immediate danger,"[31] or such as are "necessarily incident" to the employment.[32] To give a cause of action, in any case, the employer must have violated some one of the duties due from him to the employee and the violation of this duty must be the proximate cause of the injury.[33] Perils attendant upon the performance of the employer's business and the machinery or appliances necessarily employed to perform his work,

[28] Louisville, etc., R. Co. v. Frawley, 110 Ind. 18; 9 N. E. Rep. 594; 28 Am. & Eng. R. Cas. 308; Williams v. Delaware, etc., R. Co., 116 N. Y. 628; 22 N. E. Rep. 1117; 27 N. Y. S. R. 760; 41 Am. & Eng. R. Cas. 254; Hawk v. Pennsylvania R. Co. (Pa.), 11 Atl. Rep. 459; 31 Am. & Eng. R. Cas. 268; Chicago, etc., R. Co. v. Lonergan, 118 Ill. 41; 7 N. E. Rep. 55; 28 Am. & Eng. R. Cas. 491; Griffin v. Ohio, etc., R. Co., 124 Ind. 326; 24 N. E. Rep. 888.

[29] Gibson v. Oregon, etc., R. Co., 23 Oregon 493; 32 Pac. Rep. 295.

[30] Gibson v. Oregon, etc., R. Co., *supra*.

[31] Minnier v. Sedalia, etc., R. Co., 167 Mo. 99; 66 S. W. Rep. 1072.

[32] Southwestern, etc., Co. v. Woughter, 56 Ark. 206; 19 S. W. Rep. 575.

[33] Little Rock, etc., R. Co. v. Townsend, 41 Ark. 382; 21 Am. & Eng. R. Cas. 619; Mensch v. Pennsylvania R. Co., 150 Pa. St. 598; 25 Atl. Rep. 31; 53 Am. & Eng. R. Cas. 198,

or at the place where they are used, cannot be considered dangers due to his breach of duty and there can generally be no recovery due to such dangers.[34] Dangers connected with machinery, or the use of mechanical power necessary in the movement of such large and powerful bodies as railroad trains, are necessarily unavoidable, even after the exercise of due care by the employer, and such risks are consequently incident to the business, as ordinarily conducted and are assumed by persons engaging therein.[35]

A company is allowed to employ such reasonably safe tools and appliances as it may see fit, having regard to improvements in the methods of its business and no breach of duty can be charged to a failure to adopt the newest or latest inventions, or appliances of a particular kind or pattern.[36] An injury from the use of an old coupling device, used concurrently with a newer device, is a danger assumed by a brakeman;[37] a section man assumes the risk of injuries from the operation of trains in foggy weather, as well as in clear weather;[38] a company cannot be charged with negligence in using green switch targets, instead of red targets;[39] an injury due to a cause that could not have been reasonably anticipated is assumed,[40] for railroad employees are not insured, by the employer, against accidents,[41] by reason of the employment simply, nor can a breach of duty ever be predicated on the simple employment of a person, subject to

[34] Hoosier, etc., Co. v. McCain, 133 Ind. 231; 31 N. E. Rep. 956.

[35] McGovern v. Central, etc., R. Co., 123 N. P. 280; 25 N. E. Rep. 373; 33 N. Y. S. R. 416, reversing 53 Hun 635.

[36] Bailey's Mas. Liab. Inj. Serv., p. 146.

[37] Pittsburg, etc., R. Co. v. Henly, 48 Ohio St. 608; 29 N. E. Rep. 575; 53 Am. & Eng. R. Cas. 194.

[38] International, etc., R. Co. v. Hester, 64 Texas 401; 21 Am. & Eng. R. Cas. 535.

[39] Naylor v. New York, etc., R. Co., 33 Fed. Rep. 801.

[40] Beasley v. Transfer Co., 148 Mo. 413; 50 S. W. Rep. 87.

[41] Bradbury v. Kingston, etc., Co., 157 Pa. St. 231; 27 Atl. Rep. 400; Melville v. Missouri River, etc., R. Co., 48 Fed. Rep. 820.

the ordinary risks of the business, if the employee is himself aware of the risks and consents to encounter them.[42]

§ 323. **Illustrations of incidental risks assumed.**— Illustrative of the rule laid down in the foregoing section, it may not be inappropriate to name, from the great array of adjudicated cases, a few from the different departments of railroad service, where incidental risks have been held to be assumed. An express man assumes the risk of injury in moving a train box, from one car to another, with a rope;[43] an injury while throwing mail bags into moving cars is assumed;[44] a car inspector assumes the risk of injury from moving cars;[45] a brakeman assumes the risk of injury in coupling cars;[46] an engineer assumes the risk of rounding a curve and being thrown from his engine;[47] a section hand assumes the dan-

[42] McGinnis v. Canada Southern Co., 49 Mich. 466; 13 N. W. Rep. 819; 8 Am. & Eng. R. Cas. 135.

[43] Gowen v. Harley, 56 Fed. Rep. 973. This is a very clear and able decision by Judge Sanborn. In the course of the opinion, the court said:

"The errand boy whose duty it is to climb the stairs of a high building daily, cannot recover from the employer for a fall down the stairs, on the ground that the latter had just promised to furnish him an elevator for his convenience or for his safety, when the stairs themselves were reasonably safe. The mason who is placing heavy stones upon a wall by hand cannot recover of his employer if he takes up one that is too heavy for him and it falls upon his feet, on the ground that his employer had just promised to furnish him an incline plane, upon which he could roll the stones upon the wall. Nor can the plaintiff, who was employed to carry this train box, without tools or machinery, from one car to the other, recover here, because the defendant had promised to provide him with planks or a skid on which he could slide it across."

[44] Coolbroth v. Maine Central R. Co., 77 Me. 165; 21 Am. & Eng. R. Cas. 599.

[45] Cruty v. Erie, etc., R. Co., 3 T. & C. (N. Y.) 244.

[46] Jacksonville, etc., R. Co. v. Galvin, 29 Fla. 636; 11 So. Rep. 231; 53 Am. & Eng. R. Cas. 341.

[47] Knapp v. Sioux City R. Co., 71 Iowa 41; 32 N. W. Rep. 18.

ger of falling into water ways,[48] as well as injuries from moving trains;[49] a shoveler, the danger of a falling earth[50] or gravel bank;[51] a track walker, the chance of being caught on a trestle, by a train of cars;[52] and a traveling auditor of the company assumes the risk of all dangers that are open or ought to have been known to him, along the track of the defendant company.[53]

§ 324. **Injuries from low bridges, when assumed.**— As the

[48] Couch v. Charlotte, etc., R. Co., 22 So. Car. 557; 28 Am. & Eng. R. Cas. 331.

[49] Evans v. Wabash R. Co., 178 Mo. 508; 77 S. W. Rep. 515.

[50] Bradley v. Chicago, etc., R. Co., 138 Mo. 293; 39 S. W. Rep. 763.

[51] Songstad v. Burlington, etc., R. Co., 5 Dak. 517; 41 N. W. Rep. 755; 38 Am. & Eng. R. Cas. 211.

[52] Gibson v. Oregon, etc., R. Co., 23 Oregon 493; 32 Pac. Rep. 295.

[53] Minty v. Union Pac. R. Co., 2 Idaho 437; 21 Pac. Rep. 660.

An employee was held to assume the risk of jerks and jolts, in a freight train, in the following cases: Lee v. Northern Pac. Ry. Co. (Wash.), 81 Pac. Rep. 834; Louisville, etc., R. Co. v. Smith, 129 Ala. 53; 30 So. Rep. 571; Shields v. Kansas City, etc., Ry. Co., 87 Mo. App. 637; Branco v. Illinois Central R. Co. (Iowa), 93 N. W. Rep. 97.

A section hand injured by a lining block falling from the front end of a hand car, where it had been placed without order from the foreman, but which was obvious and was caused to fall by the motion of the car, assumed the risk. St. Louis, S. W. Ry. Co. v. Dempsey (Texas), 89 S. W. Rep. 789.

A brakeman who stands so close to a passing train of cars as to have his clothing caught by the door irons of a freight car, as a result of which he is thrown down and crushed, was held to assume the risk, in Indiana. Chicago, I. & L. R. Co. v. Bryan, 75 N. E. Rep. 678.

The operator of an engine or car, who knows the use of sand and the necessity of providing himself with it, fails to do so, as a result of which his car runs away, down a steep grade, causing his injury, assumes the risk and his employer is not liable. Meyer v. Detroit, etc., Ry. Co. (Mich.), 105 N. W. Rep. 888; 12 Det. Leg. N. 843.

A lineman climbing telegraph poles is held to assume the risk in the following cases: Ewald v. Michigan Cent. R. Co., 107 Ill. App. 294; Epperson v. Postal Tel., etc., Co., 155 Mo. 346; 50 S. W. Rep. 795; 55 S. W. Rep. 1050; Meehan v. Holyoke Ry. Co., 186 Mass. 511; 72 N. E. Rep. 61.

employer is permitted to construct his plant or premises in his own way, so long as same are not negligently built, and it is a frequent occurrence for bridges along railroad tracks to be too low to accommodate unusually high cars, it is quite generally held that all employees who know, or ought by their experience to have known of a low bridge, assume the risk of injury received while standing on cars which cannot pass under the bridge, with sufficient height above the car to permit a person to safely stand upon the car without stooping, as such dangers are ordinary risks of the business of railroading and are so understood by experienced employees.[54] But if the employee is so young or inexperienced that he would not appreciate the danger of such risks, or if actual notice of such bridge is not had by him, then the risk of injury therefrom is not assumed as an incident of the employment, but warning or instruction should be given of the risk.[55]

§ 325. **Injuries from properly constructed tracks, switches and cattle guards.**— While injuries from improperly or defectively constructed tracks, switches or cattle guards, are not generally held to be assumed by employees of a railroad company,[56] injuries due to tracks, switches or cattle guards that are properly constructed and installed are generally held to be risks assumed by employees, as all such constructions

[54] Baltimore, etc., R. Co. v. Strickler, 51 Md. 47; Carbine v. Bennington, etc., R. Co., 61 Vt. 348; 17 Atl. Rep. 491; 38 Am. & Eng. R. Cas. 45; Clark v. Richmond, etc., R. Co., 78 Va. 709; 18 Am. & Eng. R. Cas. 78; Baltimore, etc., R. Co. v. State, 74 Md. 152. See note, p. 431.

[55] Louisville, etc., R. Co. v. Wright, 115 Ind. 378; 16 N. E. Rep. 145; 38 Am. & Eng. R. Cas. 41.

[56] Philadelphia, etc., R. Co. v. State, 58 Md. 372; 10 Am. & Eng. R. Cas. 792; Ft. Worth, etc., R. Co. v. Thompson, 2 Texas Civil App. 170; 21 S. W. Rep. 137; Clapp v. Minneapolis, etc., R. Co., 36 Minn. 6; 29 N. W. Rep. 340; Trask v. California, etc., R. Co., 63 Cal. 96; 11 Am. & Eng. R. Cas. 192.

are necessary in the operation of railroads and contact therewith by employees cannot be avoided by the employer.

Hence, an injury from stepping into an unblocked guard rail, that was properly constructed;[57] injury to a brakeman from stepping into a cattle guard, on a public highway, near a switch;[58] an injury from stepping upon a rolling clinker, in alighting from a moving car;[59] an injury from stepping between a guard rail and a switch frog[60] and an injury from a car drifting on a side track, properly constructed,[61]

[57] McNeil v. New York, etc., R. Co., 71 Hun 24; 24 N. Y. Supp. 616; Appel v. Buffalo, etc., R. Co., 111 N. Y. 550; Michigan, etc., R. Co. v. Austin, 40 Mich. 247; Batterson v. Chicago, etc., R. Co., 53 Mich. 125; Little Rock, etc., R. Co. v. Eubanks, 48 Ark. 460; 3 S. W. Rep. 808; 31 Am. & Eng. R. Cas. 176.

[58] Henderson v. Coons, 31 Ill. App. 75.

[59] Lee v. Central & R. Co., 86 Ga. 231; 12 S. E. Rep. 307.

[60] Bourgeault v. Grand Trunk R. Co., 5 Mont. Super. 249; Appel v. Buffalo, etc., R. Co., 111 N. Y. 550; 19 N. E. Rep. 93; 20 N. Y. Supp. 90; reversing 40 Hun 632; DeForrest v. Jewett, 88 N. Y. 264; Finnell v. Delaware, etc., R. Co., 42 N. Y. S. R. 354.

[61] Twitchell v. Grand Trunk R. Co., 39 Fed. Rep. 419; Tuttle v. Detroit, etc., R. Co., 122 U. S. 189; 7 Sup. Ct. Rep. 1166.

Experienced employees were held to have assumed the risk arising from the use of an unblocked switch, in the following cases: Hynson v. St. Louis, etc., Ry. Co. (Texas), 86 S. W. Rep. 928; Loushay v. Erie R. Co., 88 N. Y. S. R. 446; 95 App. Div. 102; Riley v. Louisville, etc., R. Co., 133 Fed. Rep. 904; Shannon's Admr. v. Louisville, etc., R. Co. (Ky.), 70 S. W. Rep. 626; Johns v. Cleveland, etc., R. Co., 23 Ohio Cir. Ct. Rep. 442; Narramore v. Cleveland, etc., R. Co., 96 Fed. Rep. 298; 37 C. C. A. 499; 48 L. R. A. 68; Southern Pac. R. Co. v. Seley, 152 U. S. 145; 38 L. Ed. 391; Sherman v. Railroad Co., 34 Minn. 259; 25 N. W. Rep. 593; Gillin v. Patten, etc., R. Co., 93 Me. 80; 44 Atl. Rep. 261.

An injury from stepping into a guard rail of a switch that is not blocked, is held to be assumed, in the following cases: Haas v. Buffalo, etc., R. Co., 40 Hun (N. Y.) 145; Mayes v. Chicago, etc., R. Co., 63 Iowa 562; 14 N. W. Rep. 340; 8 Am. & Eng. R. Cas. 527; Gleason v. New York, etc., R. Co., 159 Mass. 68; 34 N. E. Rep. 79; Richmond, etc., R. Co. v. Risdon, 87 Va. 335; 12 S. E. Rep. 786; 48 Am. & Eng. R. Cas. 244.

are all instances wherein the risk was held to be assumed by the employees sustaining the several injuries noted.

§ 326. **Risks from structures near track, assumed, when.**—An employee does not assume the risk of injury from the nearness of temporary structures, negligently permitted to be erected near the track, and especially if no notice of the erection of such structures is had by the injured employee.[62] But where permanent structures are erected near the track and no negligence can be predicated on the nearness of such structures to the track, the employee assumes the risk of injuries therefrom, as such erections are made necessary in the business of railroading and employees are bound to assume the danger of contact therewith, as incidental risks of the business.[63] Accordingly, a brakeman is held to assume the risk of injury from being caught between a moving freight car and an oil house, built so near the track that the cars clear it only by a few inches. It was an obvious open risk, which all employees are charged with notice of.[64] A brakeman assumes the risk of injury from contact with a pile of stone, beside the track;[65] an engineer takes the risk of being struck by a signal post, in leaning from his engine and looking back at the train;[66] a brakeman takes the risk of striking a projecting awning at a station, while climbing the side of a car;[67] a conductor of a freight train cannot

[62] Murphy v. Wabash R. Co., 115 Mo. 111; 21 S. W. Rep. 862; Bean v. Western, etc., R. Co., 107 N. Car. 731; 12 S. E. Rep. 600; Johnston v. St. Paul, etc., R. Co., 43 Minn. 53; 44 N. W. Rep. 884; 41 Am. & Eng. R. Cas. 293; Scanlon v. Boston, etc., R. Co., 147 Mass. 484; 18 N. E. Rep. 209; 38 Am. & Eng. R. Cas. 48.

[63] Kelly v. Baltimore, etc., R. Co. (Pa.), 11 Atl. Rep. 659.

[64] Kelly v. Baltimore, etc., R. Co., *supra*.

[65] Smith v. Winona, etc., R. Co., 42 Minn. 87; 43 N. W. Rep. 968; 41 Am. & Eng. R. Cas. 289.

[66] Lovejoy v. Boston, etc., R. Co., 125 Mass. 79.

[67] Fisk v. Fitchburg, etc., R. Co., 158 Mass. 238; 33 N. E. Rep. 510.

recover for an injury from coming in contact with a projecting roof of a station;[68] nor can a brakeman, for being struck by a pile of lumber, near the track, while mounting the side of a freight car;[69] as all such risks are open, obvious risks that must be appreciated by all men.

[68] Gibson v. Erie, etc., R. Co., 63 N. Y. 449; 20 Am. Rep. 552.

[69] Gaffney v. New York, etc., R. Co., 15 R. I. 456; 7 Atl. Rep. 284; 31 Am. & Eng. R. Cas. 265.

Where the employee knows the character and position of structures likely to cause injury, he cannot require the removal of such structures, or hold the employer, in case of injury, for damages. Gibson v. Erie, etc., R. Co., 63 N. Y. 449; 20 Am. Rep. 552; Carbine v. Bennington, etc., R. Co., 61 Vt. 348; Ryan v. Long Island R. Co., 51 Hun (N. Y.) 607; DeForrest v. Jewett, 88 N. Y. 264; 8 Am. & Eng. R. Cas. 495.

An experienced employee who knows, or ought to know, of the presence of obstructions near the track, was held to assume the risk thereof, in the following cases: Nugent v. Brooklyn, etc., Ry. Co., 72 N. Y. S. R. 67; 64 App. Div. 351; Ladd v. Brocton St. Ry. Co. (Mass.), 62 N. E. Rep. 730; a low bridge, Erie R. Co. v. McCormick, 69 Ohio St. 45; 68 N. E. Rep. 571; McLoed v. New York, etc., R. Co., 191 Mass. 389; 77 N. E. Rep. 715; Mobile & Ohio R. Co. v. Vallowe, 214 Ill. 124; 73 N. E. Rep. 416; Quinn v. New York, etc., R. Co., 175 Mass. 150; 55 N. E. Rep. 891; Phelps v. Chicago, etc., R. Co. (Mich.), 81 N. W. Rep. 101; Illick v. Railroad Co., 67 Mich. 632; 35 N. W. Rep. 708; Pennington v. Railroad Co., 90 Mich. 505; 51 N. W. Rep. 634; Manning v. Railroad Co., 105 Mich. 260; 63 N. W. Rep. 312; Goodes v. Railroad Co., 162 Mass, 287; 38 N. E. Rep. 500; Content v. Railroad Co., 165 Mass. 267; 43 N. E. Rep. 94; Ryan v. Railroad Co., 169 Mass. 267; 47 N. E. Rep. 877; Brown v. Railroad Co., 69 Iowa 162; 28 N. W. Rep. 478.

In Hagar v. Terminal R. Ass'n (105 S. W. Rep. 744), the Supreme Court of Missouri, in an able opinion by Judge Graves, held that a switchman assumed the risk, as matter of law, in riding a defective car which collided with a post or bridge across the track, although he was acting under the order of the conductor in riding the car, the court saying:

"The question is whether a servant, who by reason of his employment, is required to handle both defective and sound cars, and being (admittedly) advised of the condition of the car being handled, can he recover? We think not. If there was danger in this par-

§ 327. **Risks from handling machinery, assumed, when.**—The danger of handling machinery permitted to get out of repair by the negligence of the employer, is not one of the incidental risks of the employment, assumed by the employee,[70] but where the employer has used due care in the selection and providing of machinery and appliances, the risk incident to the handling of such machinery must be taken to be assumed by the employee to whom the duty of operating the machinery is intrusted.[71] An employer is not liable to an employee for injuries in the use of an appliance, although it is different and more dangerous than those generally employed in similar service, if the use of such appliance was one of the incidents of the employment of the injured employee, voluntarily assumed by him.[72]

ticular car, the servant was as fully advised as was the master. In handling cars of this character, he, as well as the master, understood that such, in the business performed by the master, had to be handled. The servant, a man of experience, knew the dangers of his employment, and had personal knowledge of the apparent dangers accompanying the handling of this particular car. If the car had been run in upon him without knowledge of its condition, the case might be different. But here we have an admitted knowledge of the condition. Plaintiff knew that the car 'was off center,' and by his experience must have known the dangers incident to the handling thereof. Knowing that the master was bound to handle defective cars, he was obligated to look out for such cars. But, not placing this opinion upon that ground, the plaintiff in this case was fully advised as to the character of the car which he was handling, at least as much as the master, and under no theory of the law can recover." Hagar v. Ter. R. Assn., 105 S. W. Rep. 747.

[70] Brown v. Sullivan, 71 Texas 470; 10 S. W. Rep. 288.

[71] Fraker v. St. Paul, etc., R. Co., 32 Minn. 54; 19 N. W. Rep. 349; 15 Am. & Eng. R. Cas. 256.

[72] Hatter v. Illinois C. R. Co., 69 Miss. 642; 13 So. Rep. 827.

An employee by continuing the use of known defective appliances, without complaint, assumes the risk of all dangers that he knew or ought to have known would result therefrom. Lee v. St. Louis, etc., R. Co., 112 Mo. App. 372; 87 S. W. Rep. 12; Merrill v. Oregon Short Line R. Co. (Utah), 81 Pac. Rep. 85; Leach v. Oregon Short Line R. Co. (Utah), 81 Pac. Rep. 90.

Nor is the employer liable to an employee for an injury from an openly defective tool or appliance, for where the employee knows of a defect and still uses the appliance, the law infers that he assumes the risk incident to such use.[73] The danger of an insufficient stick breaking, is a danger as well known to the employee as to the employer[74] and the danger from coming in contact with a rapidly revolving shaft, or wheel, is a risk carrying notice of the danger to all men.[75]

But an employee does not assume the risk of injury from defective machinery, unless he also knows the danger from the use, or the experience of the employee, or the open nature of the defect is such as to charge him with notice of the danger.[76]

The risk of an injury from a defective handle bar is assumed by an experienced brakeman, where he knew of the defect. Mobile & O. R. Co. v. Beasley, 119 Ill. App. 18.

[73] Cumberland, etc., R. Co. v. State, 44 Md. 283; Anderson v. Minnesota, etc., R. Co., 39 Minn. 523; 41 N. W. Rep. 104; 38 Am. & Eng. R. Cas. 206; Hefferman v. Northern Pac. R. Co., 45 Minn. 471; 48 N. W. Rep. 1; Stoeckman v. Terre Haute, etc., R. Co., 15 Mo. App. 503; Porter v. Hannibal, etc., R. Co., 71 Mo. 66; Ragon v. Toledo, etc., R. Co., 97 Mich. 265; 56 N. W. Rep. 612; Cagney v. Hannibal, etc., R. Co., 69 Mo. 416; Gulf, etc., R. Co. v. Johnston, 83 Texas 628; 19 S. W. Rep. 151.

[74] Bohn v. Chicago, etc., R. Co., 106 Mo. 429; 17 S. W. Rep. 580.

[75] Van Horn v. Boston, etc., R. Co., 42 Hun (N. Y.) 654; 113 N. Y. 634; 20 N. E. Rep. 878; 22 N. Y. S. R. 994.

[76] Scanlon v. Boston, etc., R. Co., 147 Mass. 484; 18 N. E. Rep. 209; 38 Am. & Eng. R. Cas. 48.

The danger of one's clothing catching on a revolving shaft is very generally held to be an open, obvious risk, assumed. Muenchow v. Zschetzsche, etc., Co., 113 Wis. 8; 88 N. W. Rep. 909; Nugent v. Milling Co., 131 Mo. 241; 33 S. W. Rep. 428; Demers v. Marshall, 172 Mass. 548; 52 N. E. Rep. 1066; Detroit, etc., Co. v. Graible, 94 Fed. Rep. 73.

In a recent case, in the federal court, where the employer's duty to furnish reasonably safe appliances was recognized by the court, it was none the less held that if the appliances were glaringly defective or dangerous the risk of injury therefrom would be assumed

§ 328. **Risks from movement of trains in company yards assumed.**— A marked distinction is recognized by the best considered cases, between the obligation of the railroad company toward third parties and that existing toward its own employees, with reference to the necessity of giving warning or notice of the movement of its trains in its own yards, or at places where the business of railroading requires the constant or frequent movement of trains or engines. Where the public are expected to be using the track or right of way, due care requires notice of the movement of trains, for strangers may be present who do not know of the perils of the situation; with the company's employees, however, there is held to be no duty to give warning of the movement of trains, as this is the very object of the employment in which the employee is engaged and a risk incident to the service, which he is held to assume, under his contract of employment.[77] Employees about railroad yards are not like strangers or third parties; they understand the situation; they know the manner of doing the business and that cars frequently pass, without notice of their approach and the danger of being struck by a backing engine [78] or car [79] is a risk incident to

by the plaintiff. Cincinnati, etc., Co. v. Robertson, 139 Fed. Rep. 519.

An employee assumes the risk of latent defects in the place and machinery with which he works, which the ordinary care of the employer fails to discover and remove. Cryder v. Chicago, R. I. & P. Ry. Co. (U. S. C. C. A., Kan., 1907), 152 Fed. Rep. 417.

[77] Crowe v. New York, etc., R. Co., 70 Hun 37; 53 N. Y. S. R. 558; 23 N. Y. Supp. 1100; Loring v. Kansas City, etc., R. Co., 128 Mo. 349; 31 S. W. Rep. 6; Evans v. Wabash R. Co., 178 Mo. 508; 77 S. W. Rep. 515; Aerkfetz v. Humphries, 145 U. S. 418, 421; 36 L. Ed. 758.

The danger to an engine cleaner, from the collision apt to result from his stationery engine being struck by moving cars or engines, was held assumed, in New York. Lane v. New York, etc., R. Co., 94 N. Y. S. R. 988; 107 App. Div. 166.

[78] Wabash, etc., R. Co. v. Conkling, 15 Ill. App. 157, where a fireman, killed while cleaning an engine, by a backing train, was held to have assumed the risk.

[79] Galveston, etc., R. Co. v. Arispe, 81 Texas 517; 17 S. W. Rep.

the business, as carefully conducted and a peril of the employment.

§ 329. **Risks from excessive speed assumed in some States.**—The mere fact that a train was running at a high rate of speed, at the time of an injury to an employee, does not, of itself, show negligence on the part of the employer,[80] so as to render him liable in damages for an injury to an employee, and the violation of a speed limit for trains, at the time of an injury, would not render the railroad company liable, unless the excessive speed was the proximate cause of the injury complained of.[81]

47; 48 Am. & Eng. R. Cas. 350; Goodrich v. New York, etc., R. Co., 116 N. Y. 398; 22 N. E. Rep. 397; 26 N. Y. S. R. 767; 5 L. R. A. 750.

The movement of cars or engines in a railroad yard, or on main track, without notice, was held an assumed risk, in the following cases: St. Louis Stock Yards Co. v. Burns, 97 Ill. App. 175; Sanker v. Pennsylvania R. Co., 205 Pa. St. 609; 55 Atl. Rep. 833; Nelson v. Oil City R. Co., 207 Pa. St. 363; 56 Atl. Rep. 933; Simmons v. Southern Tr. Co., 207 Pa. St. 589; 57 Atl. Rep. 45; Mobile, etc., R. Co. v. Healy, 100 Ill. App. 586.

An employee injured by the sudden stopping of a car, when he knew where it would stop, is held to have assumed the risk. Simmons v. Louisville, etc., R. Co. (Ky.), 18 S. W. Rep. 1024.

A brakeman turning a switch and struck by a rapidly moving car, is held to have assumed the risk of such an injury. Coombs v. Fitchburg, etc., R. Co., 156 Mass. 200; 30 N. E. Rep. 1140; 53 Am. & Eng. R. Cas. 353.

And an employee in a company's yard at night assumes the risk of being struck by a moving car, without a light or any warning. Crowe v. New York, etc., R. Co., 53 N. Y. S. R. 558; 23 N. Y. Supp. 1100; 70 Hun 37.

An employee who, for his own convenience, uses the track as a foot way, assumes the risk of being struck by a passing train. Morehead v. Yazoo, etc., Ry. Co. (Miss.), 36 So. Rep. 151.

[80] Southern, etc., R. Co. v. Cook, 121 Ga. 416; 49 S. E. Rep. 287; Galveston, etc., R. Co. v. Cassinelli (Texas), 78 S. W. Rep. 247; St. Louis, etc., R. Co. v. Carlisle, 75 Ark. 560; 88 S. W. Rep. 584.

[81] San Antonio, etc., R. Co. v. Clark (Texas), 62 S. W. Rep. 546.

An injury to employees on the train [82] or on the track,[83] due to an excessive rate of speed, is held assumed in some States, but where the speed of the train is such as to be denominated negligence, in States where there is a statute making the railroad company liable for injuries to its employees, caused by the negligence of coemployees, engaged in the operation of the railroad, it is doubtful if such a construction of the statute would be allowed.

§ 330. **Flying switch — "Shunting" cars.** — An employee of a railroad cannot recover for injuries received while "shunting" cars upon its tracks, in the absence of evidence of negligence or the breach of some duty toward him, by the company.[84] In an Iowa case,[85] a brakeman, in pursuance of his duties, was standing on top of a freight car, while a flying switch was being made. He signaled the engineer to back and when the impact between the engine and the freight car, on which the brakeman was standing, occurred, he was thrown from the car and injured, but it was held that he had assumed the risk. Nor would the result be different, if it be conceded that the employer was negligent in permitting flying switches to be made, for by participating therein, the employee would be held to have waived the negligence of the employer and assumed the risk of the dangerous employment.[86]

[82] The dangers from running a train at an excessive rate of speed, were held assumed risks, in Iowa, in Martin v. Chicago, etc., Ry. Co., 91 N. W. Rep. 1034; 59 L. R. A. 698.

[83] The risk of an injury from excessive speed of a train, is held to be assumed, in Wisconsin, by a sectionman. Ives v. Wisconsin, etc., Ry. Co., 128 Wis. 357; 107 N. W. Rep. 452.

[84] Membery v. Great Western R. Co., 14 App. Cas. 179.

[85] Youll v. Sioux City, etc., R. Co., 66 Iowa 346; 23 N. W. Rep. 736; 21 Am. & Eng. R. Cas. 589.

[86] Youll v. Sioux City, etc., R. Co., *supra*.

Where it was the custom to kick cars down to a fieldman without

§ 331. **Jerks from taking up slack assumed.**— It is one of the ordinary incidents of railroading for trains of freight cars, coupled with the ordinary appliances, to be subject to more or less "slack," resulting in jerks or jolts, incident to the starting or stopping of cars in such a train. Such cars are usually coupled with long links; the engine starting first, by the time the slack is taken out of the different links, between the cars, the engine has reached such momentum as to occasion a sudden jerk, when the rear of the train is started and the same jolt results on stopping, as the engine stops first and the slack of the couplings brings the cars to a sudden stop.[87] Where a freight train is managed in the usual manner and the jerk or jolt complained of is only such as would ordinarily be expected on a train of such character, the employees engaged on it are very generally held to take the risk of injury from such jerks or jolts, as an incident to the employment and cannot recover for an injury due to an ordinary jerk or jolt.[88]

§ 332. **Risks from improperly loaded cars.**— As it would be impossible for the managing agents of a railroad company

warning to him, he assumed the risk of injury from cars so operated. Chicago, etc., Ry. Co. v. Voelker, 129 Fed. Rep. 522.

A brakeman, making a flying switch, who fell from the car, on account of the siding being steep and uneven, was held to assume the risk, in Vermont. Skinner v. Central Vt. Ry. Co., 73 Vt. 336; 50 Atl. Rep. 1099.

[87] The causes of such jerks in freight trains is explained by the witnesses and the court in Guffey v. Hannibal, etc., R. Co., 53 Mo. App., 466, 467.

[88] Davis v. Baltimore, etc., R. Co., 152 Pa. St. 314; 25 Atl. Rep. 498; Rutledge v. Missouri Pacific Ry. Co., 110 Mo. 312; 19 S. W. Rep. 38; Central, etc., R. Co. v. Sims, 80 Ga. 749; 7 S. E. Rep. 176; Hedrick v. Missouri Pacific Ry. Co., 195 Mo. 104; 93 S. W. Rep. 268; Erwin v. Kansas City, etc., R. Co., 94 Mo. App. 289; Chicago, etc., R. Co. v. Arnold, 144 Ill. 261; 19 L. R. A. 313; Olds v. New York, etc., R. Co., 172 Mass. 73; Wait v. Omaha, etc., R. Co., 165 Mo. 612; 65 S. W. Rep. 1028.

to personally see to the proper loading of freight cars, but it is an ordinary incident of the business of railroading for freight cars to be improperly loaded, employees are generally charged with notice of this fact, and it is generally held that an employee assumes the risk of an injury from an improperly loaded car, where no direct negligence can be charged to other than the coemployees of the injured person and such improperly loaded car has not been brought to the attention of the employer, or sufficient time existed for it to have been properly loaded.[89] The risk of an injury due to striking the ends of steel rails improperly loaded in a flat car, so that the ends protruded over the end of the car, was held to be a risk, assumed by a brakeman, in Missouri,[90] and a track walker was held to have assumed the risk of an injury caused by a piece of coal falling from an improperly loaded tender, in Wisconsin,[91] as such risks were held to be ordinarily incident to the employment of railroading. And

[89] Northern, etc., R. Co. v. Husson, 101 Pa. St. 1; 12 Am. & Eng. R. Cas. 244; Atchison, etc., R. Co. v. Plunkett, 25 Kansas 188; Louisville, etc., R. Co. v. Gower, 85 Tenn. 465; 3 S. W. Rep. 824; 31 Am. & Eng. R. Cas. 168. See, for injury from improperly loaded car of lumber, where risk held assumed, Brice v. Louisville, etc., R. Co. (Ky.), 9 S. W. Rep. 288; 38 Am. & Eng. R. Cas. 38.

[90] Jackson v. Missouri Pacific Ry. Co., 104 Mo. 448; 16 S. W. Rep. 413; 14 S. W. Rep. 54. See, also, Wabash, etc., R. Co. v. Deardruff, 14 Ill. App. 401; Scott v. Oregon, etc., R. Co., 14 Oregon 211; 13 Pac. Rep. 98; 28 Am. & Eng. R. Cas. 414; Mexican C. R. Co. v. Shean (Texas), 18 S. W. Rep. 151; Galveston, etc., R. Co. v. Lempe, 59 Texas 19.

[91] Schultz v. Chicago, etc., R. Co., 67 Wis. 616; 31 N. W. Rep. 321; 58 Am. Rep. 881; 28 Am. & Eng. R. Cas. 404.

Injuries from improperly loaded cars were held to be risks assumed in the following cases: Williams v. Northern, etc., Co. (Minn.), 113 Fed. Rep. 382; Green v. Brainard, etc., Ry. Co., 85 Minn. 318; 88 N. W. Rep. 974; Cleveland, etc., R. Co. v. Somers, 24 Ohio Cir. Ct. R. 67; St. Louis, etc., Ry. Co. v. Barrett (Texas), 72 S. W. Rep. 884; Tucker v. Northern Pac. Ter. Co., 41 Oregon 82; 68 Pac. Rep. 426.

these are but illustrations of the trend of the decisions on this subject.

§ 333. **Collisions with cattle or teams.**— The risk of injuries to train employees, by coming in contact with animals trespassing on the right of way, or with teams and wagons, at public road crossings, is one of the dangers incident to the operation of railroads, encountered by employees, among the ordinary dangers assumed by them, in the absence of negligence on the part of the employer.[92]

In Pennsylvania,[93] a freight conductor, riding on the pilot of a switch engine, who was killed by the collision of the engine with a team and wagon, at a public crossing, was held to have assumed the risk, as an incident of his employment. And, in Texas,[94] an engineer, injured as a result of the derailment of his engine, caused by a cow fastened in a bridge, was held to have assumed the risk, as an accident that could not have been foreseen by the employer.

§ 334. **Injury from use of snow-plow —"Bucking snow."** — Dangers from snowbanks are inseparable from the operation of railroads, in climates where heavy snows prevail, and it is removed from the track by the use of snowplows, or similar appliances and when employees enter the service in such climates, they are held to assume the risk of injuries from such causes, where the danger in the use of the appliance or the condition of the place is not made more dangerous by reason of the employer's negligence.[95]

[92] Ward v. Bonner, 80 Texas 168; 15 S. W. Rep. 805.

[93] Rumsey v. Delaware, etc., R. Co., 151 Pa. St. 74; 25 Atl. Rep. 37.

[94] Mansen v. Eddy, 3 Texas Civil App. 148; 22 S. W. Rep. 66.

[95] Brown v. Chicago, etc., R. Co., 69 Iowa 161; 28 N. W. Rep. 487; Dowell v. Burlington, etc., R. Co., 62 Iowa 629; Bryant v. Burlington, etc., R. Co., 66 Iowa 305; 23 N. W. Rep. 678; 55 Am.

And where the manner of removing the snow is to couple two or more engines together and run them over the track — as was done in a case reported in Pennsylvania —[96] an engineer injured by his engine running into a snow-drift, in a deep cut, was held to have intelligently assumed the risk and a recovery was denied. This same rule is followed in other States, where a similar practice obtains.[97]

§ 335. **Dangers in coupling cars.**— Railroad employees who are required to couple and uncouple cars, are presumed to know the risk of this detail of the service and to assume it. They understand that cars of different constructions and manner of couplings are constantly passing over the track and must be coupled and handled by them and they necessarily take upon themselves the obligation of ascertaining the kind of cars that must be handled and to use the necessary care and caution to avoid injury therefrom.[98] Not only the risk of injury, in coupling cars with different heights of drawheads, is held to be assumed,[99] but the danger of coupling

Rep. 275; 21 Am. & Eng. R. Cas. 593; Naylor v. Chicago, etc., R. Co., 53 Wis. 661; Howland v. Milwaukee, etc., R. Co., 54 Wis. 226.

[96] Deer v. Lehigh Valley R. Co., 158 Pa. St. 365; 27 Atl. Rep. 1002.

[97] Morse v. Minneapolis, etc., R. Co., 30 Minn. 465; 16 N. W. Rep. 358; 11 Am. & Eng. R. Cas. 168; Bryant v. Burlington, etc., R. Co., 66 Iowa 305; 23 N. W. Rep. 678; 55 Am. Rep. 275; 21 Am. & Eng. R. Cas. 593.

[98] Thomas v. Missouri Pacific Ry. Co., 109 Mo. 187; 18 S. W. Rep. 980; 53 Am. & Eng. R. Cas. 146; Henry v. Bond, 34 Fed. Rep. 101; Dysinger v. Cincinnati, etc., R. Co., 93 Mich. 646; 53 N. W. Rep. 825; Toledo, etc., R. Co. v. Black, 88 Ill. 112; Michigan, etc., R. Co. v. Smithson, 45 Mich. 212; Sims v. South Carolina R. Co., 26 So. Car. 490; 2 S. E. Rep. 486; 31 Am. & Eng. R. Cas. 199; Nashville, etc., R. Co. v. Wheeler (Tenn.), 4 Am. & Eng. R. Cas. 633; Kelly v. Abbot, 63 Wis. 307; 23 N. W. Rep. 890; 53 Am. Rep. 292; 21 Am. & Eng. R. Cas. 633.

[99] Thomas v. Missouri Pacific Ry. Co., 109 Mo. 187; 18 S. W. Rep.

cars with loads projecting over the ends of the cars, is also held to be a risk of the service, that an employee assumes.[1] The danger of using couplings of different makes or patterns, is also a risk assumed, in the absence of a negligent or defective coupling [2] and an injury from falling in a culvert while making a coupling, is a risk incident to the employment, where no negligent condition of the culvert is shown to exist,[3] but an injury received while using a defective coupling, not shown to have been known to the employee, is not necessarily a risk incident to the employment.[4]

§ 336. **Known and obvious risks.**— An employee, entering into the service of a railroad company, which is necessarily hazardous, who knows the condition of the appliances or place, in connection with which he is employed, or who, in the exercise of ordinary observation, ought to know the conditions surrounding him, as well as the danger to which he may be thereby exposed, is very generally held to have taken upon himself the risk of injury from such condi-

980; 53 Am. & Eng. R. Cas. 146; Woodworth v. St. Paul, etc., R. Co., 5 McCrary (U. S.) 574; 18 Fed. Rep. 282.

[1] Boyle v. New York, etc., R. Co., 151 Mass. 102; 23 N. E. Rep. 827; Lathrop v. Fitchburg R. Co., 150 Mass. 423.

[2] Hatter v. Illinois Central R. Co., 69 Miss. 642; 13 So. Rep. 827.

[3] Little Rock, etc., R. Co. v. Townsend, 41 Ark. 382; 21 Am. & Eng. R. Cas. 619.

[4] Taylor v. Missouri Pacific Ry. Co., 86 Mo. 457; 16 S. W. Rep. 206.

Injuries received while coupling cars of different makes or couplings were held to be assumed, in the following cases: Louisville, etc., R. Co. v. Boland, 96 Ala. 626; 11 So. Rep. 667; 53 Am. & Eng. R. Cas. 169; Holland v. Tennessee, etc., R. Co., 91 Ala. 444; 8 So. Rep. 524; Kohn v. McNulta, 147 U. S. 238; 13 Sup. Ct. Rep. 298; Darracott v. Chesapeake & O. R. Co., 83 Va. 288; 31 Am. & Eng. R. Cas. 157; Clark v. Missouri Pacific Ry. Co., 48 Kansas 654; 29 Pac. Rep. 1138; Brewer v. Flint, etc., R. Co., 56 Mich. 620; 23 N. W. Rep. 440.

tion.[5] Where he is injured in the use of an implement or machine, which does not result from any latent defect, but when the danger of using it is apparent and the machine itself is in general use and is easy to understand and requires

An employee coupling cars with different kinds of drawheads, of different heights, was held to assume the risk, in Texas, in Rio Grande, etc., R. Co. v. Lynch, 66 S. W. Rep. 712. See, also, Zahn v. Milwaukee, etc., Ry. Co. (Wis.), 89 N. W. Rep. 889.

A brakeman going between moving cars to make a coupling, was held to assume the risk of injury in the following cases: Moore v. St. Louis, etc., Ry. Co. (La. Ann.), 38 So. Rep. 913; Campbell v. Illinois Central R. Co., 100 N. W. Rep. 30.

A brakeman assumes the risk incident to chasing and coupling cars. Kennedy v. Kansas City, St. J. & C. B. R. Co., 190 Mo. 424; 89 S. W. Rep. 370.

It is held, by the Massachusetts Supreme Court, that the tender of a locomotive is not a car, within the terms of the statute of that State (St. 1895, p. 412c, 362, § 2 R. L. ch. 111, § 203, and U. S. Comp. St. 1901, p. 3176), requiring automatic couplers on locomotives, cars and trains, and that the defense of assumed risk applies as to a defective coupler, causing an injury, on the tender. Larabee v. New York, etc., R. Co., 182 Mass. 348; 66 N. E. Rep. 1032.

A car loaded with steel rails, shipped from one State to another and there side-tracked, to await further orders, is not a car engaged in interstate commerce, so as to deprive the railroad company of the defense of assumed risk, for a defective coupler, under the federal safety appliance act. Coley v. Kansas City So. Ry. Co. (Texas), 95 S. W. Rep. 96.

[5] Doyle v. St. Paul, etc., R. Co., 42 Minn. 79; 43 N. W. Rep. 787; 41 Am. & Eng. R. Cas. 376; Drake v. Union Pac. R. Co., 2 Idaho 453; 21 Pac. Rep. 560; Louisville, etc., R. Co. v. Hanning, 131 Ind. 528; 31 N. E. Rep. 187; 53 Am. & Eng. R. Cas. 452; Michigan, etc., R. Co. v. Smithson, 45 Mich. 212; 7 N. W. Rep. 791; 1 Am. & Eng. R. Cas. 101; Gaffney v. New York, etc., R. Co., 15 R. I. 456; 7 Atl. Rep. 284; 31 Am. & Eng. R. Cas. 265; Latremouille v. Bennington, etc., R. Co., 63 Vt. 336; 22 Atl. Rep. 656; 48 Am. & Eng. R. Cas. 265; Gibson v. Erie R. Co., 63 N. Y. 449; 20 Am. Rep. 552; O'Neal v. Chicago, etc., R. Co., 132 Ind. 110; 31 N. E. Rep. 669; St. Louis, etc., R. Co. v. Irwin, 37 Kansas 701; 16 Pac. Rep. 146; Melzer v. Peninsular Car Co., 76 Mich. 94; 42 N. W. Rep. 1078; Fisher v. Chicago, etc., R. Co., 77 Mich. 546; 43 N. W. Rep. 926; Williams v. Delaware, etc., R. Co., 116 N. Y. 628; 22 N. E. Rep. 1117; 42

no particular skill to operate it, the employee is not entitled to warning or instruction as to its proper use.[6]

The employer is allowed to conduct his business in the manner which most commends itself to him, so long as it is not negligently conducted, and the employee assumes the risk of working under such methods as the employer sees fit to employ, and the employer cannot be held to damages, because, in the opinion of the injured employee and his witnesses, there was a safer method that might have been employed, that would have prevented the injury.[7]

§ 337. **Presumed to know what could be observed.**— An employee of a railroad company is presumed to know of dangers that he has an opportunity to observe and unless he informs himself of open, obvious risks he cannot recover for resulting injuries therefrom.[8] He is bound to see patent and obvious defects in appliances furnished him and assumes all patent and obvious risks in machinery and appliances furnished him by the employer.[9] And while notice or appreciation of the danger, as well as the conditions that produce such danger, is generally required, before the risk

Am. & Eng. R. Cas. 254; Bailey v. Rome, etc., R. Co., 49 Hun 377; 19 N. Y. S. R. 656; Spencer v. New York, etc., R. Co., 51 N. Y. S. R. 386; 67 Hun 196; Johnston v. Oregon, etc., R. Co., 23 Oregon 94; 31 Pac. Rep. 283; Sweeney v. Central Pac. R. Co., 57 Cal. 15; 8 Am. & Eng. R. Cas. 151.

[6] International, etc., R. Co. v. McCarthy, 64 Texas 632.

[7] Bengston v. Chicago, etc., R. Co., 47 Minn. 486; 50 N. W. Rep. 531; Simmons v. Chicago, etc., R. Co., 110 Ill. 340; 18 Am. & Eng. R. Cas. 50; Naylor v. Chicago, etc., R. Co., 53 Wis. 661; Pennsylvania R. Co. v. Bachs, 133 Ill. 255; 24 N. E. Rep. 563.

[8] St. Louis, etc., R. Co. v. Marker, 41 Ark. 542; Derby v. Kentucky, etc., R. Co. (Ky.), 4 S. W. Rep. 303, where a conductor of a freight train was held chargeable with notice of the risk from a car higher than other cars in a train.

[9] Texas, etc., R. Co. v. Rogers, 57 Fed. Rep. 378; Davidson v. Southern Pacific R. Co., 44 Fed. Rep. 476.

therefrom is held to be assumed,[10] this exception to the rule does not apply, as to defects so glaring or open that a simple notice of the defect would imply a knowledge of the danger arising therefrom, for in such case it will be presumed that notice of the danger was also brought home to the employee.[11]

§ 338. **Risks from open defects in cars, assumed when.**— An employee who accepts employment by a railroad company, in any particular department of the business, is presumed to know the dangers from any peculiarities in the construction of engines or cars, used by him, as well as the employer[12] and he is generally held to assume the risk of injury from peculiarly constructed cars or engines, as well as from open obvious defects in cars or engines, that have not been brought to the attention of the employer, or when there has been no opportunity to repair the same, that could be denominated negligence on the company's part.[13] A yard switchman has been held to assume the risk of injury from such a visible defect as a drawhead on a locomotive, which is too short to allow sufficient space to stand, in coupling the engine to cars;[14] an injury traceable to an unsuitable car was held assumed, as an open, obvious risk, in California;[15] an experienced employee cannot recover for an injury caused by the lightness of a hand car, with which he was familiar, causing it to leave the track,[16] nor can an employee recover for

[10] Waldhier v. Hannibal, etc., R. Co., 87 Mo. 37.

[11] Waldhier v. Hannibal, etc., R. Co., 87 Mo. 37; Worheide v. Missouri, etc., Co., 32 Mo. App. 367.

[12] Texas, etc., R. Co. v. Minnick, 57 Fed. Rep. 362.

[13] Texas, etc., R. Co. v. Minnick, 57 Fed. Rep. 362.

[14] Brooks v. Northern Pac. R. Co., 47 Fed. Rep. 687.

[15] Long v. Coronado, etc., R. Co., 96 Cal. 269; 31 Pac. Rep. 170; Martin v. California, etc., R. Co., 94 Cal. 326.

[16] Gulf, etc., R. Co. v. Williams, 72 Texas 159; 12 S. W. Rep. 172; 39 Am. & Eng. R. Cas. 292.

an injury from his clothing catching on a threaded screw, projecting from the handle of a hand car, beyond the end of the nut,[17] as all such risks are apparent, from the open, obvious nature of the defect itself.

§ 339. **Injuries from lifting cars, rails, etc., assumed.**— It is quite generally held that when an employee is injured from lifting at a car,[18] or a steel rail,[19] or any similarly heavy substance,[20] where the weight of the object attempted to be lifted is a matter of common knowledge and the number of men that it takes to handle it is well known by the em-

[17] Carey v. Boston, etc., R. Co., 158 Mass. 228; 33 N. E. Rep. 512. An employee who knew or ought to have known, of defects in cars, engines and other appliances, was held to assume the risk, in the following cases: Denver, etc., R. Co. v. Scott (Colo.), 81 Pac. Rep. 763; St. Louis, etc., R. Co. v. Rea (Texas), 87 S. W. Rep. 324; Chicago, etc., Ry. Co. v. Tackett (Ind.), 71 N. E. Rep. 524; Crane v. Chicago, etc., Ry. Co. (Iowa), 99 N. W. Rep. 169; Loushay v. Erie R. Co., 88 N. Y. S. R. 446; 95 App. Div. 102; Montgomery, etc., Co. v. Barringer, 109 Ill. App. 185; Crane v. Chicago, etc., R. Co. (Iowa), 99 N. W. Rep. 169; Loushay v. Erie R. Co., 184 N. Y. 583; 77 N. E. Rep. 1191; Graham v. Chicago, etc., R. Co. (Texas), 91 S. W. Rep. 1081; Johnston v. Southern Pac. R. Co., 117 Fed. Rep. 462; 54 C. C. A. 508; Bryce v. Burlington, etc., R. Co. (Iowa), 93 N. W. Rep. 275; Western, etc., R. Co. v. Moran, 116 Ga. 441; 42 S. E. Rep. 737; Gerstner v. New York, etc., R. Co., 80 N. Y. S. R. 1063; 81 App. Div. 562; Texas Central R. Co. v. Bender (Texas), 75 S. W. Rep. 561; Albrecht v. Chicago & N. W. R. Co., 108 Wis. 530; 84 N. W. Rep. 882.

The risk of using a wide gauge car on narrow gauge truck was held to be an incidental risk, in Missouri, in Minnier v. Sedalia, etc., R. Co., 167 Mo. 99; 66 S. W. Rep. 1072.

[18] St. Louis, etc., R. Co. v. Lemon, 83 Texas 143; 18 S. W. Rep. 331.

[19] Coyne v. Union Pac. R. Co., 133 U. S. 370; 33 L. Ed. 651; Haviland v. Kansas City, etc., R. Co., 172 Mo. 106; 72 S. W. Rep. 515.

[20] Lee v. Chesapeake & Ohio R. Co. (Ky.), 1 Am. Neg., Rep. 60; Harrington v. Wabash R. Co., 104 Mo. App. 663; 78 S. W. Rep. 662; Leitner v. Grieb, 104 Mo. App. 173; 77 S. W. Rep. 764; Texas, etc., R. Co. v. Sherman (Texas), 87 S. W. Rep. 887.

ployee, that the risk of such an injury is assumed as an incident of the employment.

The United States Supreme Court has held:[21] "Where the method of loading a rail was by lifting it and walking with it to the car, halting, dressing, and then in concert lifting the rail, at the word of command from the boss, and throwing it on the floor of a flat car, * * * and in the course of such loading the injury to the plaintiff occurred," that no negligence could be complained of, on the employer's part, but the injury was received from a risk assumed by the employee. And similar injuries from strains, due to lifting at cross-ties,[22] rocks,[23] and other heavy substances, have been held, by different courts of the various States, to be risks assumed, as open and obvious dangers, known to the employee as well as all men.

[21] Coyne v. Union Pacific R. Co., 133 U. S. 370; 33 L. Ed. 651.

[22] Lee v. Chesapeake & Ohio R. Co., *supra.*

[23] Leitner v. Grieb, 104 Mo. App. 173; 77 S. W. Rep. 764.

In a case, in Missouri, upon a similar injury, from carrying a steel rail, the court said:

"The physical facts and plaintiff's own testimony completely nullify all such expert testimony and show that it is unreliable, and, in addition, they show that if the plaintiff strained his back, he did so without being compelled, ordered or expected to do so by anyone, and without any apparent reason for doing so, and, therefore, he did not make out a *prima facie* case." Haviland v. Kansas City, etc., R. Co., 172 Mo. 115; 72 S. W. Rep. 575.

Upon a very similar injury, in a Kentucky case, the court held: "Where plaintiff and two other employees of defendant were moving a cross-tie and one of the men stumbled, causing the tie to fall on plaintiff, there was nothing to render the defendant liable for plaintiff's injuries." Lee v. R. R. Co., 1 Amer. Neg. Rep. 60.

In Harrington v. Railroad (104 Mo. App. 663), the facts were alleged by the plaintiff as follows:

"Plaintiff was in the employ of defendant, working in its said shops, as a laborer in the repair of cars and of car trucks * * * That at the date aforesaid, plaintiff, with two other workmen, was ordered by defendant's foreman in charge of said work and over said workmen, to carry some of the aforesaid cylinders from one of said shops to the other, across said pit and tracks laid therein, and was negli-

§ 340. **Working after notice of defects and knowledge of danger.**— The rule is very generally recognized, that if an employee, knowing the hazards of the business in which he is engaged, voluntarily continues therein, without protest or complaint, and without a promise, on the part of the employer to remedy the defect causing the danger, he will thereafter be held to have voluntarily assumed the risk, in

gently and carelessly ordered to carry same over on a stick, instead of using the table provided for such purpose. * * * Plaintiff was holding the back end of said cylinder. The cylinder was tapering from one end to the other, the large end being in front and plaintiff holding the rear or smaller end, endeavoring to balance said cylinder on said stick, which by great exertion he succeeded in doing from one edge of the pit down into and across said pit and tracks therein, until said colaborers stepped across the railroad tracks at the far edge of said pit and up out of said pit to the ground level, when, by reason of the raise caused by said colaborers stepping up on to said ground level, it became impossible for plaintiff to keep said cylinder on an exact balance * * * and, by reason of the smoothness of said stick and cylinder, it rolled, tilted and slipped on said stick and fell back onto plaintiff, greatly injuring him."

But upon this state of facts, with the foreman present, directing the manner of doing the work and giving such negligent order, there was held to be no liability, in the Appellate Court.

And for a similar holding of nonliability, from assumption of risk, for an injury from moving a heavy rock, see Leitner v. Grieb, 104 Mo. App. 173; 77 S. W. Rep. 764. See, also, Texas & N. O. R. Co. v. Sherman (Texas), 87 S. W. Rep. 887.

An employee assisting to load ties by sliding them up an incline, was held to assume the risk of the tie sliding back against him, in Dunn v. Oregon Short Line R. Co., 28 Utah 478; 80 Pac. Rep. 311. And see, where insufficient force is used, where risk was held assumed, Texas, etc., Ry. Co. v. Miller (Texas), 81 S. W. Rep. 535; Webb v. Gulf, etc., R. Co. (Texas), 65 S. W. Rep. 684; Haviland v. Kansas City, etc., Ry. Co., 172 Mo. 106; 72 S. W. Rep. 515; Cleveland, etc., Ry. Co. v. Carr, 95 Ill. App. 576.

The risk of an injury from carrying steel rails is a risk assumed by the employee. Coyne v. Union Pac. R. Co., 133 U. S. 370; 33 L. Ed. 651; Haviland v. Railroad Co., 172 Mo. 115; Lee v. R. R. Co., 1 Am. Neg. Rep. 60; International & G. N. R. Co. v. Figures (Tex.), 89 S. W. Rep. 780.

the absence of some specific act of negligence on the employer's part.[24] If the employee knows that what has been provided for him to use is unfit for the purpose, he should quit the employment; and if he does not, but continues in it, he is deemed to have assumed the risk of all known defects, where he has not been induced by the promise or acts of the employer to remain in the service, relying upon such defects being remedied.[25]

But knowledge of a defect, or facts from which the law would imply notice thereof, and a failure to complain, are both held to be essential, before the employee is held to have assumed the risk [26] and although he possesses notice of the defect, if he does not also understand, or ought not, in the exercise of ordinary prudence, understand the risks to which such defect will expose him, he is not held to have assumed the risk thereof,[27] nor will the risk be held assumed, where

[24] Stafford v. Chicago, etc., R. Co., 114 Ill. 244; 2 N. E. Rep. 185; South Florida R. Co. v. Weese, 32 Fla. 212; 13 So. Rep. 436; Umbach v. Lake Shore, etc., R. Co., 83 Ind. 191; 8 Am. & Eng. R. Cas. 98; Muldowney v. Illinois, etc., R. Co., 39 Iowa 615; 8 Am. Ry. Rep. 487; Wells v. Burlington, etc., R. Co., 56 Iowa 520; McKee v. Chicago, etc., R. Co., 83 Iowa 616; 48 Am. & Eng. R. Cas. 154; Indianapolis, etc., R. Co. v. Watson, 114 Ind. 20; 14 N. E. Rep. 721; 33 Am. & Eng. R. Cas. 334; Atchison, etc., R. Co. v. Schroeder, 47 Kansas 315; 27 Pac. Rep. 965; Baltimore, etc., R. Co. v. State, 75 Md. 152; 23 Atl. Rep. 310; 53 Am. & Eng. R. Cas. 379; Price v. Hannibal, etc., R. Co., 77 Mo. 508; 15 Am. & Eng. R. Cas. 168; Rumsey v. Delaware, etc., R. Co., 151 Pa. St. 74; 25 Atl. Rep. 27; Westcott v. New York, etc., R. Co., 153 Mass. 460; 27 N. E. Rep. 10; Galveston, etc., R. Co. v. Drew, 59 Texas 10; 46 Am. Rep. 261; Pennsylvania R. Co. v. Lynch, 90 Ill. 333; Worthington v. Central, etc., R. Co., 64 Vt. 107.

[25] Illinois, etc., R. Co. v. Jones, 11 Ill. App. 324.

[26] Greenleaf v. Dubuque, etc., R. Co., 33 Iowa 52; Indianapolis, etc., R. Co. v. Watson, 114 Ind. 20; 14 N. E. Rep. 721; 33 Am. & Eng. R. Cas. 334; East Tenn., etc., R. Co. v. Gurley, 12 Lea (Tenn.) 46; 17 Am. & Eng. R. Cas. 568; Chicago, etc., R. Co. v. Hines, 132 Ill. 161; 23 N. E. Rep. 1021.

[27] Wuotilla v. Duluth, etc., Co., 37 Minn. 153; 33 N. W. Rep. 551;

the defect is traceable to the employer's negligence and the employee had reason to believe that he could safely use the appliance, by due care on his part, without resulting injury, and the continued use of such appliance was induced by the act or promise of the employer.[28]

§ 341. **Notice of dangers connected with place of work assumed, when.**— Where an employee not only knows of a defect in his place of work, but also understands, or ought by the exercise of reasonable care, to have understood the danger therefrom, he is held to assume the risk of an injury from such a place.

Illustrative of the dangers, in the place of work, which an employee knows or ought to understand and assume the risk of injury from, is that of excavating a bank of earth, liable, by the operation of natural laws, to fall on him;[29] a section hand, passing over a known defective track, with a hand car, assumes the risk of injury therefrom;[30] a projecting roof of an elevator, over a side track, is a known danger, which a brakeman on a freight car will assume;[31] a telephone wire[32] and cattle chute[33] are also known dangerous

5 Am. St. Rep. 832; Cook v. St. Paul, etc., R. Co., 34 Minn. 45; 24 N. E. Rep. 311.

[28] Flynn v. Kansas City, etc., R. Co., 78 Mo. 195; 18 Am. & Eng. R. Cas. 23; Snow v. Housatonic R. Co., 8 Allen (Mass.) 447; Richmond, etc., R. Co. v. Norment, 84 Va. 167; 4 S. E. Rep. 211.

[29] Rasmussen v. Chicago, etc., R. Co., 65 Iowa 236; 21 N. W. Rep. 583; 18 Am. & Eng. R. Cas. 54; Naylor v. Chicago, etc., R. Co., 53 Wis. 661; 11 N. W. Rep. 24; 5 Am. & Eng. R. Cas. 460; Bradley v. Chicago, etc., R. Co., 138 Mo. 293; 39 S. W. Rep. 763; Schadewald v. Milwaukee, etc., R. Co., 55 Wis. 569; 13 N. W. Rep. 458.

[30] Green v. Cross, 79 Texas 130; 15 S. W. Rep. 220.

[31] Clark v. St. Paul, etc., R. Co., 28 Minn. 128; 9 N. W. Rep. 581; 2 Am. & Eng. R. Cas. 240; Illinois, etc., R. Co. v. Welsh, 52 Ill. 183.

[32] Dalton v. Atlantic, etc., R. Co., 4 Hughes (U. S.) 180.

[33] Dorsey v. Phillips Const. Co., 42 Wis. 583; 15 Am. Ry. Rep.

obstructions imparting notice of the danger; the danger of stepping into excavations near the track, are open dangers, which brakemen assume;[34] as are also perils from platforms near the track;[35] unblocked frogs and guard rails;[36] obviously defective fences;[37] or the absence of fences;[38] an unguarded highway crossing,[39] and defective bridges[40] or overhead bridges.[41]

148; Hulehan v. Green Bay, etc., R. Co., 58 Wis. 319; 12 Am. & Eng. R. Cas. 208.

[34] Ragon v. Toledo, etc., R. Co., 97 Mich. 265; 56 N. W. Rep. 612; Needham v. Louisville, etc., R. Co., 85 Ky. 423; 3 S. W. Rep. 797; 11 S. W. Rep. 306.

[35] Perigo v. Chicago, etc., R. Co., 52 Iowa 276; 3 N. W. Rep. 43.

[36] Rush v. Missouri Pac. Ry. Co., 36 Kansas 129; 12 Pac. Rep. 582; 28 Am. & Eng. R. Cas. 484; Clark v. Missouri Pac. Ry. Co., 48 Kansas 654; Union Pac. Ry. Co. v. Mondon, 50 Kansas 539; Atkyn v. Wabash R. Co., 41 Fed. Rep. 193; St. Louis, etc., R. Co. v. Davis, 54 Ark. 389; 15 S. W. Rep. 895; Appel v. Buffalo, etc., R. Co., 111 N. Y. 550; 19 N. E. Rep. 93.

[37] McKee v. Chicago, etc., R. Co., 33 Iowa 616; 50 N. W. Rep. 209; 48 Am. & Eng. R. Cas. 154.

[38] Sweeney v. Central Pac. R. Co., 57 Cal. 15; Fleming v. St. Paul, etc., R. Co., 27 Minn. 111; 6 N. W. Rep. 448; Patton v. Central, etc., R. Co., 73 Iowa 306; 35 N. W. Rep. 149.

[39] Rumsey v. Delaware, etc., R. Co., 6 Kulp (Pa.) 359; 53 Am. & Eng. R. Cas. 376.

[40] Louisville, etc., R. Co. v. Sandford, 117 Ind. 265; 19 N. E. Rep. 770. Running into a burning bridge is a risk assumed by an engineer. Texas, etc., R. Co. v. Minnick, 57 Fed. Rep. 362.

[41] Wells v. Burlington, etc., R. Co., 56 Iowa 520; 9 N. W. Rep. 364; 2 Am. & Eng. R. Cas. 243; Coates v. Burlington, etc., R. Co., 62 Iowa 486; 15 Am. & Eng. R. Cas. 265; Rains v. St. Louis, etc., R. Co., 71 Mo. 164; 5 Am. & Eng. R. Cas. 610; Williams v. Delaware, etc., R. Co., 116 N. Y. 628; 22 N. E. Rep. 1117; 41 Am. & Eng. R. Cas. 254; Carbine v. Bennington, etc., R. Co., 61 Vt. 348; 17 Atl. Rep. 491; 38 Am. & Eng. R. Cas. 45; Ryan v. Long Island, etc., R. Co., 51 Hun. 607; 22 N. Y. S. R. 655; 4 N. Y. Supp. 381.

An employee continuing to work in a known dangerous place, without complaint, was held to assume the risk in the following cases: Purkey v. Southern Tr. Co. (W. Va.), 50 S. E. Rep. 755; Chicago, etc., Ry. Co. v. Wild, 109 Ill. App. 38; Lake Shore, etc., R. Co. v. Whidden, 23 Ohio Cir. Ct. R. 85; Lindsay v. New York, etc., Ry. Co., 112

§ 342. **Dangers from open culverts, assumed, when.**— As in the case of obstructions on or near the track, which have been maintained for such a length of time that employees ought to know and appreciate the danger therefrom, on account of the obvious nature of the danger threatening them, it is held, in a great many cases, that where a railroad company has, customarily, maintained open culverts or ditches, near its track, that its employees will assume the risk of falling into such culverts while discharging their duties in operating the railroad.[42]

§ 343. **Dangers from defects in machinery and appliances, assumed, when.**— An employee who knowingly continues the use of a defective and dangerous tool or appliance, without

Fed. Rep. 384; 50 C. C. A. 298; Bradburn v. Wabash R. Co. (Mich.), 96 N. W. Rep. 929; Wrightsville, etc., R. Co. v. Lattimore, 118 Ga. 581; 45 S. E. Rep. 453; Christensen v. Rio Grande, etc., R. Co. (Utah), 74 Pac. Rep. 876; Wagner v. New York, etc., R. Co., 86 N. Y. S. R. 921; 93 App. Div. 14; Moster v. Terminal R. Ass'n, 106 Ill. App.. 494; Harrington v. Wabash R. Co. (Mo.), 78 S. W. Rep. 662; Illinois Cent. R. Co. v. Brown, 107 Ill. App. 512; Simmons v. Southern Tr. Co., 207 Pa. St. 589; 57 Atl. Rep. 45; Illinois Central R. Co. v. Satkowski, 107 Ill. App. 524; Norfolk & Western Ry. Co. v. Gesswine, 144 Fed. Rep. 56; Marshall v. St. Louis, I. M. & S. Ry. Co. (Ark.), 94 S. W. Rep. 56; Saxe v. Wolworth, etc., Co., 191 Mass. 338; 77 N. E. Rep. 883; Illinois Central R. Co. v. Emerson (Miss.), 40 So. Rep. 818; Anderson v. Northern Pac. R. Co. (Mont.), 65 Pac. Rep. 884; Johnston v. Boston, etc., R. Co., 78 Vt. 344; 62 Atl. Rep. 1021.

[42] Kirkpatrick v. Choctaw, etc., R. Co., 195 U. S. 624; 49 L. Ed. 349, affirming 121 Fed. Rep. 11; 57 C. C. A. 253.

Where it has been the general custom of a railroad company to maintain open culverts, a brakeman assumes the risk of falling in a culvert, while coupling cars. Southern Pac. R. Co. v. Gloyd (Utah), 138 Fed. Rep. 388; Williams v. Louisville, etc., R. Co., 23 Ky. L. R. 1124; 64 S. W. Rep. 738; Lindsay v. New York, etc., Ry. Co., 112 Fed. Rep. 384; 50 C. C. A. 298; Haggerty v. Chicago, etc., Ry. Co., 141 Fed. Rep. 966; 73 C. C. A. 282; Miller v. Detroit, etc., Ry. Co. (Mich), 95 N. W. Rep. 718; and of falling in open pits in round house; Galveston, etc., R. Co. v. Walker (Texas), 76 S. W. Rep. 228.

complaint, on his part and without a promise of repair, on the employer's part, assumes the risk of an injury incident to the use of such an appliance and cannot hold the employer liable for such an injury.[43]

A section hand who knowingly uses, under the direction of the section boss, a defective hammer and cleaver, assumes the risk;[44] a freight conductor assumes the known risk of using a defective engine step;[45] a switchman using a slanting footboard, to an engine, and killed thereby, will be held to assume the risk, unless he supposed that he could use it and avoid injury, by due care on his part;[46] a brakeman assumes the risk of injury from using a box car for a caboose;[47] the danger from a defective car platform is assumed by an employee who knowingly uses it without objection;[48] a section man who knowingly uses a defective dump car, without complaint, cannot recover for an injury therefrom;[49] use of a defective brake after notice of the defect and without complaint, will bar a recovery for an injury therefrom;[50] an

[43] Louisville, etc., R. Co. v. Allen, 47 Ill. App. 465; Davidson v. Southern Pac. R. Co., 44 Fed. Rep. 476; Baker v. Western, etc., R. Co., 68 Ga. 699; Needham v. Louisville, etc., R. Co., 85 Ky. 423; 3 S. W. Rep. 797; Ilick v. Flint, etc., R. Co., 67 Mich. 632; 35 N. W. Rep. 708; Heffernen v. North Pac. R. Co., 45 Minn. 471; 48 N. W. Rep. 1; New York, etc., R. Co. v. Lyon, 119 Pa. St. 324; 13 Atl. Rep. 205; Houston, etc., R. Co. v. Myers, 55 Texas 110; 8 Am. & Eng. R. Cas. 114; Missouri Pacific Ry. Co. v. Somers, 71 Texas 700; Central R. Co. v. Haslett, 74 Ga. 59; Ballou v. Chicago, etc., R. Co., 54 Wis. 257; 11 N. W. Rep. 559; 41 Am. Rep. 31; 5 Am. & Eng. R. Cas. 480.

[44] Baker v. Western, etc., R. Co., 68 Ga. 699.

[45] Jackson v. Kansas City, etc., R. Co., 31 Kansas 761; 3 Pac. Rep. 501; 15 Am. & Eng. R. Cas. 178.

[46] O'Mellia v. Kansas City, etc., R. Co., 115 Mo. 205; 21 S. W. Rep. 503.

[47] Davis v. Baltimore, etc., R. Co., 152 Pa. St. 314; 25 Atl. Rep. 498.

[48] Rogers v. Galveston, etc., R. Co., 76 Texas 502; 13 S. W. Rep. 540.

[49] Pleasants v. Raleigh, etc., R. Co., 95 N. Car. 195.

[50] St. Louis, etc., R. Co. v. Britz, 72 Ill. 256; Burns v. Chicago, etc., R. Co., 69 Iowa 450; 30 N. W. Rep. 25; 28 Am. & Eng. R. Cas. 409.

employee cannot hold his employer liable for an injury from the use of a known defective hand car;[51] the risk from a dangerous manner of running trains is assumed, in the absence of a complaint;[52] the absence of a turntable, requiring the running of trains backwards, is a known assumed danger;[53] as is the absence of a switch marker.[54] Nor could the employee hold the employer responsible for an injury resulting from an insufficient number of employees on a train, where the injured employee, with full knowledge of the way the train was manned, had worked without complaint on this score, with full appreciation of the risk in doing so.[55]

§ 344. **Employee with equal knowledge assumes risk.**— In the absence of a promise or assurance of safety,[56] where the employee is under the same obligations as his employer to know the condition of his tool or appliance or the place of work,[57] and the risk of his employment is apparent, or is as well known to the employee as it is to the employer,[58] and

[51] Johnston v. Western, etc., R. Co., 55 Ga. 133; Central, etc., R. Co. v. Kenney, 58 Ga. 485; 16 Am. Ry. Rep. 131.

[52] Larson v. St. Paul, etc., R. Co., 43 Minn. 423; 45 N. W. Rep. 722; 44 Am. & Eng. R. Cas. 529; Lake Shore, etc., R. Co. v. Knittel, 33 Ohio St. 468.

[53] Kuhns v. Wisconsin, etc., R. Co., 70 Iowa 561; 31 N. W. Rep. 868.

[54] Union Pacific R. Co. v. Monden, 50 Kansas 539; 31 Pac. Rep. 1002; 53 Am. & Eng. R. Cas. 363.

[55] Chicago, etc., R. Co. v. Donehue, 75 Ill. 106; Chicago, etc., R. Co. v. Geary, 110 Ill. 383; 17 Am. & Eng. R. Cas. 606; Baltimore, etc., R. Co. v. State, 41 Md. 268; 6 Am. Ry. Rep. 276.

[56] Laning v. New York, etc., R. Co., 49 N. Y. 521; Chapman v. Erie R. Co., 55 N. Y. 579; Stewart v. New York, etc., R. Co., 8 N. Y. Supp. 19.

[57] Muirhead v. Hannibal, etc., R. Co., 19 Mo. App. 634; Porter v. Hannibal, etc., R. Co., 71 Mo. 66; 36 Am. Rep. 454; 2 Am. & Eng. R. Cas. 44; Louisville, etc., R. Co. v. Berry, 2 Ind. App. 427; 28 N. E. Rep. 714.

[58] Thompson v. Chicago, etc., R. Co., 4 McCrary (U. S.) 629; 14 Fed. Rep. 564,

the employee continues in the service, he will assume the risk of injuries from his surroundings, in the absence of special instructions or directions by the employer.[59]

An employee with equal knowledge that his employer possessed, of the condition of the roadbed and track, was held to assume the risk thereof, in a Kansas case;[60] where the employee was shown to have had equal means of knowledge with his employer, about the defects in a machine he was operating, he was held in Colorado, to have assumed the risk, in the absence of a promise of repair;[61] an employee with equal notice of a defective car, was held to take the risk of an injury in mounting it, in Wisconsin,[62] and these cases are in accord with the weight of authority on this question, for it is very generally held, that where the employee has equal or better information of the dangers surrounding him, than his employer has, he cannot recover for a subsequent injury, in the absence of a promise to repair, or an assurance of safety.[63]

§ 345. **Extra risks assumed, when.**— An employee is held, in law, to assume the risk of all extraordinary dangers that are obvious to him and which he voluntarily undertakes,[64]

[59] Davis v. Detroit, etc., R. Co., 26 Mich. 105; Crutchfield v. Richmond, etc., R. Co., 78 N. Car. 300; 16 Am. Ry. Rep. 212.

[60] Clark v. Missouri Pacific Ry. Co., 48 Kansas 654; 29 Pac. Rep. 1138.

[61] Burlington, etc., R. Co. v. Liehe, 17 Colo. 280; 29 Pac. Rep. 175.

[62] Flannagan v. Chicago, etc., R. Co., 50 Wis. 462; 7 N. W. Rep. 337.

[63] Week v. Fremont, etc., Co., 3 Wash. 629; 29 Pac. Rep. 215.

[64] Pittsburgh, etc., R. Co. v. Adams, 105 Ind. 151; 5 N. E. Rep. 187; 23 Am. & Eng. R. Cas. 408; Downey v. Sawyer, 157 Mass. 418; 32 N. E. Rep. 654; Smith v. Winona, etc., R. Co., 42 Minn. 87; 43 N. W. Rep. 968; 41 Am. & Eng. R. Cas. 289; Consolidated, etc., Co. v. Hannei, 146 Ill. 614; 35 N. E. Rep. 162; International, etc., R. Co. v. Turner, 3 Texas Civ. App. 487; 23 S. W. Rep. 146; Pittsburg, etc., R. Co. v. Sentmeyer, 92 Pa. St. 276.

and all risks incident to the work, that are equally open to observation of himself and the employer, although the work is temporarily more hazardous than that for which he was employed.[65] A party has a right to contract to perform any lawful business, however hazardous it may be, and although it is rendered more dangerous than it otherwise would be, by the peculiar manner of the employer, the employee, in remaining in the service after discovering the dangers, or after reasonable opportunity so to do, is held to assume the risk,[66] nor would it be material that he only remained in the employment at the urgent request of the employer,[67] or that he was unwilling to remain in the service and only did so, for fear of losing his employment.[68] The result of his voluntary act is the same, whatever may be the reason that prompted it, and where having sufficient intelligence to appreciate the danger to which he is exposed, he knowingly consents to occupy the place set apart for him, he assumes the risk incident thereto and dispenses with the obligation of the employer to furnish him a better place.[69]

But of course this result would not follow, if the dangerous condition of the place or appliance was unknown to the employee, or could not have been discovered by reasonable care, on his part,[70] or if the condition was superinduced

[65] Consolidated, etc., Co. v. Hannei, 146 Ill. 614; 35 N. E. Rep. 162.

[66] Scott v. Oregon, etc., R. Co., 14 Oregon 211; 13 Pac. Rep. 98; 28 Am. & Eng. R. Cas. 414; Pollich v. Sellers, 42 La. Ann. 623; 7 So. Rep. 786.

[67] Diehl v. Lehigh, etc., Co., 140 Pa. St. 487; 21 Atl. Rep. 430.

[68] Leary v. Boston, etc., R. Co., 139 Mass. 580; 2 N. E. Rep. 115; 52 Am. Rep. 733; 23 Am. & Eng. R. Cas. 383; Southern Kansas R. Co. v. Moore, 49 Kansas 616; 31 Pac. Rep. 138.

[69] Emma Cotton, etc., Co. v. Hale, 56 Ark. 232; 19 S. W. Rep. 600; Gulf, etc., R. Co. v. Wells (Texas), 16 S. W. Rep. 1025.

[70] Taylor, etc., R. Co. v. Taylor, 79 Texas 104; 14 S. W. Rep. 918; Irvine v. Flint, etc., R. Co., 89 Mich. 416; 50 N. W. Rep. 1008; 53 Am. & Eng. R. Cas. 210; Lake Shore, etc., R. Co. v. McCormick, 74

by the employer's negligence,[71] or the employee, because of his youth or inexperience, did not appreciate the dangers of the extra risks to which he was exposed.[72]

§ 346. **Extra risks from defective bridges, assumed, when.** — In a well-considered case that has come to the author's attention, from Alabama,[73] the plaintiff's intestate was acting as both engineer and conductor of a construction train and was killed, in attempting to cross a river, by the falling of a bridge, during a great flood. The evidence showed that deceased controlled the movements of the train and had no orders to cross the river at that time and his only motive for crossing appeared to be to get home. He had examined the bridge, during the day of his death and knew, or ought to have known, that the waters were rapidly rising, and knew or ought to have known of the danger of the trestles approaching the bridge, being washed away. The court held that he assumed the risk of crossing the bridge, with this information before him and that there could be no recovery for his death.[74] And in another case, the death of a brakeman, caused by a low bridge, was held to be remediless, where his attention had been called to the low bridge and the extra peril of passing under it.[75] The negligence of the employer was waived in this case and the waiver could not be affected by the rapidity or promptness with which the employee was required to act at the time of the accident.[76]

Ind. 440; 5 Am. & Eng. R. Cas. 474; Riley v. West Virginia, etc., R. Co., 27 W. Va. 145.

[71] Peoria, etc., R. Co. v. Puckett, 42 Ill. App. 642.

[72] Emma Cotton, etc., Co. v. Hale, 56 Ark. 232; 19 S. W. Rep. 600.

[73] Columbia, etc., R. Co. v. Bridges, 86 Ala. 448; 5 So. Rep. 864; 38 Am. & Eng. R. Cas. 136.

[74] Columbus, etc., R. Co. v. Bridges, 86 Ala. 448; 5 So. Rep. 864; 38 Am. & Eng. R. Cas. 136.

[75] Fitzgerald v. New York, etc., R. Co., 36 N. Y. S. R. 755.

[76] Brossman v. Lehigh Valley R. Co., 113 Pa. St. 490; 6 Atl. Rep. 226; 57 Am. Rep. 479.

§ 347. **Extra risks from operation of cars assumed.**— The following extra hazards, knowingly undertaken by railroad employees, in the management of engines, cars and trains, have been held to be assumed, i. e., a brakeman riding a flat car, in front of an engine, was held to have knowingly undertaken the extra perils;[77] an engineer in a railroad yard, at night, takes the risk of being struck by a backing engine that has no light;[78] the use of narrow-gauge trucks to carry a broad-gauge car upon, is a known extra peril of the employment of a brakeman;[79] the increased risk a fireman takes in remaining on his engine with a sleepy engineer is assumed;[80] a section man takes the risk of a collision with an extra or special train, without notice;[81] a switchman takes the risk of moving a car loaded with nitroglycerin, over the tracks of the receiving company and of its explosion;[82] a section man takes the risk of running a hand car, around a curve and in a deep cut, in front of an approaching freight train,[83] and a section man, running a hand car, at night, is chargeable with the risk of running it into a stationary train on the same track.[84] These and similar risks, although extra-hazardous, are assumed, because the employee knows as much about them as the employer; there is nothing unseen in the

[77] Fordyce v. Lowman, 57 Ark. 160; 20 S. W. Rep. 1090.

[78] Williams v. Delaware, etc., R. Co., 2 N. Y. Supp. 435; 18 N. Y. S. R. 857; 50 Hun 600.

[79] Titus v. Bradford, etc., R. Co., 136 Pa. St. 618; 20 Atl. Rep. 517.

[80] Carroll v. East Tennessee, etc., R. Co., 82 Ga. 452; 10 S. E. Rep. 163; 41 Am. & Eng. R. Cas. 307.

[81] Olson v. St. Paul, etc., R. Co., 38 Minn. 117; 35 N. W. Rep. 866; 33 Am. & Eng. R. Cas. 386; Larson v. St. Paul, etc., R. Co., 43 Minn. 423; 44 Am. & Eng. R. Cas. 529.

[82] Foley v. Chicago, etc., R. Co., 48 Mich. 622; 12 N. W. Rep. 879; 42 Am. Rep. 481; 6 Am. & Eng. R. Cas. 161.

[83] Hammond v. Chicago, etc., R. Co., 38 Mich. 334; 47 N. W. Rep. 965; 48 Am. & Eng. R. Cas. 377.

[84] Sliney v. Duluth, etc., R. Co., 46 Minn. 384; 49 N. W. Rep. 187.

surroundings and the dangerous condition is not due to the employer's negligence.

§ 348. **Extra dangers in use of defective cars, assumed.**— The following extra risks have been held to be assumed, by railroad employees, incurred in coupling dangerous and defective cars, *viz.*, a brakeman assumes the risk of an injury in coupling and uncoupling a car, while attached to a moving engine;[85] the danger of coupling a car from the inside curve of a track in a yard, is assumed;[86] the danger of coupling moving cars is always assumed;[87] the risk of coupling a higher and lower car together, is assumed;[88] a brakeman cannot recover for an injury in coupling to an improperly loaded car;[89] striking an obstruction in the act of coupling a car, is a danger that is voluntarily undertaken, by a brakeman;[90] injuries in coupling cars with double buffers, although the peril is increased over ordinary couplings, is a risk assumed;[91] the danger of coupling to a known broken car, is assumed;[92] no recovery can be had for an injury in coupling cars without bumpers;[93] the risk of coupling cars

[85] Kroy v. Chicago, etc., R. Co., 32 Iowa 357; 10 Am. Ry. Rep. 48.

[86] Tuttle v. Detroit, etc., R. Co., 122 U. S. 189; 7 Sup. Ct. Rep. 1166; 31 Am. & Eng. R. Cas. 217. And see Randall v. Baltimore, etc., R. Co., 109 U. S. 478.

[87] Henry v. Sioux City, etc., R. Co., 66 Iowa 52; 23 N. W. Rep. 260; 21 Am. & Eng. R. Cas. 644.

[88] Thomas v. Missouri Pacific Ry. Co., 109 Mo. 187; 18 S. W. Rep. 980; Wayne, etc., R. Co. v. Gildersleeve, 33 Mich. 133.

[89] Day v. Toledo, etc., R. Co., 42 Mich. 523; 4 N. W. Rep. 203; 2 Am. & Eng. R. Cas. 126.

[90] Pennington v. Detroit, etc., R. Co., 90 Mich. 505; 51 N. W. Rep. 634.

[91] Indianapolis, etc., R. Co. v. Flanigan, 77 Ill. 365; Louisville, etc., R. Co. v. Boland, 96 Ala. 626; 11 So. Rep. 667; 53 Am. & Eng. R. Cas. 169.

[92] Barkdall v. Pennsylvania R. Co. (Pa.), 13 Atl. Rep. 82.

[93] Houston, etc., R. Co. v. Barranger (Texas), 14 S. W. Rep. 242.

with mismatched couplings, is one that is assumed;[94] the danger of coupling engines and cars of different heights with straight links, is assumed,[95] as is the danger of making a "three link coupling" in a moving train.[96]

§ 349. **Dangers outside scope of employment assumed, when.**— An employee is not bound under all circumstances and at all hazards, to obey the orders of his employer. He cannot recover damages for injuries received, while obeying the latter's orders, if he had time to deliberate and voluntarily and with knowledge of the peril, placed himself in a position in which he was more than likely to be injured.[97] Damages cannot be recovered, although the result of a risk outside the scope of the employee's duties, if his opportunity

[94] Norfolk, etc., R. Co. v. McDonald, 88 Va. 352; 13 S. E. Rep. 706; McLaren v. Williston, 48 Minn. 299; 51 N. W. Rep. 373.

[95] Welch v. New York, etc., R. Co., 43 N. Y. S. R. 958; 63 Hun 625; Thomas v. Missouri Pacific Ry. Co., 109 Mo. 187; 18 S. W. Rep. 980.

[96] Darracott v. Chesapeake & Ohio R. Co., 83 Va. 288; 2 S. E. Rep. 511; 31 Am. & Eng. R. Cas. 157; Bennett v. Northern Pacific R. Co., 2 N. Dak. 112.

Switchmen and brakemen were held to assume the risk of handling disabled cars, in the following cases: International, etc., R. Co. v. Story (Texas), 62 S. W. Rep. 130; Railroad Co. v. Hennessey, 96 Fed. Rep. 713; 38 C. C. A. 307; Brown v. Railroad Co., 59 Kansas 70; 52 Pac. Rep. 65; Yeaton v. Railroad Corp., 145 Mass. 418; Kelley v. Railroad Co., 35 Minn. 490; 29 N. W. Rep. 173; Arnold v. Canal Co., 125 N. Y. 15; 25 N. E. Rep. 1064; Watson v. Railroad Co., 58 Texas 434; Flannagan v. Railroad Co., 50 Wis. 462; 7 N. W. Rep. 337.

An employe was held to assume the risk of injury from defects in foreign cars, in Woods v. Northern Pac. Ry. Co., 36 Wash. 658; 79 Pac. Rep. 309; Cleary v. Long Island R. Co., 66 N. Y. S. R. 568; 54 App. Div. 284; Leazott v. Boston, etc., R. Co., 70 N. H. 5; 45 Atl. Rep. 1084.

The risk of using a remodeled freight car for a caboose was held assumed, in Ohio, in Crawford v. New York, etc., R. Co., 23 Ohio Cir. Ct. 207.

[97] McDermott v. Hannibal, etc., R. Co., 87 Mo. 285; 28 Am. & Eng. R. Cas. 528.

for observing the danger was equal to that of his employer, nor would the employer be guilty of negligence, in requiring such additional duty, if good reason existed therefor, such as the safety of passengers, in an unusual storm,[98] if ordinarily safe track, culverts and roadway were provided.

Under this rule of law, an employee in a railroad yard, for three months, was held to assume the risk of obeying an order to couple a car with projecting lumber over the end;[99] an employee in a railroad shop, accustomed to wheel scrap iron, to have assumed the open risk of running the hammer, although the work was done for the first time the day of the injury;[1] a foreman of bridge builders, was held to assume the known risk of obeying an order to use an engine to do switching;[2] an employee undertaking the use of a known defective tool, although under the immediate supervision of his foreman, was held not entitled to recover;[3] an order to use a known defective hand car, will not give a right of action therefor,[4] nor will an order to work in a tunnel, likely to cave in because of shots which loosened the walls, give a right of action,[5] as this is a risk due to natural forces, which one man ought to be held to assume the same as another.

[98] Houston, etc., R. Co. v. Fowler, 56 Texas 452; 8 Am. & Eng. R. Cas. 504; English v. Chicago, etc., R. Co., 24 Fed. Rep. 906.

[99] Atchison, etc., R. Co. v. Plunkett, 25 Kansas 188; 2 Am. & Eng. R. Cas. 127.

[1] Hanrathy v. Northern C. R. Co., 46 Md. 280; 18 Am. Ry. Rep. 188.

[2] Cole v. Chicago, etc., R. Co., 71 Wis. 114; 37 N. W. Rep. 84; 5 Am. St. Rep. 201; 33 Am. & Eng. R. Cas. 274.

[3] Baker v. Western, etc., R. Co., 68 Ga. 699.

[4] Bell v. Western, etc., R. Co., 70 Ga. 566.

[5] Anderson v. Winston, 31 Fed. Rep. 528.

An employee performing voluntary services outside the line of his employment is held to assume the risk, in the following cases: Central, etc., R. Co. v. McWhorter, 115 Ga. 476; 42 S. E. Rep. 82; Devoe v. New York, etc., R. Co., 75 N. Y. S. R. 136; 70 App. Div. 495; Cleveland, etc., R. Co. v. Workman, 66 Ohio St. 509; 64 N. E. Rep. 582; Martin v. Kansas City, etc., R. Co., 77 Miss. 720; 27 So. Rep. 646;

§ 350. **Dangers from obeying orders of coemployee assumed.**— While the employee is not held to assume the risk of injuries due to negligent orders of vice-principals, or those who stand in the place of the employer, in the giving of such orders,[6] as none but those delegated by the employer to so act for him, are held, in law, to be able to bind him by the result of orders or assumption of powers not delegated to them, the employer is not generally held to be liable for injuries received by his employees, due to risks encountered while obeying the orders of coemployees of the injured employee, for it is optional with the employee to either obey or refuse such orders.[7]

Under this rule, it was held, in Tennessee, in a well-considered case,[8] that a yard man, in a railroad yard, who was not under the duty to obey the orders of an engineer, assumed the risk of making a coupling, at the request of the engineer, when he was killed, as a result of the negligent manner in which the cars were brought together, by the engineer.

§ 351. **Risks assumed, notwithstanding promise of repair, when.**— If an employee knows and appreciates the danger of a given act, which he undertakes, he is held to have assumed the risk of injury in so doing, although he undertakes the accomplishment of the act under an order of his employer or a vice-principal.[9] It is only where he has not equal means

Warden v. Railroad Co., 94 Ala. 277; 10 So. Rep. 276; 14 L. R. A. 552; Beyer v. Railroad Co., 114 Ala. 424; 21 So. Rep. 952.

[6] Greenleaf v. Illinois, etc., R. Co., 29 Iowa 14; Thompson v. Chicago, etc., R. Co., 4 McCrary (U. S.) 629; 14 Fed. Rep. 564; Chicago, etc., R. Co. v. Harney, 28 Ind. 28.

[7] Watts v. Hart, 7 Wash. 178; 34 Pac. Rep. 423, 771; Pittsburg, etc., R. Co. v. Adams, 105 Ind. 151; 5 N. E. Rep. 187; 23 Am. & Eng. R. Cas. 408.

[8] Bradley v. Nashville, etc., R. Co., 14 Lea (Tenn.) 374.

Obeying the order of a coemployee was held assumed, in Van Derhoff v. New York Cent. R. Co., 84 N. Y. S. R. 650; 88 App. Div.

[9] Chicago, etc., R. Co. v. Crotty (C. C. A. 8 Cir.), 4 L. R. A. (N. S.) 832.

of information with his employer and does not understand the danger of his obeying the order of his vice-principal or employer, that he can claim to be exempt from the risk of his work, because of an order of his employer, for where he knows and appreciates the danger, the mere fact of an order on the employer's part, would not alter his acceptance of the risk, by virtue of his contract of employment.[10]

And the same rule applies as to a promise to repair simple, common tools or appliances, of which the promise could not be said to have been the essential inducement for the continued use of such tools, but where the danger of the use was apparent to all men and the promise was relied on, only after an injury, to excuse an otherwise voluntary act on the part of the employee, resulting in his injury.[11]

§ 352. **Risks assumed by car and track repairers.**— It is very generally held, by the best considered cases, that a car repairer, who knowingly goes under or about a crippled or damaged car, in a railroad yard where trains or cars are apt, at any minute, to be backed into or against such car, without placing a flag or other danger signal, assumes the risk of receiving an injury, while so engaged and cannot recover therefor;[12] an employee who accepts employment on a con-

[10] An employee, although acting under an order of a superior, where he had full notice of the dangers of his surroundings, was held to assume the risk, in Southern Ry. Co. v. Logan (S. C.), 138 Fed. Rep. 725; Weed v. Chicago, etc., Ry. Co. (Neb.), 99 N. W. Rep. 827; Chicago & Gr. West Ry. Co. v. Crotty, 141 Fed. Rep. 913; 73 C. C. A. 147; Huggins v. Southern Ry. Co. (Ala.), 41 So. Rep. 856; Haywood v. Galveston, etc., R. Co. (Texas), 85 S. W. Rep. 433.

[11] The rule that a promise to repair waives the defense of assumption of the risk does not apply to the use of simple every-day tools or appliances. Bowen v. Chicago & N. E. Ry. Co., 117 Ill. App. 9.

[12] Renfro v. Chicago, etc., R. Co., 86 Mo. 302; Latremouille v. Bennington, etc., R. Co., 63 Vt. 336; 22 Atl. Rep. 656; 48 Am. & Eng. R. Cas. 265; Campbell v. Pennsylvania R. Co. (Pa.), 2 Atl. Rep. 489; 24 Am. & Eng. R. Cas. 427; Crowe v. New York, etc., R. Co.,

struction train, for the purpose of finding and repairing washouts, is also chargeable with notice of the dangers of the service and assumes the risk;[13] risks and dangers due to defective tracks are known and assumed by those engaged in the repair of such tracks;[14] a brakeman assumes the risk of handling a known broken car;[15] coupling a crippled car, with a broken drawhead is a risk assumed by brakemen who know of the defect in the car;[16] an employee taking a defective engine to the machine shop, for repair, assumes the risk of an injury while so engaged;[17] a track repairer knows that he must repair the tracks between passing trains and takes the risk of injury therefrom;[18] they take the risk, while proceeding to their work, on hand cars, of being run into by special trains, running without schedule time;[19] the risk of clearing away a wrecked train is a known dangerous employment, which the employee assumes[20] and the danger of coupling or working on a train that has broken in two is a risk known to employees and no recovery can be had for an injury from the detached portion of such train running back

23 N. Y. Supp. 1100; Cincinnati, etc., R. Co. v. Long (Ind.), 13 N. E. Rep. 659; Peterson v. Chicago, etc., R. Co., 34 N. W. Rep. 260.

[13] Vaughan v. California, etc., R. Co., 83 Cal. 18; 23 Pac. Rep. 215.

[14] Colorado Midland R. Co. v. O'Brien, 16 Colo. 219; 27 Pac. Rep. 701; 48 Am. & Eng. R. Cas. 235; Brick v. Rochester, etc., R. Co., 98 N. Y. 211; 31 Hun 453; 21 Am. & Eng. R. Cas. 605.

[15] Chicago, etc., R. Co. v. Ward, 61 Ill. 130; 12 Am. Ry. Rep. 434; Watson v. Houston, etc., R. Co., 58 Texas 434; 11 Am. & Eng. R. Cas. 313; Fraker v. St. Paul, etc., R. Co., 32 Minn. 54; 19 N. W. Rep. 349; 15 Am. & Eng. R. Cas. 256; Arnold v. Delaware, etc., R. Co., 125 N. Y. 15; 25 N. E. Rep. 1064.

[16] Arnold v. Delaware, etc., R. Co., 125 N. Y. 15; 25 N. E. Rep. 1064.

[17] Houston, etc., R. Co. v. O'Hara, 64 Texas 600.

[18] Coyne v. Union Pacific R. Co., 133 U. S. 370; 10 Sup. Ct. Rep. 382; Kennedy v. Pennsylvania R. Co. (Pa.), 17 Atl. Rep. 7.

[19] Pennsylvania R. Co. v. Wachter, 60 Md. 395; 15 Am. & Eng. R. Cas. 187.

[20] Slatterly v. New York, etc., R. Co., 21 N. Y. S. R. 552; 51 Hun 638; 4 N. Y. Supp. 910.

and injuring employees working on the stationary portion of the train.[21]

§ 353. **Various injuries due to caving earth banks assumed.**— Injuries to employees on railroads are of quite frequent origin, where the labor is in cuts or ditches, due to the caving in of the banks of earth, near which the work is being done. As all men are chargeable with a knowledge of the operation of natural laws, if the cave-in is the result of natural forces, or the progress of the work, there is generally held to be no liability in this class of cases.[22]

Accordingly, it is held that an employee wheeling earth, near a bank fifteen feet high, which by the frost and thaws was cracked and fell on him, assumed the risk and could not recover for a resulting injury;[23] an employee working in a

[21] Course v. New York, etc., R. Co., 17 N. Y. S. R. 715; 49 Hun 609; 2 N. Y. Supp. 312.

Injuries on a known defective track were held assumed risks, in Arnold v. Louisville, etc., R. Co., 22 Ky. L. R. 511; 58 S. W. Rep. 370.

An employee engaged in laying a track assumes the risk of an injury from the unevenness of the track, which was hardly noticeable. Meehan v. St. Louis, M. & S. E. R. Co., 114 Mo. App. 396; 90 S. W. Rep. 102.

An employee engaged in clearing a railroad track, after a wreck, is not entitled to rely upon an inspection of the track, by his employer, but assumes the risk of a dangerous track. Florence, etc., R. Co. v. Whipps (Colo.), 138 Fed. Rep. 13.

An employee engaged in dismantling a bridge, where the work performed continuously changes the place and makes it more insecure, assumes the risk of injury therefrom. Grayson, etc., Co. v. Carter (Ark.), 88 S. W. Rep. 597.

A car repairer engaged at work on a car, without a flag, where the employer's rules provided for a flag, was held to have assumed the risk, in the following cases: Canadian Pacific Ry. Co. v. Elliott, 137 Fed. Rep. 904; Sauls v. Chicago, etc., Ry. Co. (Texas), 81 S. W. Rep. 89; State v. South Baltimore Car Works (Md.), 58 Atl. Rep. 447.

[22] White, Personal Inj. in Mines, §§ 185, 200, 229, and cases cited.

[23] Olson v. McMullen (Minn.), 24 N. W. Rep. 318.

railroad cut, was denied a recovery, where the cave-in of the cut was due to the progress of the work;[24] the danger of loosened rock, in clay seams, to fall on a workman below, is a risk assumed by an employee;[25] an employee in a gravel pit, at work with a steam shovel, assumes the risk of the gravel caving in on him;[26] a shoveler near an earth bank, engaged in loading dirt cars, is held to assume the risk of the earth bank caving on him;[27] an employee excavating sand and gravel knows as much about the liability of the bank near which he works, to cave as his employer and assumes the risk of an injury therefrom;[28] the danger of excavating a frozen gravel bank, with cracks from the frost and blasts, is a known risk, assumed by a laborer thereon;[29] the danger of a cinder and earth bank caving in is assumed by even an illiterate employee near such bank;[30] one excavating gravel, covered with earth, assumes the risk of the earth giving way;[31] the risk of rock breaking and falling and injuring an employee working near a ledge of rock is known as well to the employee, as to the employer,[32] nor would an order of the employer or his representative, in such case, change the rule of nonliability,[33] for in all such cases, there is an

[24] Bradley v. Chicago, etc., R. Co., 138 Mo. 294; 39 S. W. Rep. 763.

[25] Mielke v. Chicago, etc., R. Co. (Wis.), 79 N. W. Rep. 22.

[26] Reiter v. Winona, etc., R. Co. (Minn.), 75 N. W. Rep. 219; Swanson v. Railway Co. (Minn.), 70 N. W. Rep. 978.

[27] Rasmussen v. Chicago, etc., R. Co. (Iowa), 21 N. W. Rep. 581.

[28] Vincennes, etc., Co. v. White (Ind.), 24 N. E. Rep. 745.

[29] Allan v. Logan (Utah), 37 Pac. Rep. 496; Aldrich v. Furnace Co., 78 Mo. 559.

[30] Brown v. Chattanooga, etc., R. Co. (Tenn.), 47 S. W. Rep. 415.

[31] Griffin v. Ohio, etc., Ry. Co. (Ind.), 24 N. E. Rep. 888; Naylor v. Chicago, etc., Ry. Co. (Wis.), 2 N. W. Rep. 24.

[32] Kane v. St. Louis, etc., R. Co. (Mo. App.), 87 S. W. Rep. 571.

[33] Skidmore v West Virginia, etc., R. Co. (W. Va.), 23 S. E. Rep. 713; Aldrich v. Furnace Co., 78 Mo. 559.

absence of negligence on the employer's part and all the elements of an assumed risk, on the part of the employee.[34]

§ 354. **Risks from negligence of coemployees assumed at common law.**— By the common law, an employee was held to assume all the risks of his employment, including the risk of injuries due to the negligence of his coemployees, provided they were selected by the employer with due care and not retained in his employment after he had knowledge of their unfitness or habitual negligence.[35] And, at common law, the employee assumed the risk of the negligence of a coemployee, even though the latter was in a position of greater responsibility or a different line of employment, so long as both were engaged in the same general business, where the negligence of the one contributed to the danger of the other.[36] The negligence of an employee in one grade of the service was as much one of the risks of the business as

[34] White, Personal Inj. in Mines, §§ 185, 200, 229, and cases cited.

[35] Hunn v. Michigan Central R. Co., 78 Mich. 513; Harrison v. Detroit, etc., R. Co., 79 Mich. 409; 41 Am. & Eng. R. Cas. 398; Taylor v. Evansville, etc., R. Co., 121 Ind. 124; 22 N. E. Rep. 876; 6 L. R. A. 584; 41 Am. & Eng. R. Cas. 437; Kelly v. Chicago, etc., R. Co., 35 Minn. 490; 29 N. W. Rep. 173; Hudson v. Ocean Steamship Co., 110 N. Y. 625; 17 N. E. Rep. 342; Gardner v. Michigan Central R. Co., 58 Mich. 584; 26 N. W. Rep. 301; Baltimore, etc., R. Co. v. McKenzie, 81 Va. 71; 24 Am. & Eng. R. Cas. 395; Pullman Car Co. v. Laack, 143 Ill. 242; 32 N. E. Rep. 285; Howd v. Mississippi C. R. Co., 50 Miss. 178; Louisville, etc., R. Co. v. Petty, 67 Miss. 255; 7 So. Rep. 351; 41 Am. & Eng. R. Cas. 441; Bordeau v. Valley Falls Co., 16 R. I. 448; 17 Atl. Rep. 54; Texas, etc., R. Co. v. Whitmore, 58 Texas 276; 11 Am. & Eng. R. Cas. 195; Grattis v. Kansas City, etc., R. Co., 153 Mo. 380; 55 S. W. Rep. 108; 48 L. R. A. 399; 77 Am. St. Rep. 721; Toledo, etc., R. Co. v. Durkin, 76 Ill. 395; Craig v. Chicago, etc., R. Co., 54 Mo. App. 523.

[36] Grattis v. Kansas City, etc., R. Co., 153 Mo. 380; 55 S. W. Rep. 108; 48 L. R. A. 399; 77 Am. St. Rep. 721; Robinson v. Houston, etc., R. Co., 46 Texas 540; 13 Am. Ry. Rep. 303; Gulf, etc., R. Co. v. Blohn, 73 Texas 637; 11 S. W. Rep. 867; 4 L. R. A. 764; Dallas v. Gulf, etc., R. Co., 61 Texas 196; 21 Am. & Eng. R. Cas. 575.

that of another, in a different grade, and as it is impractical to hold that an employee by his implied contract of employment assumes the risk of the negligence of one class of employees and not that of another, hence, at common law, the negligence of all classes of employees was assumed [37] whether the injured employee was an adult or a minor,[38] and if it was known that the employee causing the injury was incompetent and the injured employee had worked with him, without objection, he would also be held to have assumed, by his failure to make known the fact of such incompetency to his employer, the risk of the known incompetency of such coemployee.[39]

Of course this rule of nonliability does not obtain in States where the common-law rule upon the subject has been abrogated by statute and the rule under the statutes, with

[37] Robinson v. Houston, etc., R. Co., *supra*.

[38] Heffernen v. Northern Pac. R. Co., 45 Minn. 471; 48 N. W. Rep. 1, 526.

[39] Latremouille v. Bennington, etc., R. Co., 63 Vt. 336; 22 Atl. Rep. 656; 48 Am. & Eng. R. Cas. 265.

The risk of injury due to the negligence of competent coemployees was held to be a risk assumed, in the following late cases: Louisville, etc., R. Co. v. Dillard, 114 Tenn. 240; 86 S. W. Rep. 313; Weeks v. Scharer, 111 Fed. Rep. 330; 49 C. C. A. 372; Miniter v. Chicago, etc., Ry. Co. (Iowa), 96 N. W. Rep. 1108; American Bridge Co. v. Seeds, 144 Fed. Rep. 605; Grandin v. Southern Pac. R. Co. (Utah), 85 Pac. Rep. 357; Roseman v. Southern Ry. Co., 66 S. C. 91; 44 S. E. Rep. 574; Benignia v. Pennsylvania R. Co., 197 Pa. St. 384; 47 Atl. Rep. 359.

An employee working with known incompetent employees, without objection, was held to have assumed the risk of an injury therefrom, in Hull v. Northern Pac. Ry. Co. (Wash.), 136 Fed. Rep. 153; 69 C. C. A. 151.

The Iowa Code, 1897 (§ 2071), is held, by the federal court, to only abrogate the defense of assumed risk, so far as the risks of the negligence of coemployees is concerned, leaving intact the defense as to risks obvious and inherent in the act itself, although the danger may have arisen through the prior negligence of a coemployee. Chicago, etc., Ry. Co. v. Crotty, 141 Fed. Rep. 913; 73 C. C. A. 147.

reference to the liability of the employer, for the negligence of coemployees, engaged in the operation of trains, will be treated of elsewhere.

§ 355. **Additional risks from inclement weather assumed.**— Employees, as well as the employer, are chargeable with notice of the action of the elements and as all employments are subject to the risk of such uncontrolled forces as the wind, fire and water, employees are generally held to assume the increased hazards of their employment, due to the operation of such natural elements, and, in the absence of negligence combining therewith to produce the injury, the employer is not liable for an injury caused thereby.[40]

In a Kentucky case,[41] which illustrates the proposition in the title, a brakeman was killed by slipping from the top of a car, by snow and ice formed by the weather on the car, and his administrator charged that the company was negligent in failing to remove the ice, or to provide sand or salt to cover it with. Considering the liability of the employer, under the doctrine of assumed risk, the court said: "Conceding that at that season of the year (December) and in that locality where the accident happened, that it was the duty of the appellee to provide its trains with a sufficient supply of salt or sand to be used in times of snow or ice, yet this action presents no complaint upon this score; and we do not, therefore, decide that any such duty rested upon the company. The failure complained of is that the ice was not removed, or sand or salt put upon it. Certainly in the absence of averment, we will not assume that in this latitude it was the duty of the company to provide other servants than the brakemen themselves to accompany the train, in

[40] Frangoise v. Horton & Hemenway, 26 R. I. 291; 58 Atl. Rep. 949; White, Personal Inj. in Mines, § 221, and cases cited.

[41] O'Bannon's Admr. v. Louisville, etc., R. Co., 9 Ky. L. R. 706; 6 S. W. Rep. 434.

anticipation of unusual weather and remove the ice or sleet from their pathway, or strew it with salt or sand. One entering the employment assumes all the risks incident to it. The increased dangers of railroading, arising from rain, snow and ice, or the weather, are a part of the ordinary risks incident to the business. To hold railroads liable to their employees on account of danger arising from the elements, would lead to the running of trains in good weather only, thus seriously interfering with the travel and business of the country." And this is the trend of the decisions, on this proposition.[42]

§ 356. **Obvious dangers from violations of statutes, assumed in some States.**— The courts of different States have expressed divergent views upon the proposition whether or not an obvious risk, due to a violation of a statute, is assumed. Text writers have taken the position that such obvious dangers should be held to be assumed, under the employee's implied contract of the common law, the same as other known risks,[43] for the reason that any other construction is an impairment and unjust limitation upon the rights of the employer, under the well established doctrine of the common law.[44] The courts which deny that risks resulting from a breach of statutory duty, are assumed, however, place their conclusion upon the ground that any other construction of

[42] Martin v. Chicago, etc., R. Co. (Iowa), 87 N. W. Rep. 654; Railroad Co. v. Smith, 82 Ga. 236; 8 S. E. Rep. 311; Piquegno v. Railroad Co., 52 Mich. 40; 17 N. W. Rep. 232; 50 Am. Rep. 243; Harding v. Transfer Co., 80 Minn. 504; 83 N. W. Rep. 395; Railroad Co. v. Hester, 64 Texas 401.

A brakeman was held to assume the risk of slipping from the top of a freight car, on account of snow and ice on the car, in New York, in Kilken v. New York Central R. Co., 177 N. Y. 566; 69 N. E. Rep. 1125; 78 N. Y. S. R. 568; 76 App. Div. 529.

[43] Dresser's Emp. Liab., § 51, *et sub.*

[44] Bailey's Mas. Liab. Inj. Serv., p. 181.

the statute will practically deny the employee the benefit of a statute passed for his protection.[45] Hence, it is, that the one construction denies the employee the benefit of the statute, which he has consented to waive, while the other denies the employer the benefit of a well established common-law defense, that he is urging he has not waived. An employee not protesting against the failure to comply with a statute or ordinance, passed for his protection, is held in many States, to waive the protection of the statute[46] or ordinance,[47] while in others, it is held that public enactments, adopted by the State or municipalities, on grounds of public policy, cannot thus be set aside by the mere acquiescence of those for whose protection the same were passed, and that such dangers are not assumed.[48]

[45] Springside, etc., Co. v. Patting (Ill.), 71 N. E. Rep. 371; Mt. Olive, etc., Co. v. Herbeck, 92 Ill. App. 441; 60 N. E. Rep. 105; Mosgrove v. Coal Co. (Iowa), 81 N. W. Rep. 227.

[46] Spiva v. Osage, etc., Co., 88 Mo. 68; Adams v. Kansas, etc., Co., 85 Mo. App. 486; Victor, etc., Co. v. Muir, 20 Colo. 320; 38 Pac. Rep. 378; 26 L. R. A. 435; O'Maley v. Gaslight Co., 158 Mass. 135; 32 N. E. Rep. 1119; 47 L. R. A. 161; Grand v. Railroad Co., 83 Mich. 564; 47 N. W. Rep. 837; 11 L. R. A. 402; Fitzgerald v. Railroad Co., 59 Hun 225; 25 N. Y. S. R. 205; Knisley v. Pratt, 148 N. Y. 372; 42 N. E. Rep. 986; 32 L. R. A. 367.

[47] A brakeman, who knows that trains are run at a rate of speed in excess of that provided by an ordinance, is held to assume the risk, where he fails to protest. Martin v. Chicago, etc., R. Co. (Iowa), 87 N. W. Rep. 654.

[48] Durant v. Coal Co., 97 Mo. 62; 10 S. W. Rep. 484; Railroad Co. v. Peterson, 156 Ind. 364; 59 N. E. Rep. 1044; Springside Coal Co. v. Patting (Ill.), 71 N. E. Rep. 371. For discussion of this subject and other cases, see White, Personal Inj. in Mines, § 205.

An obvious danger, resulting from a violation of a statutory duty, was held to be a risk assumed, in the following cases: Gillan v. Railroad Co., 93 Me. 80; 44 Atl. Rep. 363; Fitzgerald v. Paper Co., 30 Misc. Rep. 438; 62 N. Y. S. R. 597; Powell v. Steele Co., 98 Wis. 35; 73 N. W. Rep. 573.

The federal court, for Colorado, holds that the statutes of that State, requiring block switches, does not deprive a railroad company

§ 357. **Risk of accidents are assumed.**— The Missouri Supreme Court has held an occurrence which an experienced man in the business could not have foreseen would happen, or guarded against, as a hazard incident to the business to be an accident, which every man engaged in the business assumed,[49] since no negligence could be predicated upon such an event and all men must show negligence, or a breach of duty, to recover from another for an injury.

Those unforeseen and unexpected events, generally called accidents, that frequently result so disastrously to men engaged in such hazardous business as railroading, are some of the dangers assumed by employees, as a part of their contract of employment,[50] and although none the less disastrous because the injured employee is without redress, because lacking in the essential element of prior negligence, on the employer's part, no redress is given for such unfortunate occurrences.

But if the injury result both from causes accidental and also from the negligence of the employer, and the casualty would not have taken place, but for the employer's negligence, then the employee will not be held to have assumed

of the defense of assumed risk, where the statute was knowingly violated, by the employer. Denver, etc., R. Co. v. Norgate, 141 Fed. Rep. 247; 72 C. C. A. 365.

The Ohio statute requires a railroad company to block its guard rails to switches, but a failure to do so was held to be a risk assumed, in Johns v. Cleveland, etc., R. Co., 23 Ohio Cir. Ct. R. 442.

A failure to guard cog wheels, as required by statute, in New York, does not absolve the employee from an assumption of the risk of injury therefrom. Stevens v. Gair, 96 N. Y. S. 303; 109 App. Div. 621.

[49] Beasley v. Transfer Co., 148 Mo. 413; 50 S. W. Rep. 87.

[50] Buswell, Per. Inj., § 111; Alabama, etc., Co. v. Marcus, 115 Ala. 389; Diehl v. Iron, etc., Co., 140 Pa. St. 487; Bailey, Mas. Liab. Inj. Serv., pp. 44, 445; 20 Amer. & Eng. Enc. Law (2 ed.), 110, 111.

the risk, but the employer will be answerable, as in other cases, for the result of his negligent act.[51]

§ 358. **Selecting more dangerous way.**— If there are two or more ways or appliances to use to perform a given duty, and the employee selects, voluntarily, the more dangerous way or appliance, in case of a resulting injury, the employee

[51] Alabama, etc., Co. v. Marcus, 115 Ala. 319; White, Personal Inj. in Mines, § 200, and cases cited.

An injury from a piece of steel, from a punch, flying into the eye of an employee, was held, assumed, in Cincinnati, etc., Ry. Co. v. Phinney (Ind.), 77 N. E. Rep. 296.

An injury from a piece of steel striking an employee using a chisel, was held to be assumed, in Texas. Ft. Worth, etc., R. Co. v. Ramp, 70 S. W. Rep. 508.

The danger of the head of a spike pulling off and letting a section man fall backwards, as a result of which he was injured, is held to be a risk assumed, in Parish v. Missouri, etc., R. Co. (Texas), 76 S. W. Rep. 234.

In a recent decision by the federal court, in Tennessee, an engineer was killed, as a result of a landslide in the mountains, by which the track and his engine was borne into the river. The track was considered unsafe, but was patroled and a crew of men accompanied the train to which the engine was attached, to clear the track. He had objected to proceeding, on account of the danger, but was ordered to proceed slowly and carefully, looking out for slides. It was held that his death was the result of a mere accident, and that he had assumed the risk. Kinzel v. Atlanta, etc., Ry. Co., 137 Fed. Rep. 489.

A railroad employee attempting to round up a Texas steer, or other vicious animal, assumes the risk of injury therefrom. Clark v. Missouri, etc., R. Co., 179 Mo. 66; 77 S. W. Rep. 882.

A fireman who, while ringing the bell, by a sudden lurch of the train, in rounding a curve, is thrown from his seat and is injured, assumes the risk of the injury, as an incident to his employment, nor is the company liable for failing to furnish a bell cord of sufficient strength to support him. Illinois Cent. R. Co. v. Mercer, 28 Ky. L. R. 3; 88 S. W. Rep. 1054.

An employee who gets outside of a lighted, beaten way, furnished by the employer, and falls into a pit and is injured, assumed the risk and cannot recover for such an injury. Geis v. Tennessee Coal Iron, etc., R. Co. (Ala.), 39 So. Rep. 301.

will be held to have assumed the risk and there will be no liability on the employer's part,[52] because where the employer has provided a safer way or appliance to use to perform the work, it could not be said he was negligent in that the employee voluntarily selected the more dangerous way to attain his object, but the law only places the result of his acts upon the employee in holding that no one shall be held in damages for his lack of judgment or discretion in performing his work in the more dangerous manner.[53]

[52] Moore v. Kansas City, etc., R. Co., 146 Mo. 572; 48 S. W. Rep. 487; Acme, etc., Co. v. McIleer, 5 Colo. App. 267; Wabash R. Co. v. Probst, 92 Ill. App. 485; Bigelow v. Danielson, 102 Wis. 470; 78 N. W. Rep. 599; Gilbert v. Burlington, etc., R. Co., 128 Fed. Rep. 529; Lepalla v. Cleveland, etc., Co. (Mich.), 81 N. W. Rep. 553; White, Personal Inj. in Mines, § 189, and cases cited.

[53] White, Personal Injuries in Mines, § 189, and cases cited.

An employee selecting the more dangerous way to perform his work is held to assume the risk, in Foster v. Lake, etc., R. Co., 108 Ill. App. 113; Moore v. Kansas City, etc., Ry. Co., 146 Mo. 572; 48 S. W. Rep. 587; Suttle v. Choctaw, etc., Ry. Co., 144 Fed. Rep. 668; Griffith v. Lexington Ter. R. Co., 124 Ga. 553; 53 S. E. Rep. 97; Duffy v. New York, etc., R. Co. (Mass.), 77 N. E. Rep. 1031; McDonald v. New York, etc., R. Co. (Mass.), 78 N. E. Rep. 548; Huggins v. Southern Ry. Co. (Ala.), 41 So. Rep. 856; Chicago Grt. West. R. Co. v. Crotty, 141 Fed. Rep. 913; 73 C. C. A. 147; Hayzel v. Columbia Ry. Co. (D. C.), 19 App. D. C. 359; Morris v. Duluth, etc, R. Co., 108 Fed Rep. 747; 47 C. C. A. 661; Wabash R. Co. v. Probst, 92 Ill. App. 485; Weed v. Chicago, etc., Ry. Co. (Neb.), 99 N. W. Rep. 827; Moore v. Kansas City, etc., Ry. Co., 146 Mo. 572; 48 S. W. Rep. 487.

An employee who abandons the ordinary safe way of getting on a car, and instead gets on in a different way, as a result of which he is injured, assumes the risk, in Illinois. Southern Ry. Co. v. Lambert, 116 Ill. App. 52.

A switchman was held to assume the risk of injury, while climbing from the foot board of a moving engine to the top of the tank, in Chicago, etc., Ry. Co. v. Barr, 204 Ill. 163; 68 N. E. Rep. 543.

CHAPTER XV.

RISKS NOT ASSUMED BY EMPLOYEES.

§ 359. Limitations and exceptions to rule.
360. Risks from negligence not assumed.
361. Injury in negligent collision not assumed.
362. Section man working in cut does not assume risks, when.
363. Injury to brakeman from wild engine, not assumed, when.
364. Injuries to brakemen and others, handling cars, not assumed, when.
365. Dangerous working place — Caving earth bank.
366. When risk of injury from low bridges not assumed.
367. Injury from defective track, not assumed, when.
368. Injuries from running into open switches.
369. Injuries from obstructions near track, not assumed, when.
370. Risks from defective cars, not assumed, when.
371. Risks from too great speed, not assumed.
372. Danger must be appreciated, before risk assumed.
373. Dangers not appreciated or understood, generally not assumed.
374. Injuries from latent, unknown defects, not generally assumed.
375. Risks not assumed after promise to repair, when.
376. Various risks not assumed, after promise to repair.
377. Extra risks not generally assumed.
378. Risks outside scope of employment, not generally assumed.
379. Dangers from orders of vice-principal not assumed.
380. Risks not assumed by car and track repairers.
381. Risks of injuries due to incompetency of employees not assumed.
382. Statutes denying defense of assumed risk.
383. Statutes regulating defense of assumed risk.
384. Injuries from flying particles of brittle substances not assumed, when.
385. Federal statutes exempting employees of inter-state carriers from defense of assumed risks.
386. Statutes exempting employees from risks of negligence of coemployees.
387. Assumption of risk jury issue, when.

§ 359. **Limitations and exceptions to rule.**— An employee assumes such risks as he knew existed, or those which he might have discovered by the exercise of ordinary care.[1] It is error to charge that only such risks as existed at the commencement of the employment and such as were subsequently incidental thereto are assumed, as the employee assumes all such as subsequently arise, in the course of the employment, of which he has knowledge or ought to have known, by the exercise of ordinary care on his part.[2] But an employee does not assume unknown perils of the service in which he is engaged, due to the negligent direction of the work, for they are not usual or ordinary risks of the business.[3] As to injuries arising from other than the ordinary or usual hazards of the business, the employee stands toward the employer in the same attitude as a stranger.[4] If the employer knew or ought to have known that the employee was ignorant of a given peril of his employment, or being without experience or youthful, that there were dangers of the service that he could not or did not appreciate or understand, without instruction or warning, the rule would not embrace such risks, but the failure to give instruction or warning to the employee, in such a case, would be negligence on the part of the employer.[5]

[1] Galveston, etc., R. Co. v. Garrett, 73 Texas 272; 13 S. W. Rep. 62.

[2] Sowden v. Idaho, etc., Co., 55 Cal. 443.

[3] Schroeder v. Chicago, etc., R. Co., 108 Mo. 322; 18 S. W. Rep. 1094; 53 Am. & Eng. R. Cas. 436; Taylor v. Evansville, etc., R. Co., 121 Ind. 124; 22 N. E. Rep. 876; 41 Am. & Eng. R. Cas. 437; 6 L. R. A. 584.

[4] Ohio, etc., R. Co. v. Hammersley, 28 Ind. 371; Cole v. Chicago, etc., R. Co., 71 Wis. 114; 33 Am. & Eng. R. Cas. 274; Chicago, etc., R. Co. v. Bayfield, 37 Mich. 205; Chamberlain v. Milwaukee, etc., R. Co., 11 Wis. 238. But see 18 Wis. 700.

[5] Louisville, etc., R. Co. v. Frawley, 110 Ind. 18; 9 N. E. Rep. 594; 28 Am. & Eng. R. Cas. 308; Bauer v. St. Louis, etc., R. Co., 46 Ark. 388.

§ 360. **Risks from negligence not assumed.**— When one enters into the service of another he assumes to run all the ordinary risks pertaining to such service, but this means only that he cannot recover for any injury that his employer, by the exercise of ordinary care and prudence, could not provide against.[6] The neglect of a railroad company to perform the duties imposed upon it, by either the common law or by statute, is not a peril which an employee of such company assumes in entering into its employment.[7] An employee does not assume or contract to waive the liability of the employer for his own negligence, whether committed in person, or by agents authorized by the employer to perform a duty resting upon the employer, as such, but as to all such breaches of duty, in case of a resulting injury, there is a liability, if the injury results proximately from such breach of duty.[8]

[6] Louisville, etc., R. Co. v. Cavens, 9 Bush. (Ky.) 559; McGovern v. Central, etc., R. Co., 123 N. Y. 280; 25 N. E. Rep. 373, reversing 53 Hun 635; Ford v. Lake Shore, etc., R. Co., 124 N. Y. 493; 26 N. E. Rep. 1101; 48 Am. & Eng. R. Cas. 201.

[7] Chicago, etc., R. Co. v. Avery, 109 Ill. 314; 17 Am. & Eng. R. Cas. 649; Gulf, etc., R. Co. v. Silliphant, 70 Texas 623; 8 S. W. Rep. 673; Missouri Pac. Ry. Co. v. Crenshaw, 71 Texas 340; 9 S. W. Rep. 262.

[8] Pullman Palace Car Co. v. Laack, 143 Ill. 242; 32 N. E. Rep. 285.

The law does not recognize the employer's negligence as a risk incident to the employment, but, however dangerous the business may be, the employee only assumes such risks as remain after the employer has exercised reasonable care for his safety. Mobile, etc., R. Co. v. Vallowe, 115 Ill. App. 621; 214 Ill. 124; 73 N. E. Rep. 416; Hansell, etc., Co. v. Clark, 214 Ill. 399; 73 N. E. Rep. 787; Blundell v. Miller, etc., Co., 189 Mo. 552; 88 S. W. Rep. 103; Warren v. Chicago, etc., R. Co., 113 Mo. App. 498; 87 S. W. Rep. 585; St. Louis, etc., Ry. Co. v. Rea (Texas), 87 S. W. Rep. 324; St. Louis, etc., Ry. Co. v. Vestal (Texas), 86 S. W. Rep. 790; Shore v. Bridge Co. (Mo.), 86 S. W. Rep. 905; Chicago, etc., R. Co. v. Howell, 109 Ill. App. 546; 70 N. E. Rep. 15; Pressed Steel Car Co. v. Heirath, 110 Ill. App. 596; Chicago, etc., R. Co. v. Bell, 111 Ill. App. 280; Cole v. St. Louis Tr. Co., 183 Mo. 81; 81 S. W. Rep. 1138; Texas, etc., R. Co. v. Kelly (Texas), 80 S. W. Rep. 79; San Antonio, etc., R. Co. v. Waller

§ 361. **Injury in negligent collision not assumed.**— It is held, in Georgia,[9] that an employee, in the service of a railroad company, does not take upon himself the risk of being killed in a collision between railroad trains, caused by the negligence of agents of the railroad, as such danger is not an ordinary incident to his employment.

§ 362. **Section man working in cut, does not assume risk, when.**— While the danger of injuries from moving trains on a railroad track is one of the ordinary perils of the business of railroading and it is not incumbent on the railroad com-

(Texas), 65 S. W. Rep. 210; Smith v. Gulf, etc., Ry. Co. (Texas), 65 S. W. Rep. 83; Missouri, etc., Ry. Co. v. Walden (Texas), 66 S. W. Rep. 584; St. Louis, I. M. & S. Ry. Co. v. Touhey, 67 Ark. 209; 54 S. W. Rep. 577; 77 Am. St. Rep. 109; Dobbin v. Railroad Co., 81 N. C. 446; 31 Am. Rep. 512; Cleveland, etc., Ry. Co. v. Keary, 3 Ohio St. 201; Mahoney v. Bay State Co., 184 Mass. 287; 68 N. E. Rep. 234; Houston, etc., R. Co. v. Turner (Texas), 91 S. W. Rep. 562; Chicago, etc., Ry. Co. v. Riley, 145 Fed. Rep. 137; Illinois Ter. R. Co. v. Thompson, 112 Ill. App. 463; 210 Ill. 226; 71 N. E. Rep. 328; Foster v. New York, etc., Ry. Co., 187 Mass. 21; 72 N. E. Rep. 331; Depuy v. Chicago, etc., R. Co., 110 Mo. App. 110; 84 S. W. Rep. 103; Northern Ala. R. Co. v. Shea (Ala.), 37 So. Rep. 796; Montgomery v. Chicago, etc., Ry. Co., 109 Mo. App. 88; 83 S. W. Rep. 66; Hill v. Southern Pac. R. Co. (Utah), 63 Pac. Rep. 814; St. Louis, etc., Ry. Co. v. Touhoy, 67 Ark. 209; 54 S. W. Rep. 577.

An employee does not, in Texas, assume risks arising from the employer's negligence, but only such as are incidental to the business, when conducted with reasonable care and such as are open and obvious. St. Louis, S. W. Ry. Co. v. Dempsey, 89 S. W. Rep. 786.

Assumption of the risk is not a defense, in Alabama, if there is evidence of a wanton or reckless course, on the part of defendant's engineer. Tennessee, C. I. & R. Co. v. Bridges, 39 So. Rep. 902.

The negligence of his foreman is not a risk assumed by a railroad brakeman. Kennedy v. Kansas City, etc., Ry. Co., 190 Mo. 424; 89 S. W. Rep. 370.

[9] Georgia, etc., R. Co. v. Rhodes, 56 Ga. 645.

A bridge watchman, employed to ride his velocipede over a bridge and inspect it, does not assume the risk of the failure of the engineer of a train to keep a lookout for him, or to give him timely warning. San Antonio, etc., Ry. Co. v. Brock (Texas), 80 S. W. Rep. 422.

pany, in places where trains are momentarily expected, to give warning thereof, to the company's employees,[10] it is quite generally recognized as a duty incumbent on the operatives of a train, at a place where employees are at work on the track and where the presence of a train is not to be expected, or its approach is obscured, to give some warning of the approach of such train, to employees whose vision is obscured, or who may not reasonably expect such train. Where a section man is at work in a cut, therefore, where he cannot see an approaching train, he will not be held, in law, to assume the danger of being struck by a train run very fast into such cut, when no warning of its approach is given.[11]

§ 363. **Injury to brakeman from wild engine, not assumed, when.**— As the carelessness on the employer's part is never assumed by an employee, when two engines are negligently allowed to escape from a railroad yard and run uncontrolled until they collide with a freight train, killing a brakeman thereon, the risk is not one which the brakeman will be held to assume, as an ordinary incident of his employment, where the collision is caused by a failure on the employer's part, to adopt reasonable precautions to prevent the escape of engines from its yard.[12]

§ 364. **Injuries to brakemen and others handling cars not assumed, when.**— A brakeman, or other employee who is injured in the coupling or handling of a defective car or engine, where he has full notice of the defects that may exist in the car and without complaint voluntarily proceeds with

[10] Aerkfetz v. Humphries, 145 U. S. 418; Elliott v. Railroad Co., 150 U. S. 245; Evans v. Wabash Ry. Co., 178 Mo. 508; 77 S. W. Rep. 515.

[11] Northern Pacific R. Co. v. Charles, 51 Fed. Rep. 562; 7 U. S. App. 359; 2 C. C. A. 380; 51 Am. & Eng. R. Cas. 198.

[12] Southern Pac. R. Co. v. Lafferty, 57 Fed. Rep. 536.

his work, until he is injured, is generally held to have assumed the risk,[13] but a brakeman, or other employee, will not be held to have assumed the risk in handling a defective car or engine, where he did not know or appreciate the danger he incurred, in so doing, and the defect was not of a character to be openly observed by one of his experience and skill.[14] While acting under an order to go between moving cars, or between standing cars, a brakeman or other employee is held entitled to rely upon the assumption that he can safely make the coupling, or perform his work, unless the danger of so doing is imminent,[15] and while making a coupling, between cars of his own train, a brakeman does not assume the risk of an injury by the train of another company, that he had no reason to expect at that place, bumping into the cars he was engaged in working between.[16]

[13] Hayzel v. Columbia, etc., R. Co., 19 App. Cas. (D. C.) 359; 4 Thompson on Neg., § 4718.

[14] Brinkmeier v. Missouri Pacific Ry. Co., 69 Kansas 738; 77 Pac. Rep. 586.

[15] Pittsburg, etc., R. Co. v. Hewitt, 202 Ill. 28; 66 N. E. Rep. 829.

[16] Holmes v. Chicago, etc., R. Co. (Neb.), 103 N. W. Rep. 77.

A brakeman, between the cars of a standing train, on a track where it was not customary for cars to be shunted, was held not to assume the risk of an injury from a collision, in Chicago, etc., Ry. Co. v. White, 209 Ill. 124; 70 N. E. Rep. 588.

The sudden stopping of a train by application of the emergency brake, instead of the service stop, by which a brakeman is injured, is not assumed, in Missouri. Benedict v. Chicago, etc., Ry. Co., 78 S. W. Rep. 60.

A brakeman, in Missouri, was held not to have assumed the risk of injury from going between cars, where his duty required him to do so. McManus v. Oregon Short Line R. Co., 94 S. W. Rep. 743.

A brakeman was held not to assume the risk of coupling tourist sleepers with other cars, with mismatched couplers, when he was not familiar with or advised of the danger incurred in so doing. Southern Pac. R. Co. v. Winton (Texas), 66 S. W. Rep. 477.

An injury from falling on icy steps, not known by the employee to be icy, was held not to be a risk assumed, in Harding v. Railway Tr. Co. (Minn.), 83 N. W. Rep. 395.

§ 365. **Dangerous working place — Caving earth bank.**— While an employee is very generally held to assume the risk of injury from a caving earth or gravel bank, when the falling of the bank is caused by natural forces, or is due to the progress of the work of excavation, as an ordinary incident to the work,[17] an injury from a falling gravel or earth bank, not due to natural causes, but to the negligent construction of the bank or trench, by other than the injured employee, who had nothing to do with the work of excavation, would not generally be held to be assumed as an incident of the employment in which he was engaged.

In New York,[18] it was held that an employee going in a trench to remove a water pipe, where the trench had been constructed for the purpose, by other than the injured employee, did not assume the risk of injury from the earth caving in on him, while at work removing the water pipe. And in another case,[19] in the same State, where a laborer in a cut, alongside a building, was killed by a falling brace from such building and the evidence failed to show that he knew of such brace, or had anything to do with placing it, the defense of assumed risk was held not made out.

§ 366. **When risk of injury from low bridges not assumed.** — While an experienced employee, with notice of a low bridge, is very generally held to assume the risk of injury therefrom,[20] dangers from a low overhead bridge, not known

[17] DeVitto v. Craig, 165 N. Y. 378; 59 N. E. Rep. 141; Buswell, Per. Inj., § 204; White, Per. Inj. in Mines, §§ 185, 229; Reiter v. Winona, etc., R. Co. (Minn.), 75 N. W. Rep. 219; Swanson v. Railway Co., 70 N. W. Rep. 978; Bradley v. Milwaukee, etc., R. Co., 138 Mo. 293; 39 S. W. Rep. 763; Murphy v. Boston, etc., R. Co., 88 N. Y. 152; Cook v. New York, etc., R. Co., 119 N. Y. 653; 29 N. Y. S. R. 994.

[18] Kranz v. Long Island, etc., R. Co., 33 N. Y. S. R. 46; Lasalle v. Kostka, 190 Ill. 130; 60 N. E. Rep. 72.

[19] Mickee v. Wood, etc., R. Co., 70 Hun (N. Y.) 456; 53 N. Y. S. R. 689.

[20] Baltimore, etc., R. Co. v. Strickler, 51 Md. 47; Carbine v. Benning-

to an employee, are not generally held to be among the risks assumed by him, especially where no warning has been given and the injury therefrom occurs on a dark night, or at a time and place where notice of the bridge could not and had not been received.[21]

§ 367. **Injury from defective track, not assumed, when.**— Railroad employees, regardless of their experience, are not ordinarily held to have assumed the risk of injuries from a defective track or roadbed, due to the employer's negligence. Where an employee is injured, therefore, by reason of an imperfect track, or a defective roadbed, due to the employer's negligence, the railroad company is not entitled to an instruction that such employee will be held to have assumed the risk of injury, if he knew, or ought to have known of such defective track or roadbed.[22]

An engineer killed because of a broken and defective switch rail;[23] an employee riding to work, injured by reason

ton, etc., R. Co., 61 Vt. 348; 17 Atl. Rep. 491; 38 Am. & Eng. R. Cas. 45; Baltimore, etc., R. Co. v. State, 75 Md. 152.

Where a railroad company has failed to erect "telltales," at the distance required by statute, near a low bridge, the risk of being struck by such bridge is not assumed. Hailey v. Texas, etc., Ry. Co. (La. Ann.), 37 So. Rep. 131.

[21] Louisville, etc., R. Co. v. Wright, 115 Ind. 378; 16 N. E. Rep. 145; 38 Am. & Eng. R. Cas. 41.

An employee not familiar nor advised of the danger of a low or defective bridge was held not to have assumed the risk of an injury therefrom, in the following cases: Miller v. Boston, etc., R. Co. (N. H.), 61 Atl. Rep. 360; Leach v. Oregon Short Line R. Co. (Utah), 81 Pac. Rep. 90; Dolan v. Sierra Ry. Co., 135 Cal. 435; 67 Pac. Rep. 686; Louisville, etc., R. Co. v. Tucker's Admr., 23 Ky. L. R. 1929; 65 S. W. Rep. 453.

[22] Philadelphia, etc., R. Co. v. State, 58 Md. 372; 10 Am. & Eng. R. Cas. 792; Ft. Worth, etc., R. Co. v. Thompson, 2 Texas Civil App. 170; 21 S. W. Rep. 137.

[23] Clapp v. Minneapolis, etc., R. Co., 36 Minn. 6; 29 N. W. Rep. 340.

of a derailment due to a defective roadbed;[24] an engineer killed by a derailment caused by a washout in a mountainous section, where no culvert had been constructed;[25] an injury to an employee due to a low joint of track, not shown to be customary,[26] and an injury to a brakeman, caused by catching his foot in a defective place in the track,[27] are instances of such risks held not to be assumed by the employee.

§ 368. **Injuries from running into open switches.**— It has

[24] Trask v. California, etc., R. Co., 63 Cal. 96; 11 Am. & Eng. R. Cas. 192; Meloy v. Chicago, etc., R. Co. (Iowa), 37 N. W. Rep. 335; 33 Am. & Eng. R. Cas. 358.

[25] Union Pacific R. Co. v. O'Brien, 49 Fed. Rep. 538; 4 U. S. App. 221; 1 C. C. A. 354.

[26] Ft. Worth, etc., R. Co. v. Thompson, 2 Texas Civil App. 170; 21 S. W. Rep. 137.

[27] Philadelphia, etc., R. Co. v. State, 58 Md. 372; 10 Am. & Eng. R. Cas. 792.

Knowledge of defects in one place, in a track, is not sufficient to charge a brakeman with defects in another place in the track, but notice of the defect that occasioned the injury is essential to an assumption of the risk. Mumford v. Chicago, R. I. & P. R. Co., 128 Iowa 685; 104 N. W. Rep. 1135.

Injuries due to a defective track were held not to be assumed in the following cases: Northern Ala. R. Co. v. Shea (Ala.), 37 So. Rep. 796; Pierson v. Chicago, etc., Ry. Co. (Iowa), 102 N. W. Rep. 149; Montgomery v. Chicago, etc., Ry. Co., 109 Mo. App. 88; 83 S. W. Rep. 66; Missouri, etc., R. Co. v. Keefe (Texas), 84 S. W. Rep. 679; Pennsylvania R. Co. v. Jones (Pa.), 123 Fed. Rep. 753; Smith v. Erie R. Co., 67 N. J. L. 636; 52 Atl. Rep. 634; Arkansas Central R. Co. v. Jackson, 70 Ark. 295; 67 S. W. Rep. 757; Hurst v. Kansas City, etc., R. Co., 163 Mo. 309; 63 S. W. Rep. 695; Story v. Concord R. Co. (N. H.), 48 Atl. Rep. 288; Madole v. Denver, etc., R. Co. (Colo.), 62 Pac. Rep. 964; International, etc., R. Co. v. Johnston (Texas), 55 S. W. Rep. 772; Gulf, etc., R. Co. v. Warner, 22 Texas Civ. App. 167; 54 S. W. Rep. 1064.

The danger from a defective roadbed, in the absence of warning, is not assumed by an engineer, if it is not open. Western R. Co. v. Russell (Ala.), 39 So. Rep. 311.

Defects in a railroad track are not risks assumed by a fireman, in New York. Neagle v. Syracuse, etc., R. Co., 95 N. Y. S. 884; 109 App. Div. 339.

been held, in a number of cases, that an employee on a railroad does not assume the risk of injury from running a train into an open switch.[28] This holding would seem perfectly proper, in States where the employer is held responsible for an injury due to the negligence of coemployees, in the operation of the railroad, where the switch was negligently left open, but where the switch was wrongfully set by some third party, or was accidentally left open by an employee of the employer, since the intervening agency of the third party or the accidental means occasioning the injury, in such a case would be the proximate cause of the injury, instead of the negligence of the employer, it would seem that he ought not be held, in such a case, but the Supreme Court of Texas,[29] and the Appellate Court of Illinois,[30] have held the railroad company liable for such an injury. And the Appellate Court of Missouri, in a recent case,[31] held that the railroad company's negligence was properly a jury issue, where it appeared that the injury resulted from running a train into an open switch and there was some evidence that an employee of another train, operated by the defendant, had left the switch open, after his train had picked up cars from the sidetrack.

[28] Injuries received from running a train into an open switch, were held not to be assumed risks, in International, etc., R. Co. v. Johnson, 23 Texas Civ. App. 160; 55 S. W. Rep. 772; Seldomridge v. Railway Co., 46 W. Va. 569; Consolidated, etc., Ref. Co. v. Peterson, 8 Kansas App. 316; Young v. Railroad Co., 69 N. H. 356; Allen v. Railroad Co., 69 N. H. 271.

[29] An injury from a misplaced switch is held not to be a risk assumed, in Texas. International, etc., R. Co. v. Moneyhan, 76 S. W. Rep. 803.

[30] The risk of danger from a switch being accidentally left open, was held, in Illinois, not to be an assumed risk, in Wabash R. Co. v. Thomas, 117 Ill. App. 110.

[31] Dover v. Mississippi River, etc., R. Co., 100 Mo. App. 330; 73 S. W. Rep. 298.

§ 369. **Injuries from obstructions near track, not assumed, when.**— An employee assumes the risk of injuries from coming in contact with such permanent structures near the railroad track, as the business of railroading makes it necessary to maintain, when the maintenance of such structures could not be denominated negligence by the company.[32]

But in the absence of notice of such structures, employees are not held to have assumed the risk of injury from such temporary structures as sign posts, erected too near the track.[33] An employee, without notice of the nearness to the track of a fence, is not held to have assumed the risk of injury therefrom;[34] an injury from striking a switch stand too near the track was held not to be assumed in one case;[35] the fall of a ledge of rock, so as to strike an employee on a train, where the falling is caused by the jar of the train, is not a risk assumed,[36] nor is the fall of a tree, dangerously near the track, a risk assumed by the employment,[37] as all

[32] Kelly v. Baltimore, etc., R. Co. (Pa.), 11 Atl. Rep. 659.

[33] Johnston v. St. Paul, etc., R. Co., 43 Minn. 53; 44 N. W. Rep. 884; 41 Am. & Eng. R. Cas. 293; Scanlon v. Boston, etc., R. Co., 147 Mass. 484; 18 N. E. Rep. 209; 38 Am. & Eng. R. Cas. 48.

[34] Murphy v. Wabash, etc., R. Co., 115 Mo. 111; 21 S. W. Rep. 862.

[35] Pidcock v. Union Pac. R. Co., 5 Utah 612; 19 Pac. Rep. 191; 1 L. R. A. 131. See, also, Hulehan v. Green Bay, etc., R. Co., 68 Wis. 520; 32 N. W. Rep. 529; Boss v. Northern Pac. R. Co., 2 N. Dak. 128; 49 N. W. Rep. 655.

[36] Bean v. Western, etc., R. Co., 107 N. Car. 731; 12 S. E. Rep. 600.

[37] Texas, etc., R. Co. v. Vallie, 60 Texas 481.

The danger of an injury from a cattle chute, near the track, was held to be a risk not assumed by a brakeman, in Coles v. Union Ter. Ry. Co. (Iowa), 99 N. W. Rep. 108.

The risk of being injured by obstructions on the track, or near thereto, was held not assumed, in the following cases: Texas, etc., R. Co. v. Kelly (Texas), 80 S. W. Rep. 79; McLean v. Pere Marquette R. Co. (Mich.), 100 N. W. Rep. 748; 11 Detroit Leg. News 358; Pittsburg, etc., Ry. Co. v. Parish (Ind.), 62 N. E. Rep. 514; Choctaw, etc., Ry. Co. v. McDade, 112 Fed. Rep. 888; 50 C. C. A. 591; 191 U. S. 64; 48 L. Ed. 96; Bradburn v. Wabash R. Co. (Mich.), 96 N. W. Rep. 929; Wright v. Chicago, etc., R. Co. (Ind.), 66 N. E. Rep. 454; Gulf,

such risks are dependent more upon the want of care on the part of the employer, than as mere incidents of the employment, after the bestowal of due care.

§ 370. **Risks from defective cars, not assumed, when.**— As it would be permitting the employer to take advantage of his own neglect or wrongful act to hold that he could, by failure to inspect or repair an engine or car, permit it to become defective or dangerous and that his employees assumed the risk of injury therefrom, it is quite generally held that an employee does not assume the risk of injuries from a defective car or engine, where negligence could be chargeable to the employer as the cause of such defective or dangerous condition.[38] A laborer on the track does not assume the risk of an injury caused by a defective engine, because the engineer may have neglected to report its condition to the employer;[39] a switchman does not necessarily assume the risk of an injury from a defective footboard on an engine;[40] the danger from making a coupling with a car without a bumper, is not a risk

etc., R. Co. v. Darby (Texas), 67 S. W. Rep. 446; Morrissette v. Canadian Pac. R. Co., 74 Vt. 232; 52 Atl. Rep. 520; Chicago, etc., R. Co. v. Stevens, 189 Ill. 226; 59 N. E. Rep. 577; Donohue v. Boston, etc., R. Co. (Mass.), 59 N. E. Rep. 663; International, etc., R. Co. v. Stephenson, 22 Texas Civ. App. 220; 54 S. W. Rep. 1086; Highland Ave. R. Co. v. Miller, 120 Ala. 535; Plunkett v. Railway Co., 105 Ga. 203; Potter v. Detroit, etc., R. Co. (Mich.), 81 N. W. Rep. 80; 82 N. W. Rep. 245; Johnson v. Railroad Co., 43 Minn. 53; 44 N. W. Rep. 884; Scanlon v. Railroad Co., 147 Mass. 484; 18 N. E. Rep. 209; Sweet v. Railroad Co., 87 Mich. 559; 49 N. W. Rep. 882; Kelleher v. Railroad Co., 80 Wis. 586; 50 N. W. Rep. 943; Scidmore v. Railroad Co., 89 Wis. 188; 61 N. W. Rep. 765.

[38] O'Mellia v. Kansas City, etc., R. Co., 115 Mo. 205; 21 S. W. Rep. 503; Gotlieb v. New York, etc., R. Co., 100 N. Y. 462; 3 N. E. Rep. 344; 24 Am. & Eng. R. Cas. 421.

[39] Peoria, etc., R. Co. v. Johns, 43 Ill. App. 83.

[40] O'Mellia v. Kansas City, etc., R. Co., 115 Mo. 205; 21 S. W. Rep. 503.

assumed by a brakeman,[41] nor is the defective condition of a brake step a risk assumed by him,[42] although the dangerous condition of foreign cars or engines, not received a sufficient time for the employer to have repaired the same, is generally held to be a risk assumed by the employees.[43]

§ 371. **Risks from too great speed not assumed.**— An employee, in entering the service of a railroad company, only assumes the risks of perils that are incident to the operation of the road in a reasonably prudent and careful manner and he does not assume the risk of dangers arising from running trains at too great a speed.[44] This is especially true, if there is a defective condition of the track, coupled with too great speed, and if the employer has failed to keep the track in a proper condition for such speed, or the track is new and unballasted, or other negligent condition of the track exists, the negligence in permitting too great speed would be aggravated more than a high rate of speed on a good track and in such case the employee injured as a result of such speed would not be held to have assumed the danger, caused by the employer's negligence, in this particular.[45]

[41] Mahoney v. New York, etc., R. Co., 60 Hun 586; 30 N. Y. S. R. 911; 131 N. Y. 623.

[42] Van Tassell v. New York, etc., R. Co., 1 Misc. 299; 48 N. Y. S. R. 767; 20 N. Y. Supp. 708.

[43] Baldwin v. Chicago, etc., R. Co., 50 Iowa 680; Ballou v. Chicago, etc., R. Co., 54 Wis. 257; 41 Am. Rep. 31; 5 Am. & Eng. R. Cas. 480; Watson v. Houston, etc., R. Co., 58 Texas 434; 11 Am. & Eng. R. Cas. 213.

An engineer does not assume the risk of injury from a defective engine or its appliances, but if he is not careful in the discharge of his duties and his injury is a result of his own want of care, no recovery can be had by him. Biles v. Seaboard Air Line R. Co., 139 N. C. 528; 52 S. E. Rep. 129.

[44] Conner v. Burlington, etc., R. Co., 74 Iowa 383; 37 N. W. Rep. 966.

[45] Meloy v. Chicago, etc., R. Co., 77 Iowa 743; 42 N. W. Rep. 563; 38 Am. & Eng. R. Cas. 130. But see, Carlson v. Oregon, etc., R. Co., 21 Oregon 450.

§ 372. **Danger must be appreciated, before risk assumed.**—An employee does not necessarily assume the risk of using unsafe machinery or appliances, because he knows of their character and condition; it is also necessary that he should appreciate, or by common observation ought to have known of the danger attending upon the use of such appliances.[46] An open visible risk has been held to be such a one as would instantly appeal to any one of ordinary intelligence, or such a one as would be recognized at once by one familiar with the business. As to such a risk there could be no difference of opinion, between persons accustomed to the business.[47] But where, although the defect is apparent, it would require skill and judgment not possessed by ordinary persons, or not possessed especially by the injured employee, to understand the hazard that might be apprehended therefrom, then he will not be held to have assumed such hazards.[48] For this reason no presumption of familiarity with the risk or danger of a defect will be indulged in, as against an employee, with reference to appliances outside his particular line of duty[49] and while an engineer would be chargeable with a knowledge of the dangers from apparent defects in his engine or appliances that he came in contact with, in the regular course of his employment, he would not be held chargeable with notice of the dangers resulting from rotten ties or defective rails in the track, as these would not be within his general

[46] Russell v. Minneapolis, etc., R. Co., 32 Minn. 230; 20 N. W. Rep. 147; Hungerford v. Chicago, etc., R. Co., 41 Minn. 444; 43 N. W. Rep. 324; 41 Am. & Eng. R. Cas. 269; Anderson v. Clark, 155 Mass. 368; 29 N. E. Rep. 589.

No assumption of the risk will result if there is no appreciation of the danger. Chicago, I. & L. R. Co. v. Bryan (Ind.), 75 N. E. Rep. 678.

[47] Johnston v. Oregon, etc., R. Co., 23 Oregon 94; 31 Pac. Rep. 283.

[48] Davidson v. Cornell, 132 N. Y. 228; 30 N. E. Rep. 573; 43 N. Y. S. R. 887.

[49] Houston, etc., R. Co. v. McNamara, 59 Texas 255.

duties or so apt to be noticed by him as appliances handled by him.[50]

§ 373. **Dangers not appreciated or understood, not generally assumed.**— Unless it affirmatively appears, from the evidence in a case, that an injured employee had notice of the danger of a defective appliance it will not be presumed on his part,[51]

[50] Houston, etc., R. Co. v. McNamara, 59 Texas 255. A baggage man is not chargeable with notice of the risk of a defective schedule for running of trains. Georgia, etc., R. Co. v. Rhodes, 56 Ga. 645, nor is a brakeman chargeable with notice of a defective track or roadbed. Houston, etc., R. Co. v. McNamara, 59 Texas 255; Colorado, etc., R. Co. v. O'Brien, 16 Colo. 219; 27 Pac. Rep. 701; 48 Am. & Eng. R. Cas. 235.

Mere notice of a defect was held not to charge an employee with an assumption of the risk, in the absence of an appreciation of the danger, in the following cases: El Paso, etc., Ry. Co. v. Vizard (Texas), 88 S. W. Rep. 457; Shepard v. St. Louis Tr. Co., 189 Mo. 362; 87 S. W. Rep. 1007; International, etc., R. Co. v. Reeves (Texas), 79 S. W. Rep. 1099; Missouri, etc., Ry. Co. v. Hutchens (Texas), 80 S. W. Rep. 415; Missouri, etc., Ry. Co. v. Gearheart (Texas), 81 S. W. Rep. 325; Chicago, etc., Ry. Co. v. Bell, 111 Ill. App. 280; Brinkmeyer v. Missouri Pac. Ry. Co. (Kansas), 77 Pac. Rep. 586; Missouri, etc., Ry. Co. v. Crum (Texas), 81 S. W. Rep. 72; Cole v. St. Louis Transit Co., 183 Mo. 81; 81 S. W. Rep. 1138; Gulf, etc., Ry. Co. v. Davis (Texas), 80 S. W. Rep. 253; Ryker v. New York, etc., R. Co., 72 N. Y. S. R. 168; 64 App. Div. 357; Southern Pac. R. Co. v. Winton (Texas), 66 S. W. Rep. 477; Gaulden v. Kansas City So. Ry. Co., 106 La. Ann. 409; 30 So. Rep. 889; San Antonio, etc., R. Co. v. Waller (Texas), 65 S. W. Rep. 210; San Antonio, etc., Ry. Co. v. Lindsay (Texas), 65 S. W. Rep. 668; Carson v. Southern Ry. Co., 68 S. C. 55; 46 S. E. Rep. 525; Dowd v. Erie R. Co. (N. J.), 57 Atl. Rep. 248; Root v. Kansas City So. Ry. Co., 195 Mo. 348; 92 S. W. Rep. 621; Missouri, etc., Ry. Co. v. Dumas (Texas), 93 S. W. Rep. 493; St. Louis, etc., R. Co. v. Ames (Texas), 94 S. W. Rep. 1112; Pierson v. Chicago, etc., Ry. Co. (Iowa), 102 N. W. Rep. 149; Seley v. Railway Co., 6 Utah 319; 23 Pac. Rep. 751; Meehan v. Great Northern Ry. Co. (N. D.), 101 N. W. Rep. 183; Atchison, etc., Ry. Co. v. Bancord (Kansas), 71 Pac. Rep. 253; Franklyn v. Missouri, etc., Ry. Co., 97 Mo. App. 473; 71 S. W. Rep. 540.

[51] Chicago, etc., R. Co. v. Hines, 132 Ill. 161; 23 N. E. Rep. 1021.

and the fact that he knew of a defect will not work an assumption of the risk therefrom, unless he also understood or ought to have understood the danger resulting therefrom.[52] Knowledge of a defect and a failure to complain thereof will not always work an assumption of the risk,[53] for the employee may have had reasonable ground to believe, by the exercise of due care on his part, that he could use the defective appliance, without resulting injury.[54] And although the defect is visible, yet, if by reason of the youth or inexperience of the employee, he did not understand the danger therefrom, [55] or if, notwithstanding a knowledge of the defects, a person of ordinary prudence would not have considered them dangerous, he may disregard them, without losing his right to complain, if he suffers an injury therefrom, while in the exercise of due care on his part.[56]

§ 374. **Injuries from latent, unknown defects not generally assumed.**— It is the duty of the employer to search for latent defects in appliances furnished his employees, so as to render them reasonably safe for the purpose for which they are used, but the employee is required to notice only such defects as are patent to ordinary observation and he is not required to search for latent defects.[57] The employee as-

[52] Wuoutilla v. Duluth, etc., Co., 37 Minn. 153; 33 N. W. Rep. 551; 5 Am. St. Rep. 832.

[53] East Tenn., etc., R. Co. v. Gurley, 12 Lea (Tenn.), 46; 17 Am. & Eng. R. Cas. 568; Greenleaf v. Dubuque, etc., R. Co., 33 Iowa 52.

[54] Flynn v. Kansas City, etc., R. Co., 78 Mo. 195; 18 Am. & Eng. R. Cas. 23; Richmond, etc., R. Co. v. Norment, 84 Va. 167; 4 S. E. Rep. 211.

[55] Goins v. Chicago, etc., R. Co., 37 Mo. App. 221.

[56] Colorado, etc., R. Co. v. Ogden, 3 Colo. 499; Burlington, etc., R. Co. v. Liehe, 17 Colo. 280; Hosic v. Chicago, etc., R. Co., 75 Iowa 683; 37 N. W. Rep. 963.

[57] Little Rock, etc., R. Co. v. Leverett, 48 Ark. 333; 3 S. W. Rep.

sumes the risk of injuries from defects observable in the ordinary course of his employment, by the exercise of due care on his part, but there is no presumption of knowledge, on his part, of special dangers, arising from exceptional or peculiar conditions.[58]

An inexperienced employee has been held not to assume the risk of getting his foot caught in an unblocked guard rail, where he did not know of such a risk;[59] latent defects in machinery or appliances are not a part of the ordinary risks that an employee is held to assume;[60] nor are defects in the track[61] or cars,[62] that are not observable by the exercise of ordinary care, in the performance of the duties of the employee.

But while employees are not required to search for latent defects in the appliances furnished them,[63] the employee assumes the risk of injury from defects that could not be

50; 28 Am. & Eng. R. Cas. 459; Gutridge v. Missouri Pacific Ry. Co., 105 Mo. 520; 16 S. W. Rep. 943; Missouri Pacific Ry. Co. v. Lehmberg, 75 Texas 61; 12 S. W. Rep. 838.

[58] Whalen v. Illinois, etc., R. Co., 16 Ill. App. 320.

[59] Davis v. St. Louis, etc., R. Co., 53 Ark. 117; 13 S. W. Rep. 801; 44 Am. & Eng. R. Cas. 690.

[60] Clowers v. Wabash, etc., R. Co., 21 Mo. App. 213; Carpenter v. Mexican, etc., R. Co., 39 Fed. Rep. 315; Songstadt v. Burlington, etc., R. Co., 5 Dakota 517; 38 Am. & Eng. R. Cas. 211; McDonald v. Chicago, etc., R. Co., 41 Minn. 439; 43 N. W. Rep. 380. The bursting of an emery wheel, that was apparently safe, was held to give a cause of action, in Murtaugh v. New York, etc., R. Co., 23 N. Y. S. R. 636; 3 N. Y. Supp. 483.

[61] Pennsylvania R. Co. v. Zink, 126 Pa. St. 288; 17 Atl. Rep. 614.

[62] A defect in a brake on a car, that could only be discovered by stooping down to examine it, is not so open as to be a risk assumed. Louisville, etc., R. Co. v. Buck, 116 Ind. 566; 19 N. E. Rep. 453; 2 L. R. A. 520; 38 Am. & Eng. R. Cas. 152; Wooden v. Western, etc., R. Co., 46 N. Y. S. R. 77; 43 N. Y. S. R. 218; Little Rock, etc., R Co. v. Mosely, 56 Fed. Rep. 1009.

[63] Louisville, etc., R. Co. v. Allen, 78 Ala. 494; 28 Am. & Eng. R. Cas. 514; Porter v. Hannibal, etc., R. Co., 71 Mo. 66; 36 Am. Rep. 454;

discovered by the employer, by the exercise of due care on his part and if the defect would not have been discoverable by a reasonably safe and careful inspection, then it could not have been foreseen by the employer and is held to be an accident for which the employer would not be liable.[64]

§ 375. **Risk not assumed, after promise to repair, when.**— An employee does not assume the risk of a peril by remaining in the service of his employer and using a defective tool or appliance, or continuing at work in a dangerous place, after notice of the danger, if the employer, on his complaint, has given him an assurance of the safety of the appliance or the place, or has promised to remove the danger.[65]

In such case, the employer takes upon himself the responsibility for any accident that may occur, before the expiration of a reasonable time, after the promise is made[66] and for an injury within a reasonable time after the giving of the promise, or within a period that would not preclude

2 Am. & Eng. R. Cas. 44; Burton v. Missouri Pacific Ry. Co., 32 Mo. App. 455; Goodrich v. New York, etc., R. Co., 116 N. Y. 398; 22 N. E. Rep. 397; Missouri Pacific Ry. Co. v. Crenshaw, 71 Texas 340; 9 S. W. Rep. 262.

[64] Racine v. New York, etc., R. Co., 70 Hun 453; 53 N. Y. S. R. 680; 24 N. Y. Supp. 388; Louisville, etc., R. Co. v. Campbell, 97 Ala. 147; 12 So. Rep. 574; Alabama, etc., R. Co. v. Arnold, 84 Ala. 159; Atchison, etc., R. Co. v. Wagner, 33 Kansas 660; 7 Pac. Rep. 204; 21 Am. & Eng. R. Cas. 637; Louisville, etc., R. Co. v. Allen, 78 Ala. 494; 28 Am. & Eng. R. Cas. 514.

An employee was held not to have assumed the risk of concealed hidden dangers, in the following cases: Wagner v. Boston, etc., Ry. Co., 188 Mass. 437; 74 N. E. Rep. 919; Vartanian v. New York, etc., Ry. Co., 25 R. I. 398; 56 Atl. Rep. 184.

[65] New Jersey, etc., R. Co. v. Young, 49 Fed. Rep. 723; Chicago, etc., R. Co. v. Travis, 44 Ill. App. 466; Blair v. Chicago, etc., R. Co., 43 Iowa 662; 14 Am. Ry. Rep. 575; Roux v. Blodgett, etc., Co., 85 Mich. 519; 48 N. E. Rep. 1092.

[66] Joliet, etc., E. Co. v. Velie (Ill.), 26 N. E. Rep. 1086.

all reasonable expectation of the keeping of the promise, the employee can recover the same as if he had not had notice of the danger.[67]

But if the employee knows that the danger is great and immediate, such as a reasonably prudent man would not assume, he cannot recover even though he remain in the service after the employer's promise to repair,[68] for even after a promise to repair a known defective appliance, if the employee knows the danger as well as the employer, a promise to repair will not relieve him from the effects of his own negligence in the continued use of a known defective tool, and he will be denied a recovery, notwithstanding such promise.[69]

[67] Parody v. Chicago, etc., R. Co., 5 McCrary (U. S.) 38; 15 Fed. Rep. 205; Hough v. Texas & Pacific Ry. Co., 100 U. S. 213.

[68] Indianapolis, etc., R. Co. v. Watson, 114 Ind. 20; 14 N. E. Rep. 721; 33 Am. & Eng. R. Cas. 334; St. Louis, etc., R. Co. v. Kelton, 55 Ark. 483; 18 S. W. Rep. 933; Missouri, etc., Co. v. Abend, 107 Ill. 44.

[69] Gulf, etc., R. Co. v. Brentford, 79 Texas 619; 15 S. W. Rep. 561.

An employee injured within a reasonable time, after a promise to repair a known defective appliance, was held not to assume the risk in the following cases: Anderson v. Fielding (Minn.), 99 N. W. Rep. 357; Studenroth v. Hammond, etc., Co., 106 Mo. App. 480; 81 S. W. Rep. 487; Dunkerley v. Webemdorfer, etc., Co. (N. J.), 58 Atl. Rep. 94; Missouri, etc., Ry. Co. v. Baker (Texas), 81 S. W. Rep. 67; Illinois Central R. Co. v. North, 97 Ill. App. 124; Yerkes v. Northern Pac. R. Co., 112 Wis. 184; 88 N. W. Rep. 33; Atchison, etc., Ry. Co. v. Sledge (Kansas), 74 Pac. Rep. 1111; Shemwell v. Owensboro, etc., Ry. Co. (Ky.), 78 S. W. Rep. 448; Dowd v. Erie Co. (N. J.), 57 Atl. Rep. 248; Foster v. Chicago, etc., R. Co. (Iowa), 102 N. W. Rep. 422.

The defense of assumption of the risk, being based upon an implied contract on the employee's part, it is held, in Indiana, that if there is an express contract that an employer is to keep an engine in repair, assumed risk is not a defense to an action for an injury from a failure so to do. Cleveland, etc., Co. v. Patterson, 75 N. E. Rep. 857.

After a promise to repair or replace shields about an oil tube to an engine, the engineer will not assume the risk of injury until

§ 376. **Various risks not assumed, after promise to repair.**— Where the superintendent of a machine shop repaired a defective tool and told the operator it was all right, the subsequent risk of using it was not assumed;[70] a promise to a section hand to use a defective appliance, until others can be procured,[71] or to use a tool until it can be repaired or replaced with another one, will not subject the employee to the subsequent risk of using such defective tool;[72] the promise of a yardmaster to place running boards on an engine will not prevent the representatives of a switchman, who used it after such promise, from recovering;[73] a car repairer is justified in remaining in his employment, after a promise to make additional rules, to protect him from moving trains, in the yard;[74] a promise to provide a car for an employee to warm in, will justify his working at shoveling snow and enable a recovery for injuries therefrom;[75] a promise to fix a defective side track, waives the defense of assumption of the risk from the use thereof, by an engineer;[76] and a promise by a conductor or trainmaster, to repair or replace a defective car[77] or hand car,[78] will justify an employee in using it, for a reasonable time, to await the promised repairs, or substituted car.

after a reasonable time in which they might have been furnished. Cincinnati, etc., R. Co. v. Robertson, 139 Fed. Rep. 519. See, also, Burch v. Southern Pac. R. Co., 140 Fed. Rep. 270.

[70] Atchison, etc., R. Co. v. McKee, 37 Kansas 592; 15 Pac. Rep. 484.

[71] Southern Kansas E. Co. v. Crocker, 41 Kansas 747; 21 Pac. Rep. 785; 38 Am. & Eng. R. Cas. 203.

[72] Gulf, etc., R. Co. v. Brentford, 79 Texas 619; 15 S. W. Rep. 561; St. Louis, etc., R. Co. v. Lemon, 83 Texas 143.

[73] Pieart v. Chicago, etc., R. Co., 82 Iowa 148; 47 N. W. Rep. 1017.

[74] St. Louis, etc., R. Co. v. Triplett, 54 Ark. 289; 15 S. W. Rep. 831; 48 Am. & Eng. R. Cas. 283.

[75] Hyatt v. Hannibal, etc., R. Co., 19 Mo. App. 287.

[76] Patterson v. Pittsburg, etc., R. Co., 76 Pa. St. 389.

[77] Louisville, etc., R. Co. v. Henley, 92 Tenn. 208; 721 S. W. Rep. 326.

[78] Texas, etc., R. Co. v. Kane, 15 Am. & Eng. R. Cas. 218.

§ 377. **Extra risks not generally assumed.**— It is a part of the implied obligation, on the part of the employer, that he will not subject his employees through his own fraud, negligence or malice, to any greater or additional risks than those which fairly and properly belong to the particular service in which the employee is engaged.[79] A risk made hazardous by the negligence of the employer is not one which could not have been prevented, by reasonable care, on his part, nor is it one that an employee assumes on entering into the employment.[80] Where the employer fails to furnish suitable or safe machinery or appliances,[81] or to employ careful and prudent employees in the service he is engaged in,[82] the risks resulting from such failure on his part, are extra-hazardous and are not assumed by his employees. Employees do not assume the extra hazards that arise from the employer's failure to adopt reasonable rules for the regulation of his business;[83] or by a failure to inspect or repair machinery or appliances,[84] or to inspect or repair the roadbed and track,[85] and for injuries resulting from such extra hazards of the employment, an action generally will lie.

[79] Lake Shore, etc., R. Co. v. McCormick, 74 Ind. 440; 5 Am. & Eng. R. Cas. 474; Riley v. West Virginia, etc., R. Co., 27 W. Va., 145.

[80] Cregg v. Chicago, etc., R. Co., 91 Mich. 624; 52 N. W. Rep. 62.

[81] Consolidated, etc., Co. v. Haenni, 146 Ill. 614; 35 N. E. Rep. 162.

[82] Consolidated, etc., Co. v. Haenni, *supra.*

[83] Irvine v. Flint, etc., R. Co., 89 Mich. 416; 50 N. W. Rep. 1008; 53 Am. & Eng. R. Cas. 210.

[84] Bridges v. St. Louis, etc., R. Co., 6 Mo. App. 389.

[85] Taylor, etc., R. Co. v. Taylor, 79 Texas 104; 14 S. W. Rep. 918.

Extraordinary risks of the employment are not assumed, unless the employee knowingly remains in the employment after notice thereof. Illinois Ter. R. Co. v. Thompson, 112 Ill. App. 463; 210 Ill. 226; 71 N. E. Rep. 328; American Car, etc., Co. v. Clark, 32 Ind. App. 644; 70 N. E. Rep. 828; Chicago, etc., R. Co. v. Merriam, 95 Ill. App. 628; Yerkes v. Northern Pac. R. Co., 112 Wis. 184; 88 N. W. Rep. 33; Louisville, etc., R. Co. v. York, 128 Ala. 305; 30 So. Rep. 676; Gulf, etc., Ry. Co. v. Newman (Texas), 64 S. W. Rep. 790.

§ 378. **Risks outside scope of employment not assumed, when.**— Where an employer orders his employee to perform work not contemplated by his employment, and in doing so an extra risk is encountered, although the additional risk is equally apparent to both employer and employee, it does not follow that the employee assumes the risk, unless the danger is such that no man of ordinary prudence would undertake to perform the work in the face of such a danger. If the danger is not so threatening, but the employee had a right to assume, that by ordinary care, he could perform the work, without resulting damage, the law does not compel him to abandon the service or assume the additional risk, not contemplated by his employment, but he has a right to obey the order and look to his employer for protection, if he uses due care.[86] Although the danger was known to the employee, the rule *volenti non fit injuria* would not apply, as the order of the employer and the fact that the work was outside the regular duties of the employment, would prevent an assumption of the risk.[87] But where the extra duties have been performed for a time sufficient for the employee to have become familiar with the additional risks arising therefrom,[88] or where the extra hazards were assumed voluntarily

[86] Nall v. Louisville, etc., R. Co., 129 Ind. 260; 28 N. E. Rep. 183; 611; 48 Am. & Eng. R. Cas. 309; Jones v. Lake Shore, etc., R. Co., 49 Mich. 573; 14 N. W. Rep. 551; 8 Am. & Eng. R. Cas. 221; Stephens v. Hannibal, etc., R. Co., 86 Mo. 221; 28 Am. & Eng. R. Cas. 538; Ballard v. Chicago, etc., R. Co., 51 Mo. App. 453; Louisville, etc., R. Co. v. Hanning, 131 Ind. 528; 31 N. E. Rep. 187; 53 Am. & Eng. R. Cas. 452; Harrison v. Denver, etc., R. Co., 7 Utah 523; 27 Pac. Rep. 728.

[87] Thrussell v. Handyside, 20 Q. B. D. 359; Hungerford v. Chicago, etc., R. Co., 41 Minn. 444; 43 N. W. Rep. 324; 41 Am. & Eng. R. Cas. 269.

[88] An employee in freight house was asked to act as engine cleaner and fireman and had so acted about twenty times when he was injured by being jolted off of the foot board of the engine, while it was backing, but was held to have assumed the risk of such injury. Leary

by the employee and without an order of his employer,[88a] he could not hold his employer liable for an injury so received, but would be held to have assumed such additional risk.

§ 379. **Dangers from orders of vice-principal not assumed.**— Where the employer places one employee in his service under the orders of another employee and the latter, in the exercise of the authority conferred upon him by the employer, orders the former into a place of unusual danger, and thus exposes him to extraordinary perils, of which he is not advised and the employee so ordered receives an injury, as a result of obeying such negligent order, he can recover from the employer therefor.[89]

Under this rule exempting employees from perils while obeying the orders of their superiors, a person employed to load and unload cars about a depot, was held not to have assumed the risk of injury in obeying an order of the superintendent of the depot, to couple cars, and his representative was held entitled to recover damages for his death due to an injury, while so engaged.[90] And, in New York, it was held that a brakeman did not assume the risk of injury while

v. Boston, etc., R. Co., 139 Mass. 580; 2 N. E. Rep. 115; 52 Am. Rep. 733; 23 Am. & Eng. R. Cas. 383.

88a In this case, a freight conductor voluntarily uncoupled cars outside his duties and was injured while so doing. It was held he assumed the risk. Kane v. Savannah, etc., R. Co., 85 Ga. 858; 11 S. E. Rep. 493.

89 Thompson v. Chicago, etc., R. Co., 4 McCrary (U. S.) 629; 14 Fed. Rep. 564; Chicago, etc., R. Co. v. Harbey, 28 Ind. 28; Fitzgerald v. Honkomp, 44 Ill. App. 365; Chicago, etc., R. Co. v. May. 108 Ill. 288; Greenleaf v. Illinois Central R. Co., 29 Iowa 14; Krow v. Chicago, etc., R. Co. 32 Iowa 357.

Attempting dangerous work in obedience to orders is held, in Choctaw, O. & G. R. Co. v. Jones (Ark.), 4 L. R. A. (N. S.) 837, not to involve an assumption of the risk if it was not fully appreciated.

90 Lalor v. Chicago, etc., R. Co., 52 Ill. 401.

running a train, under the orders of the conductor, down a grade, without detaching portions of the train, and without help in handling it.[91]

§ 380. **Risks not assumed by car and track repairers.**— Whenever an injury to a car repairer or track repairer can be held to have resulted from the negligence of the employer, rather than from a risk incident to the service, the employee will not be held to have assumed the risk, but the employer will be liable for the result of his negligent act.

Accordingly, it is held, that where a car repairer had been

[91] Wooden v. Western, etc., R. Co., 25 N. Y. Supp. 977; 5 Misc. 537.

An employee injured while obeying orders of the employer, where the danger was not so imminent that no prudent man would assume the risk, was held entitled to recover, in the following cases: Pressed Steel Car Co. v. Herath, 110 Ill. App. 596; Wurtenberger v. Metropolitan St. Ry. Co. (Kansas), 75 Pac. Rep. 1049; Stewart v. Texas, & P. R. Co. (La. Ann.), 37 So. Rep. 129; American Car, etc., Co. v. Clark, 32 Ind. App. 644; 70 N. E. Rep. 828; Illinois Cent. R. Co. v. Johnson, 95 Ill. App. 54; 61 N. E. Rep. 334; Terre Haute, etc., R. Co. v. Rittenhouse (Ind.), 62 N. E. Rep. 295; Bowes v. New York, etc., R. Co. (Mass.), 62 N. E. Rep. 949; Smith v. Wilmington, etc., R. Co., 129 N. C. 173; 39 S. E. Rep. 805; Galveston, etc., Ry. Co. v. Hitzfelder (Texas), 66 S. W. Rep. 707; Gulf, etc., Ry. Co. v. Newman (Texas), 64 S. W. Rep. 790; Haas v. Chicago, etc., Ry. Co., 97 Ill. App. 624; Southern Ry. Co. v. Hart, 23 Ky. L. R. 1054; 64 S. W. Rep. 650; Allison v. Southern Ry. Co., 129 N. C. 336; 40 S. E. Rep. 91; Choctaw, etc., Ry. Co. v. Jones (Ark.), 92 S. W. Rep. 244; North Chicago, etc., Ry. Co. v. Aufmann, 221 Ill. 614; 77 N. E. Rep. 1120; Murphy v. New York, etc., R. Co., 187 Mass. 18; 72 N. E. Rep. 330; Pittsburg, etc., R. Co. v. Nicholas (Ind.), 73 N. E. Rep. 195; 74 N. E. Rep. 626; Mitchell v. Chicago, etc., R. Co., 108 Mo. App. 142; 83 S. W. Rep. 289; Kansas City, etc., R. Co. v. Thornhill (Ala.), 37 So. Rep. 412; Wabash, etc., Co. v. Hawk, 121 Ill. 259; 2 Am. St. Rep. 82; 12 N. E. Rep. 253; Misouri, etc., R. Co. v. Crane, 13 Texas Civ. App. 426; 35 S. W. Rep. 797; Pittsburg, etc., R. Co. v. Hewitt, 102 Ill. App. 428; 66 N. E. Rep. 829; Long's Admr. v. Illinois Cent. R. Co., 24 Ky. L. R. 567; 58 L. R. A. 237; 68 S. W. Rep. 1095.

accustomed to repair cars on a certain repair track, where he was always protected, while so engaged, and he was ordered to repair a car on another track, where he had a right to expect the same protection, but he was injured by a backing train colliding with the car on which he worked, and it was shown that no precautions at all had been taken for his protection, he did not assume the risk of such negligence on the employer's part.[92] Nor do track repairers assume the risks arising from the neglect of the employer to provide a reasonably safe working place or reasonably safe appliances to work with, when the true conditions are unknown to the employees and cannot be discovered by reasonable care on their part, but the employer will be liable for an injury caused by such neglect.[93] The single spiking of three ties, coupled with an omission to spike the fourth, upon a curve of five or six degrees curvature, is negligence which an employee does not assume the responsibility for;[94] the employee has the right to expect such reasonable care as is ordinarily bestowed by prudent men in the same business;[95] nor would a track repairer or other employee, in the absence of notice of the defective condition thereof, assume the danger from the unknown defective condition of the roadbed[96] or a bridge thereon,[97] but for an injury from such unknown defects, a recovery could be had.

[92] Luebke v. Chicago, etc., R. Co., 59 Wis. 127; 17 N. W. Rep. 870; 48 Am. Rep. 483; 15 Am. & Eng. R. Cas. 183.

[93] Carlson v. Oregon, etc., R. Co., 21 Oregon 450; 28 Pac. Rep. 497; 53 Am. & Eng. R. Cas. 135.

[94] Colorado Midland R. Co. v. Naylor, 17 Colo. 501; 30 Pac. Rep. 249.

[95] *Ante idem.*

[96] Carlson v. Oregon, etc., R. Co., 21 Oregon 450; 28 Pac. Rep. 497; 53 Am. & Eng. R. Cas. 135.

[97] Conlon v. Oregon, etc., R. Co., 23 Oregon 499; 32 Pac. Rep. 397; 53 Am. & Eng. R. Cas. 356.

A car repairer, engaged in repairing a car on a side track, was held, in Missouri, not to assume the risk of an injury from a car

§ 381. **Risks of injuries due to incompetency of employees not assumed.**— The rule that the employee assumes the risks of injuries due to the negligence of his coemployees, obtains only as to the negligence of competent employees and of such of the incompetent employees in the employer's service, where he could not have discovered their incompetency by the exercise of reasonable care on his part. If the employer knowingly employs or retains incompetent or habitually negligent employees, the extra hazards due to injuries from the incompetency of such employee so employed or retained, do not come within the risks which the employee assumes and for an injury resulting therefrom, if the employee was not conscious of such incompetency, or it was not obvious, the employer is liable.[98] The employee is not bound to enquire as to the competency of his coemployees, but has the same right to infer the discharge of the employer's duty in this regard, as he has in the selection of fit and appropriate tools or appliances and if he is injured by the incompetency or

escaping from the main track and colliding with the car he was at work on, where there was no derailing switch to prevent such an accident. Smith v. Fordyce, 190 Mo. 1; 88 S. W. Rep. 679. See, also, St. Louis, etc., Ry. Co. v. Pope (Texas), 86 S. W. Rep. 5; Ft. Worth, etc., Ry. Co. v. Smith (Texas), 87 S. W. Rep. 371.

Car repairers, and others, working on cars on tracks known as repair track, were held, in following cases, not to assume risk of injury by cars set in on such track, without notice to them: Street's Western Car, etc., Co. v. Bonander, 97 Ill. App. 601; 63 N. E. Rep. 688; Bowes v. New York, etc., R. Co. (Mas.), 62 N. E. Rep. 949; Morbly v. Chicago, etc., Ry. Co. (Iowa), 89 N. W. Rep. 105; Jones v. Kansas City, etc., R. Co., 178 Mo. 528; 77 S. W. Rep. 890; Cincinnati, etc., Ry. Co. v. Maley's Admr., 25 Ky. L. R. 690; 76 S. W. Rep. 334; Carroll v. New York, etc., R. Co., 182 Mass. 237; 65 N. E. Rep. 69.

An employee in a railroad yard, of not sufficient experience to know that it was not customary to give notice of the running or kicking of cars, is held not to assume the risk of injury, as a matter of law, in Illinois. Pennsylvania R. Co. v. Chapman, 118 Ill. App. 201; 77 N. E. Rep. 248.

[98] Hough v. Texas, etc., R. Co., 100 U. S. 213; 21 Am. Ry. Rep. 451; Northern Pac. R. Co. v. Charless, 51 Fed. Rep. 562; 7 U. S. App.

unfitness of a coemployee, he is generally entitled to recover therefor.[99] But if an employee knows that another employee is habitually negligent or incompetent and he remains in the service without complaint, and without being induced to believe that a change will be made, then he assumes the risk of the incompetency of such known unfit employee, to the same extent that he would assume the risk of working with a known defective tool without complaint.[1]

§ 382. **Statutes denying defense of assumed risk.**— In some of the States in the United States, the demand by the citizens for more stringent laws against the employers, has reached the stage that to satisfy the employees, politicians in the legislature have gone to the extreme of enacting that

359; 2 C. C. A. 380; 51 Am. & Eng. R. Cas. 198; United States, etc., Co. v. Wilder, 116 Ill. 100; 5 N. E. Rep. 92; 25 Am. & Eng. R. Cas. 414; Craig v. Chicago, etc., R. Co., 54 Mo. App. 523; Taylor v. Evansville, etc., R. Co., 121 Ind. 124; 22 N. E. Rep. 876; 6 L. R. A. 584; 41 Am. & Eng. R. Cas. 437; Lake Shore, etc., R. Co. v. Knittal, 33 Ohio St. 468.

[99] St. Louis, etc., R. Co. v. Corgan, 49 Ill. App. 229; Sweeny v. New York, etc., Co., 25 N. Y. S. R. 598; 6 N. Y. Supp. 528; 117 N. Y. 642; 22 N. E. Rep. 1131.

[1] Kroy v. Chicago, etc., R. Co., 32 Iowa 357; 10 Am. Ry. Rep. 48; Wells. v. Burlington, etc., R. Co., 56 Iowa 520; Indianapolis, etc., R. Co. v. Watson, 114 Ind. 20; 14 N. W. Rep. 721; 33 Am. & Eng. R. Cas. 334.

The employee was held not to have assumed the risk of ignorant or incompetent employees, in the following cases: Anderson v. Southern Ry. Co., 70 S. C. 490; 50 S. E. Rep. 202; Morbly v. Chicago, etc., Ry. Co. (Iowa), 89 N. W. Rep. 105; Metropolitan, etc., Ry. Co. v. Fortin, 107 Ill. App. 157; Southern Ry. Co. v. Harrell, 161 Ind. 689; 63 L. R. A. 460; 68 N. E. Rep. 262; Galveston, etc., R. Co. v. Fitzpatrick (Texas), 83 S. W. Rep. 406; Illinois Central R. Co. v. Smiesni, 104 Ill. App. 194; Boyer v. Eastern Ry. Co., 87 Minn. 367; 92 N. W. Rep. 326; Metropolitan, etc., Ry. Co. v. Fortin, 203 Ill. 454; 67 N. E. Rep. 977; Hicks v. Southern Ry. Co., 63 S. C. 559; 41 S. E. Rep. 753.

the defense of assumed risk shall not be available, as a defense by railroad corporations.

The statute of North Carolina [2] is an illustration of this class of legislation, where it was enacted that railroad companies should not be permitted to set up the defense of assumed risk. The Supreme Court of the State enforced this statute, against a company that defended a suit for damages for an injury to an employee from the use of a known defective sand driver, but the benefit of the defense was denied it and the statute was enforced.[3] Such legislation is on a par with that making railroad companies pay their employees at stated intervals, but permitting other employers to pay their employees or not, at their pleasure, and all such discriminating legislation ought generally to be held unconstitutional by the courts.[4]

[2] Priv. Laws, 1897, p. 83, ch. 56.

[3] Walker v. Carolina Central R. Co., 135 N. C. 738; 45 S. E. Rep. 675.

[4] State v. Loomis, 115 Mo. 307; 22 S. W. Rep. 350; State v. Missouri Tie, etc., Co., 181 Mo. 536; 80 S. W. Rep. 933; State v. Julow, 129 Mo. 163; 31 S. W. Rep. 781; 29 L. R. A. 257; 50 Am. St. Rep. 443; San Antonio, etc., Co. v. Wilson (Texas), 19 S. W. Rep. 910; Gulf, Colo., etc., Ry. Co. v. Ellis, 165 U. S. 150, 154; Braceville, etc., Co. v. People, 147 Ill. 66; Grand Rapids Chair Co. v. Runnells, 77 Mich. 104; 35 Cent. Law J. 242.

Constitution of South Carolina (art. 9, § 15), prevents railroad company from setting up assumption of risk, as a defense. Bodie v. Charleston, etc., R. Co., 61 S. C. 468; 39 S. E Rep. 715.

By Constitution 1895 (art. 9, § 15), of South Carolina, knowlege of a defect in machinery or appliances and the continued use thereof, does not make a case of assumed risk. Southern Ry. Co. v. Carson, 194 U. S. 136; 48 L. Ed. 907; Youngblood v. South Car. R. Co. 60 S. C. 9; 38 S. E. Rep. 232. And for construction of North Carolina statute (Priv. Laws, 1897, ch. 56, §§ 1, 2), to same effect, see Coley v. North Carolina R. Co., 39 S. E. Rep. 43; 40 S. E. Rep. 195.

The North Carolina statute (Priv. Laws 1897, ch. 56, §§ 1 and 2), prevents the defense of assumed risk, whether arising from express or implied contract and whether pleaded directly or under the doctrine of coemployees. Coley v. North Carolina R. Co., 129 N. C. 407; 40 S. E. Rep. 195; Thomas v. Raleigh, etc., R. Co., 129 N. C. 392;

§ 383. **Statutes regulating defense of assumed risk.**— In some of the United States, statutes have been enacted regulating the defense of assumed risk, as in New York, where it is made a jury issue, by statute, whether or not a given risk is assumed.[5] The statute provides that the employee shall be presumed to have consented to the necessary risks and no others, that arise in his employment; it defines what such risks shall include and makes the issue as to the employee's understanding of the danger, a jury issue.[6] It is held by the courts of that State, construing the statute, that since it is a general statute, applicable alike to all employees in the State, it applies to an action by an employee against

40 S. E. Rep. 201; Cogdell v. Southern Ry. Co., 129 N. C. 398; 40 S. E. Rep. 202.

Assumption of the risk is held not to be a defense in an action in North Carolina, for the violation of ch. 56, Priv. Laws. 1897, giving a right of action for an injury from defective ways, works, or appliances of a railroad and providing that the terms of the act cannot be waived. Biles v. Seaboard Air Line Ry. Co., 139 N. C. 528; 52 S. E. Rep. 129.

The Vermont statute, regulating railroad cars and providing for the recovery of damages by employees injured by reason of a violation of the statute, does not deprive employees of the right of contract, in depriving them of the assumption of the risk, but the statute is held valid, as a police regulation, for the protection of the poor and the helpless. Kirkpatrick v. Grand Trunk R. Co. (Vt.), 52 Atl. Rep. 531.

The federal court of Ohio held that statutory negligence could not be a risk assumed, for to hold this would be to set aside the act of the legislature, because of the violation of the statute by the employer. Narramore v. Cleveland, etc., R. Co., 96 Fed. Rep. 298; 37 C. C. A. 499; 48 L. R. A. 68.

It is held, in Indiana, that where the action is based upon a violation of a statutory duty, assumed risk is not a defense. American Car, etc., Co. v. Clark, 32 Ind. App. 644; 70 N. E. Rep. 828.

The risk of an injury from unguarded machinery, which is required by statute to be guarded, is held not to be assumed in Washington (Laws 1903, p. 40). Hoveland v. Marine, etc., Co., 41 Wash. 164; 82 Pac. Rep. 1090.

[5] Employer's Liab. Act, Laws 1902, p. 1750, ch. 600, §3.

[6] *Ante idem.*

a railroad company, for a failure to adopt such rules as are reasonably sufficient to render the employment reasonably safe, and the question of whether or not the risk was assumed, was a jury issue, under the statute.[7] Without such a statute, the Missouri Supreme Court adopted the same legislative standard and held that the question of whether or not a risk was one assumed by an employee was for the jury.[8]

§ 384. **Injuries from flying particles of brittle substances not assumed, when.**— To avoid the natural conclusion that it is a mere chance or accident that a given employee happens to be at the particular place, where a flying particle of steel or brass may penetrate his eye, some courts have reasoned so as to reach the conclusion that while it may be a mere accident that the employee happened to be so situated as to be injured from such a substance, yet, if the negligence of the employer was the force that set the cause of the injury in motion such negligence was none the less the proximate cause of the injury and he was liable for such an injury.[9]

In a Texas case,[10] where an ordinary laborer, not familiar or advised as to the liability of brass to chip off, was called to assist in driving brasses from the boxes of certain cars, with a piece of brass for a punch, and a piece flew off and struck him in the eye, it was held that he did not assume the risk, and a similar result was reached by the Indiana court, in a case[11] where an ordinary laborer was holding a steel rod being hammered by other employees and a particle of the rod struck him in the eye. The conclusion in these cases, however, was reached, because the risk was not an in-

[7] Ward v. Manhattan Ry. Co., 88 N. Y. S. R. 758; 95 App. Div. 437.
[8] Hamman v. Central, etc., Co., 156 Mo. 245.
[9] See White, Personal Inj. in Mines, for list of cases on this subject, § 242, p. 246.
[10] Gulf, etc., Ry. Co. v. Whisenhunt, 81 S. W. Rep. 332.
[11] Republic, etc., Co. v. Ohler, 68 N. E. Rep. 901.

cident or ordinary risk of the employment of the given employee, but an extraordinary risk, as to which the employee had not been properly advised, and it is to be supposed that if it had been an employee accustomed to such work, the element of chance governing the injury would have been held to preclude a recovery.

§ 385. **Federal statute exempting employees of interstate carriers from assumption of risk.**— By the federal statute, requiring automatic couplers on cars and engines,[12] so as to obviate the necessity of employees going between cars to make couplings, it is provided that an employee of an interstate carrier who may be injured by any car in use, contrary to the provision requiring automatic couplers, shall not be deemed thereby to have assumed the risk, although he continues in the employment of the carrier after the unlawful use of such car has been brought to his knowledge.

Under this statute, it was held[13] that a switchman who was engaged in handling a freight car with a defective coupler, on a track used principally for handling freight trains, though sometimes used to handle cars needing repairs, did not assume the risk arising from the defect in the coupler,

[12] Act March 2, 1893, ch. 196, § 8; 27 Stat. 532; 3 U. S. Comp. St. 1901, p. 3176.

The safety appliance act of Congress is held to be within the power of Congress to pass, although it deprives the employer of his defense of assumed risk. Kansas City, etc., R. Co. v. Flippo, 138 Ala. 787; 35 So. Rep. 457; Southern Ry. Co. v. Carson, 68 S. C. 55; 46 S. E. Rep. 525; 194 U. S. 136; 48 L. Ed. 907.

[13] Chicago, etc., Ry. Co. v. Voelker, 129 Fed. Rep. 522.

But the tender of a locomotive is not a "car," within the terms of the Massachusetts statute requiring automatic couplers on "locomotives, cars and trains." Larabee v. New York, etc., R. Co. (182 Mass. 348; 66 N. E. Rep. 1032), and a car shipped from one stop to another and then side tracked, to await further orders, is not a car "engaged in" interstate commerce, so as to take away the defense of assumed risk, under the federal safety appliance act.

as the car had not been marked or isolated as one in bad repair, and its movement at the time of the injury was not with a view to its repair.

§ 386. **Statutes exempting employees from risks of negligence of coemployees.**— In many of the United States, statutes have been passed making railroad companies responsible for injuries to employees, caused by the negligence of coemployees, engaged in the operation of the railroad where the employee was injured.[14] These statutes differ in their details, but the effect of all such statutes is substantially the same and under such statutes the common-law doctrine of assumption of risks from the negligence of coemployees is abolished.[15] In States where such statutes have been adopted an employee of a railroad company does not assume the risk of an injury caused by the neglect of other employees of the company in the operation and control of trains, but the company is held liable in damages for an injury so resulting.[16]

[14] Session Laws Missouri, 1897, p. 96; Rev. St. Mo. for 1899, § 2873.

A brakeman, under the Iowa statute, is held not to assume the risk of a negligent order to stop by a train dispatcher. Phinney v. Illinois Cent. R. Co., 98 N. W. Rep. 358.

[15] Session Laws Mo. for 1897, p. 96; Rev. St. Mo. 1899, § 2873.

"The risk of injury attending the removal from the track of a hand car used for the transportation of a section crew and materials is peculiar to the 'operation of railroads,' (within Rev. St. 1898, § 1816, as amended by Laws 1903, p. 741, ch. 448), providing that every railroad shall be liable for damages to its employees, provided the same shall arise from a risk peculiar to the 'operation of railroads.'" Hardt v. Chicago, M. & St. P. Ry. Co., 111 N. W. Rep. 427.

[16] International, etc., Ry. Co. v. McVey (Texas), 81 S. W. Rep. 991; 83 S. W. Rep. 34; Callahan v. St. Louis, etc., Ter. R. Co., 170 Mo. 473; 71 S. W. Rep. 208; 60 L. R. A. 249; 94 Am. St. Rep. 746; 194 U. S. 628; 24 Sup. Ct. Rep. 857; 48 L. Ed. 1157; Pearl v. Omaha, etc., R. Co. (Iowa), 88 N. W. Rep. 1078.

The risk of negligence of coemployees, obtaining at common law, was held to be abolished by statutes, as to railroads, in the following cases: St. Louis, etc., R. Co. v. Boyles (Ark.), 95 S. W. Rep. 783;

§ 387. **Assumption of risk jury issue, when.**— If an employee is acquainted with the conditions likely to cause an injury, in the course of his employment, and he is also aware of the resulting danger therefrom, or if the conditions were open and obvious and the danger apparent or he knew as much about the risk as his employer, or ought to have equal knowledge, then he is generally held to have assumed the risk, as matter of law.[17]

But where the employee is not acquainted with the conditions that threaten danger to him, in the course of his employment, or, although aware of the condition, if he was ignorant of the danger, and the danger is not such as he ought to have appreciated, in the exercise of reasonable care on his part, then the issue should be submitted to the jury, whether or not, under the particular facts in evidence, the employee could be held to have appreciated the danger and assumed the risk.[18]

It was held to be a jury issue whether or not the deceased, an experienced brakeman, had notice of the dangerous proximity near the track, of a water spout, by which he was struck and killed;[19] whether the danger of obeying an order was

Phippin v. Missouri Pacific Ry. Co., 196 Mo. 321; 93 S. W. Rep. 410; Houston, etc., R. Co. v. Turner, 92 S. W. Rep. (Texas) 1074; Worcester v. Galveston, etc., R. Co. (Texas), 91 S. W. Rep. 339; Mott v. Southern Ry. Co., 131 N. C. 234; 42 S. E. Rep. 601; Thompson v. Chappell, 91 Mo. App. 297; Texas, etc., Ry. Co. v. Putnam, 120 Fed. Rep. 754; 57 C. C. A. 58; Mexican Cent. R. Co. v. Knox, 114 Fed. Rep. 73; 52 C. C. A. 21.

[17] Bailey, Mas. Liab. Inj. Serv., pp. 180, 181; Watson v. Coal Co., 52 Mo. App. 366; Aldrich v. Furnace Co., 78 Mo. 559; Minnier v. Sedalia, etc., Ry. Co., 167 Mo. 99; 66 S. W. Rep. 1072; White, Personal Inj. in Mines, § 206, p. 219.

[18] Bailey, Mas. Liab. Inj. Serv., p. 181; Springside, etc., Co. v. Patting (Ill.), 71 N. E. Rep. 371; Hamman v. Central, etc., Co., 156 Mo. 232; 56 S. W. Rep. 1091.

[19] Choctaw, etc., R. Co. v. McDade, 112 Fed. Rep. 888; 50 C. C. A. 591; 191 U. S. 64.

sufficiently obvious for the employee to assume the risk;[20] whether or not a sufficient time had elapsed after a promise to repair, for an employee to assume the risk;[21] whether the obedience to a command instantly obeyed, was such as to give the employee notice of the danger;[22] whether or not the plaintiff had entered a protest to the continuance of the employment with a known defective tool, where the evidence was conflicting.[23] These and similar issues of fact are held proper issue for the jury, but if the evidence is all one way, as to the knowledge on the part of the employee of a given risk, it is proper for the court to decide the question, as a matter of law.[24]

[20] Ide v. Fratcher, 194 Ill. 552; 62 N. E. Rep. 814; Illinois Cent. R. Co. v. North, 97 Ill. App. 124; Haas v. Chicago, etc., R. Co., 97 Ill. App. 624; Bodie v. Charleston, etc., R. Co., 61 S. C. 468; 39 S. E. Rep. 715.

[21] Galveston, etc., R. Co. v. Sanchez (Texas), 65 S. W. Rep. 893.

[22] Galveston, etc., R. Co. v. Sanchez (Texas), 65 S. W. Rep. 893.

[23] Yerkes v. Northern Pac. R. Co., 112 Wis. 184; 88 N. W. Rep. 33.

[24] Bailey, Mas. Liab. Inj. Serv., p. 181.

CHAPTER XVI.

CONTRIBUTORY NEGLIGENCE OF EMPLOYEES.

§ 388. Explanation of the defense.
389. Not confined to parties occupying special relations.
390. Mutual negligence bars recovery.
391. Reason for rule denying recovery in such case.
392. Limits and exceptions to the rule.
393. Concurrent causes never relieve negligent party.
394. Ordinary care the test.
395. Any negligence, contributing to injury, bars recovery.
396. Negligence must contribute proximately to injury.
397. Illustration of proximate and remote negligence.
398. Doctrine of last clear chance.
399. Employee must use ordinary prudence.
400. Voluntarily selecting more dangerous way.
401. Effect of employee's negligence.
402. Contributory negligence of volunteer.
403. Effect of plaintiff's lack of skill.
404. As a defense to statutory negligence.
405. When intoxication bars recovery.
406. Remaining in service involving danger.
407. Employee may assume employer's performance of duty.
408. Duty to look and listen for trains.
409. Failure to guard against known dangers.
410. Voluntarily assuming position of peril.
411. Crossing track in front of train.
412. Standing or walking upon track.
413. Walking or standing near the track.
414. Climbing over stationary cars.
415. Under cars or locomotives.
416. Crossing bridge in front of train.
417. Sleeping upon or near railroad track.
418. Walking in dangerous place in dark.
419. Failure to discover defects in appliances.
420. Failure to keep appliances under employee's car, in repair.
421. Unauthorized use of appliances.
422. Acts in emergencies or situations of peril.

§ 423. Collisions due to engineer's negligence.
424. Injuries from obstructions near the track.
425. Striking overhead bridge.
426. Running at immoderate rate of speed.
427. Injuries from observance or nonobservance of signals.
428. Riding in dangerous places.
429. Boarding moving cars or engines.
430. Jumping from moving car or engine.
431. Injuries from loading and unloading cars.
432. Negligence in operation of hand cars or tricycles.
433. Negligence in coupling and uncoupling cars.
434. Violation of rules in coupling cars.
435. Injuries in making couplings, while violating orders.
436. Employee falling from moving car or engine.
437. Negligence in disobedience of rules, generally.
438. Violation of particular rules.
439. Disobedience of special orders.
440. Contributory negligence of infant employees.
441. Pleading contributory negligence.
442. Contributory negligence as question of law or fact.

§ 388. **Explanation of the defense.**— The defense of contributory negligence is perhaps the most general defense urged in personal injury actions. It is very generally held to apply as well to actions based upon statutory negligence,[1] as to actions based upon common-law negligence, and while

[1] "Employers' Liability Act (Laws, N. Y. 1902, p. 1748, ch. 600), increasing the rights of employees to recover for injuries sustained in the course of their employment, does not change the general law with respect to contributory negligence; the modification of the doctrine provided by § 3, p. 1750, being applicable only to a continuance in the employment after knowledge of defects in the ways, works, or machinery provided by the employer." Chisholm v. Manhattan Ry. Co., 101 N. Y. S. 622.

Schlemmer v. Buffalo, etc., R. Co., 27 U. S. Sup. 407; 51 L. Ed. 689.

Schlemmer v. Buffalo, etc., R. Co., 207 Pa. 198; 56 Atl. Rep. 417, reversed.

McGinnis v. Rigby, etc., Co. (Mo.), 99 S. W. Rep. 4.

Spiva v. Osage, etc., Co., 97 Mo. 62; Adams v. Coal Co., 85 Mo. App. 320. Contributory negligence is not a defense to statutory negligence, in Illinois. Wilmington Star Mining Co. v. Fulton, 27 U. S. Sup. Ct. Rep. 412; 51 L. Ed. 689.

the defense of assumption of the risk, in many States, has been limited by different statutory enactments, since it is but just that no man should be held for the result of the wrongful act of another, in no way his agent, both by the legislative and judicial branch of government, the defense of contributory negligence has been left intact.

The defense is thus explained, in a recent case,[2] by the United States Supreme Court: "Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained, if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured, subject to this qualification, which has grown up in recent years, that the contributing negligence of the party injured will not defeat the action, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence." The reason for the rule is manifest, for it would be clearly unjust to permit a person who, by his own negligence has caused an injury to himself, to recover damages from another, upon the assumption that if it had not been for the wrongful act of the other, no injury would have resulted.[3] In jurisdictions where the doctrine of comparative negligence does not exist, therefore, the rule is generally recognized to be that "if the party injured, by the exercise of ordinary care, under the circumstances, might have avoided the consequences of the defendant's negligence, but did not, the case is one of mutual fault and the law

[2] Grand Trunk Ry. Co. v. Ives, 144 U. S. 429. See, also, Terre Haute, etc., R. Co. v. Graham, 95 Ind. 291.

"An instruction that, if plaintiff contributed to the injury as the immediate cause of it, then he could not recover, though defendant company was negligent, was not an improper definition of contributory negligence." Cole v. Blue Ridge Ry. Co. (S. C. 1906), 55 S. E. Rep. 126.

[3] Wharton on Neg., § 130; Bailey's Mas. Liab. Inj. Serv., p. 395.

will neither cast all the consequences upon the defendant, nor will it attempt any apportionment thereof." [4]

§ 389. **Not confined to parties occupying special relations.**— The absence of ordinary care on the part of the plaintiff, which can be denominated contributory negligence is suffi-

[4] Cooley, on Torts, p. 368; 4 Amer. & Eng. Enc. Law 17; Shearm. & Redf. on Neg., § 25; Tuff v. Warman, 5 C. B. (N. S.) 573.

Both under the civil and the common law, the defense of contributory negligence could be urged. Richmond, etc., R. Co. v. Morris, 31 Gratt. (Va.) 200; Snyder v. Pittsburg, etc., R. Co., 11 W. Va. 14; 18 Amer. Ry. Rep. 154; Central R. Co. v. DeBray, 71 Ga. 406; Hawk v. Chicago, etc., R. Co., 147 Ill. 399; 35 N. E. Rep. 139; Rogers v. Chicago, etc., R. Co., 117 Ill. 116; Milbur v. Kansas City, etc., R. Co., 86 Mo. 104; 29 Am. & Eng. R. Cas. 244; Rome v. Southern California R. Co. (Cal.), 87 Pac. Rep. 220.

Definitions of contributory negligence, in substantial conformity to those given in the text, are given in the following cases: Montgomery Co. v. Montgomery, etc., R. Co., 86 Ala. 372; 5 So. Rep. 735; Vicksburg & M. R. Co. v. McGowan, 62 Miss. 682; Bomar v. Louisiana, etc., R. Co., 42 La. Ann. 983; 8 So. Rep. 478; Paland v. Chicago, etc., R. Co., 44 La. Ann. 1003; 11 So. Rep. 707; Houston, etc., R. Co. v. Smith, 52 Texas 178; International, etc., R. Co. v. Garcia, 75 Texas 583; 13 S. W. Rep. 223; Riley v. West Virginia, etc., R. Co., 27 W. Va. 145; Cawley v. Winnifred, etc., R. Co., 31 W. Va. 116; Smith v. Union Ry. Co., 61 Mo. 588; Meyers v. Chicago, etc., R. Co., 103 Mo. App. 268; 77 S. W. Rep. 149; Hanheide v. Transit Co., 104 Mo. App. 323; 78 S. W. Rep. 820; Zumault v. Kansas City, etc., Ry. Co., 175 Mo. 288; 74 S. W. Rep. 1015; Moore v. Lindell Ry. Co., 176 Mo. 528; 75 S. W. Rep. 672; Hogan v. Citizens Ry. Co., 150 Mo. 36; 51 S. W. Rep. 473.

"Contributory negligence is such negligence on the part of the injured party as materially contributes to his injury." Cleveland, C., C. & St. L. Ry. Co. v. Henry (Ind. App. 1907), 80 N. E. Rep. 636.

"Where plaintiff and defendant were negligent, and the negligence of both contributed to the injury, plaintiff cannot recover." Brown v. Northern Ohio Traction Co. (Ohio 1907), 81 N. E. Rep. 326.

"An employee cannot recover damages for an injury to which he has directly contributed, whether his participation is the direct cause of the injury, or whether his omission of duties would, if performed, have prevented the injury." Elmgren v. Chicago, M. & St. P. Ry. Co. (Minn. 1907), 112 N. W. Rep. 1067.

cient to defeat a recovery, no matter what particular relation the injured party may occupy, upon which the breach of duty is charged to have occurred, and the defense is not confined to those occupying any particular *status* or relation toward the defendant; if the carelessness of a third party contributes to his own injury, he is denied a recovery, the same as the want of ordinary care will bar an employee who is injured thereby from recovering. So the defense is not confined to employers only, but exists in all cases where an injury is charged to have resulted from the wrongful act of another.[5] The essential element of the defense is the want of ordinary care, on the part of the injured person, which contributed to cause the injury, and where this absence of care is found, since all persons are alike subject to a just rule of law, when similarly situated, the individuality of the plaintiff, or the existence of his legal or business *status* or relation toward the defendant, are wholly immaterial, as the defense obtains, in all cases, when this absence of ordinary care is found, contributing to cause the injury complained of.[6]

§ 390. **Mutual negligence bars recovery.**— The general

[5] Southern Ry. Co. v. Stutts (Ala.), 144 Fed. Rep. 948.

[6] Bailey, Mas. Liab. Inj. Serv., p. 413, and cases cited.

All plaintiffs, in actions for injuries resulting from negligence, who are adults, and all persons mentally and physically incapable of taking care of themselves, stand on the same level and cannot recover, if they, or those under whose care they are, have been guilty of negligence contributing to the injury. Murray v. Central City R. Co., 66 Barb. (N. Y.) 43; 51 N. Y. 666; Willetts v. Buffalo, etc., R. Co., 14 Barb. (N. Y.) 585; Maher v. Atlantic, etc., R. Co., 64 Mo. 267; Fletcher v. Atlantic, etc., R. Co., 64 Mo. 484; Kelly v. Hannibal, etc., R. Co., 75 Mo. 138; Zimmerman v. Hannibal, etc., R. Co., 71 Mo. 476; Bell v. Hannibal, etc., R. Co., 72 Mo. 168; Turner v. Hannibal, etc., R. Co., 74 Mo. 602; Powell v. Missouri Pacific Ry. Co., 76 Mo. 80; Lennix v. Missouri Pacific Ry. Co., 76 Mo. 86; Dlauhi v. St. Louis, etc., R. Co., 105 Mo. 645; 16 S. W. Rep. 281; 139 Mo. 291; 40 S. W. Rep. 890; 37 L. R. A. 406; 60 Am. St. Rep. 576; White v. Wabash R. Co., 34 Mo. App. 57.

rule in regard to contributory negligence is that if the negligence be mutual and concurring, on the part of the plaintiff and defendant, there can be no recovery.[7] This is true, because, where negligence is the issue, it must be a case of unmixed negligence to justify a recovery.[8] It rests upon the plaintiff to trace the cause of his injury to the defendant, and for this purpose he must show the circumstances under which the injury occurred; and if, in proving these circumstances, it also appears that the fault was mutual, he has, by establishing the circumstances of his injury, disproved his right of recovery.[9] Where the negligence of both parties contributes to the injury of either, the common law gives neither party damages for his injury.[10]

But the plaintiff's negligence, to be contributory and effectual as a defense, must be concurrent, simultaneous and connected with the defendant's negligence,[11] and if the injury is disconnected from the plaintiff's act of contributory

[7] Overby v. Chesapeake, etc., R. Co., 37 W. Va. 524; 16 S. E. Rep. 813; 53 Am. & Eng. R. Cas. 417; Carrico v. West Virginia, etc., R. Co., 35 W. Va. 389; 14 S. E. Rep. 12; 52 Am. & Eng. R. Cas. 393; Colorado, etc., R. Co. v. Holmes, 5 Colo. 197; 8 Am. & Eng. R. Cas. 410; Kellny v. Missouri Pacific Ry. Co., 101 Mo. 67; 13 S. W. Rep. 806; 43 Am. & Eng. R. Cas. 186; Doggett v. Richmond, etc., R. Co., 78 N. Car. 305; 16 Am. Ry. Rep. 193.

[8] Toledo, etc., R. Co. v. Goddard, 25 Ind. 185; Bellefontaine, etc., R. Co. v. Hunter, 33 Ind. 335; Chicago, etc., R. Co. v. Hedges, 118 Ind. 5; 20 N. E. Rep. 530; 37 Am. & Eng. R. Cas. 516.

[9] Butcher v. West Virginia, etc., R. Co., 37 W. Va. 180; 16 S. E. Rep. 457.

[10] Allen v. Maine, etc., R. Co., 82 Me. 111; 19 Atl. Rep. 105.

[11] Montgomery Co. v. Montgomery, etc., R. Co., 86 Ala. 372; 5 So. Rep. 735; Louisville, etc., R. Co. v. Sullivan, 81 Ky. 624; 16 Am. & Eng. R. Cas. 390; Rains v. St. Louis, etc., R. Co., 71 Mo. 164; 5 Am. & Eng. R. Cas. 610; Duncan v. Missouri Pacific Ry. Co., 46 Mo. App. 198; Farmer v. Wilmington, etc., R. Co., 88 N. Car. 564; 20 Am. & Eng. R. Cas. 481; International, etc., R. Co. v. Garcia, 75 Texas 583; 13 S. W. Rep. 223.

negligence, by an independent cause, then there is no legal contribution to the injury, on his part.[12]

§ 391. **Reason for rule denying recovery in such case.**— The reasons for the rule of law, that where a person is injured by the joint fault of himself and another he is denied a recovery, is stated by the Ohio court to be (1) the mutuality of the wrong, entitling each party alike, where both are injured, to his action against the other, if it entitles either; (2) the impolicy of allowing a person to recover for his own wrong; and (3), the policy of making the personal interest of the parties dependent upon their own prudence and care.[13] The reason for the rule rests not upon the idea that one wrong offsets the other, or that one justifies the other, but on the broader ground that when the negligence of the plaintiff has contributed proximately to the injury, the damage resulting therefrom is of his own causing and it is difficult, if not impossible, to determine the quantum of injury which resulted from the defendant's tortious act.[14]

One who, in any circumstances, contributes directly to his own injury, by a failure to exercise the ordinary care which would have prevented injury from the negligence of the other, is denied a recovery from the other, because the law will not undertake to apportion the blame between the two wrongdoers, and in such case the negligence of each party must be regarded as the proximate cause of the injury.[15]

[12] Pennsylvania R. Co. v. Righter, 42 N. J. L. 180; 2 Am. & Eng. R. Cas. 220.

[13] Bellefontaine, etc., R. Co. v. Snyder, 18 Ohio St. 399.

[14] Memphis, etc., R. Co. v. Copeland, 61 Ala. 376; Tanner v. Louisville, etc., R. Co., 60 Ala. 621; Mobile, etc., R. Co. v. Blakely, 59 Ala. Eng. R. Cas. 481; International, etc., R. Co. v. Garcia, 75 Texas 583; 471; Manly v. Wilmington, etc., R. Co., 74 N. Car. 655; 13 Am. Ry. Rep. 105; Murray v. Richmond, etc., R. Co., 93 N. Car. 92; McAdoo v. Richmond, etc., R. Co., 105 N. Car. 140; 11 S. E. Rep. 316; 41 Am. & Eng. R. Cas. 524.

[15] Vicksburg, etc., R. Co. v. McGowan, 62 Miss. 682; Northern, etc.,

§ 392. **Limits and exceptions to the rule.**— The doctrine that in case of an injury by negligence, where the parties are mutually in fault, the injured party is not entitled to redress, is subject to the following qualifications, i. e., the age, intelligence and capacity of the injured person must be looked to, as well as the act or omission at the time of the injury,[16] and, where the negligence of the plaintiff was only remote and consisted of some act or omission not occurring at the time of the injury, but the negligence of the defendant was the proximate cause thereof, the action is maintainable.[17] In

R. Co. v. State, 29 Md. 420; Colorado, etc., R. Co. v. Holmes, 5 Colo. 516; 8 Am. & Eng. R. Cas. 410; Northern C. R. Co. v. State, 31 Md. 357.

If the injury was occasioned in any degree by the plaintiff's own carelessness, he is without redress, in the absence of willfulness or intentional wrong, on defendant's part. New Jersey Express Co. v. Nichols, 33 N. J. L. 434; St. Louis, etc., R. Co. v. Freeman, 36 Ark. 41; 4 Am. & Eng. R. Cas. 608. The question for the court to determine is not whether the negligence of the plaintiff, or of the defendant was the more proximate cause of the injury — where the rule of comparative negligence does not obtain — but whether or not the plaintiff's negligence proximately contributed to the injury. Missouri Pacific R. Co. v. Moseley, 57 Fed. Rep. 921; Holwerson v. St. Louis, etc., R. Co., 157 Mo. 216; 57 S. W. Rep. 770; 50 L. R. A. 850.

"That an employee was guilty of an error in judgment in attempting to pass around a moving train, or in stepping out of his way, does not relieve the employer from liability unless the conduct of the employee was the proximate cause of the injury." Betchman v. Seaboard Air Line Ry. (S. C. 1906), 55 S. E. Rep. 140.

"Intestate's contributory negligence, and not the negligence of the engineer in not bringing the train to a standstill when he first saw deceased, was the proximate cause of the injury." Rowe v. Southern California Ry. Co. (Cal. App. 1906), 87 Pac. Rep. 220.

[16] Bellefontaine, etc., R. Co. v. Snyder, 18 Ohio St. 399; International, etc., R. Co. v. Garcia, 75 Texas 583; 13 S. W. Rep. 223; Government, etc., R. Co. v. Hanlon, 53 Ala. 70; Bay Shore R. Co. v. Harris, 67 Ala. 6.

[17] Longabaugh v. Virginia City R. Co., 9 Nev. 271; Kline v. Central Pacific R. Co., 37 Cal. 400; Meeks v. Southern Pacific R. Co., 56 Cal. 513; 38 Am. Rep. 67; 8 Am. & Eng. R. Cas. 314; Esrey v. Southern Pacific R. Co., 88 Cal. 399; 26 Pac. Rep. 211; Isbell v. New York,

other words, the strict letter of the rule, in all cases, does not apply to infants, or those under disability.[18] and, in every case, the want of ordinary care, on the plaintiff's part, must have proximately contributed to produce the injury, in some way.[19] And if the negligence of the defendant is so gross as to be denominated intentional or willfulness, the absence of reasonable care on the plaintiff's part will not constitute a defense,[20] and, notwithstanding the negligence of the injured person, if the defendant, after becoming aware of his negligence, failed to use a proper degree of care to avoid the accident, the plaintiff will be allowed a recovery.[21]

But while the negligence of the plaintiff must, in whole

etc., R. Co., 27 Conn. 393; Gates v. Burlington, etc., R. Co., 39 Iowa 45; Central R. Co. v. Moore, 24 N. J. L. 824; Cornwall v. Charlotte, etc., R. Co., 97 N. Car. 11; 2 S. E. Rep. 659.

[18] International, etc., R. Co. v. Smith, 62 Texas 252; 19 Am. & Eng. R. Cas. 21; Hassenyer v. Michigan Central R. Co., 48 Mich. 205; 12 N. W. Rep. 155; 42 Am. Rep. 470; 6 Am. & Eng. R. Cas. 59; International, etc., R. Co. v. Garcia, 75 Texas 583; 13 S. W. Rep. 223.

[19] Cornwall v. Charlotte, etc., R. Co., 97 N. Car. 11; 2 S. E. Rep. 659; Oates v. Metropolitan St. Ry. Co., 168 Mo. 535; 68 S. W. Rep. 906; 58 L. R. A. 447; Frank v. Transit Co., 99 Mo. App. 323; 73 S. W. Rep. 239; Kolb v. Transit Co., 102 Mo. App. 143; 76 S. W. Rep. 1050.

[20] Pennsylvania R. Co. v. Sinclair, 62 Ind. 301; Darwin v. Charlotte, etc., R. Co., 23 So. Car. 531; 55 Am. Rep. 32; Indianapolis, etc., R. Co. v. Boettcher, 131 Ind. 82; 28 N. E. Rep. 551; Louisville, etc., R. Co. v. Ader, 110 Ind. 376; 11 N. E. Rep. 437; Rowen v. New York, etc., R. Co., 59 Conn. 364; 21 Atl. Rep. 1073; Korrady v. Lake Shore, etc., R. Co., 131 Ind. 261; 29 N. E. Rep. 1069.

[21] Cooper v. Central R. Co., 44 Iowa 134; Johnston v. Louisville, etc., R. Co., 91 Ky. 651; 25 S. W. Rep. 754; Straus v. Kansas City, etc., R. Co., 75 Mo. 185; 6 Am. & Eng. R. Cas. 384; Hurt v. St. Louis, etc., R. Co., 94 Mo. 255; 7 S. W. Rep. 1; 34 Am. & Eng. R. Cas. 422; Dun v. Seaboard, etc., R. Co., 78 Va. 645; 49 Am. Rep. 388; 16 Am. & Eng. R. Cas. 363; Baltimore, etc., R. Co. v. Kean, 65 Md. 394; 5 Atl. Rep. 325; 28 Am. & Eng. R. Cas. 580; Duncan v. Missouri Pacific Ry. Co., 46 Mo. App. 198; Brown, Hannibal, etc., R. Co., 50 Mo. 461; 11 Am. Rep. 420; Cogan v. Cass Ave. R. Co., 101 Mo. App. 179; 73 S. W. Rep. 738; Klockenbrink v. St. Louis, etc., R. Co., 172 Mo. 678; 72 S. W. Rep. 900; Shanks v. Traction So., 101

or in part, contribute proximately to the injury, it is not essential that it constitute the sole cause thereof, as contributory negligence is a complete defense, when it is one of two or more efficient concurring causes and it is not necessary that it should be the sole proximate cause of the injury.[22]

§ 393. **Concurrent causes never relieve negligent party.**—In a preceding chapter [23] a distinction is drawn between intervening and concurrent causes of personal injuries and it is seen that while intervening or independent causes relieve one charged with negligence, mere concurrent causes, whether originating from the carelessness of another or from an accident, combined with a negligent act, will not relieve the party guilty of the wrongful act, from the effects of such negligence.[24]

The United States Supreme Court, in a leading case,[25] has drawn the distinction between concurrent and intervening causes, or between contribution and cause and effect and it is shown that the proper test is, did the accident or intervening cause break the sequence of events? Unless it did, it is a mere case of concurrent negligence or causes, which will not relieve the negligent party, except in the sole case of the negligence of the injured party concurring with that of the defendant.

The consequence is, that if an injured party shall be shown to have been negligent himself, it is no excuse for his negligence, that the wrongful act of a coemployee also combined

Mo. App. 702; 74 S. W. Rep. 386; Ries v. Transit Co., 179 Mo. 1; 77 S. W. Rep. 734.

[22] Hanheide v. Transit Co., 104 Mo. App. 323; 78 S. W. Rep. 820; North Birmingham R. Co. v. Calderwood, 89 Ala. 247; 7 So. Rep. 360; Spencer v. Illinois Central R. Co., 29 Iowa 55.

[23] See Chapter on Proximate Cause of Injury.

[24] Austin v. New Jersey, etc., Co., 43 N. Y. 75.

[25] Milwaukee, etc., R. Co. v. Kellogg, 94 U. S. 474.

to bring about the injury.[26] And, on the other hand, if the defendant is shown to have been negligent and the plaintiff or injured party was free from blame, the fact that an accident[27] or the negligence of a coemployee with the injured person, combined with the wrongful act of the employer, to produce the injury, will constitute no defense to the action,[28] as this would be a mere concurrent, as distinguished from an intervening, cause of the injury.[29]

§ 394. **Ordinary care the test.**— The law imposes upon every person the duty to use ordinary care for his own protection and security against accident.[30] The negligence of the plaintiff bars a recovery for personal injuries, where, by

[26] Bartlett v. Boston, etc., Co., 117 Mass. 536; Baltimore, etc., R. Co. v. Reaney, 42 Md. 117.

[27] Hull v. Kansas City, 54 Mo. 598; Austin v. New Jersey, etc., Co., 43 N. Y. 75; Morse v. Richmond, 41 Vt. 435.

[28] Pittsburg, etc., R. Co. v. Henderson, 37 Ohio St. 549; Whitwam v. Chicago, etc., R. Co., 58 Wis. 408; 17 N. W. Rep. 124; Clark v. Seoul, 137 Mass. 380; Cowan v. Milwaukee, etc., R. Co., 80 Wis. 284; 50 N. W. Rep. 180; Grand Trunk R. Co. v. Cummings, 106 U. S. 700; Griffin v. Boston, etc., R. Co., 148 Mass. 143; 19 N. E. Rep. 166; Atkinson v. Goodrich, etc., Co., 60 Wis. 141; 18 N. W. Rep. 764.

[29] This distinction is clearly drawn, by Judge Bailey, in his excellent work on Mas. Liab. Inj. Serv., pp. 434, 437. See, also, Wharton on Neg., § 144.

"In an action for personal injuries, plaintiff cannot recover if he was himself at the time of the accident guilty of concurrent negligence." Garrett v. People's Ry. Co. (Del. Super. 1906), 64 Atl. Rep. 254.

"Where the negligence of a person injured, assuming it to exist, continued up to the very moment of the accident, unbroken by any new independent cause, and without which that event would not have occurred, there could be no controversy as to whether his contributory negligence was proximate or not, and an instruction omitting the word 'proximate,' or its equivalent, was not error." Jansen v. Southern Pac. Co. (Cal. App. 1907), 89 Pac. Rep. 616.

[30] Parvis v. Philadelphia, etc., R. Co. (Del.), 17 Atl. Rep. 702; Louisville, etc., R. Co. v. Eves, 1 Ind. App. 224; 27 N. E. Rep. 580; Allender v. Chicago, etc., R. Co., 37 Iowa 264; 8 Am. Ry. Rep. 115.

ordinary care, he could have avoided the injury.[31] Ordinary care, as a legal measure for the degree of diligence is invariable, but as the conduct of a prudent man varies with the degree of danger attending the vocation in which he is engaged, and he is more or less cautious according to circumstances, those who are bound to conform their conduct to his, must graduate it in like manner and this rule applies both to one exposed to danger and to others not so exposed, whose acts or omissions affect his safety.[32]

The test of contributory negligence is not always found in the failure to exercise the best judgment or to use the wisest precautions; the influences which ordinarily govern human action are to be considered and what would, under some circumstances, be considered a want of reasonable care, may not be such, under other conditions.[33] The plaintiff is not required to exercise more care than is usual under similar circumstances, among careful persons, of the class to which he belongs.[34] The exercise of ordinary caution, by the injured person, to avoid the danger, is all that the law requires in order that he may be protected against the consequences of having contributory negligence imputed to him.[35] Hence, although a person injured by a railroad train, may be in fault, to some extent, yet he can recover, if the injury could not have been avoided by him, by the exercise of ordinary care, on his part.[36]

[31] Kearney v. Lindell R. Co., 15 Mo. App. 576; Ohio, etc., R. Co. v. Gullett, 15 Ind. 487; Kansas Pacific R. Co. v. Pointer, 14 Kansas 37; Bowers v. Union Pacific R. Co., 4 Utah 215; 7 Pac. Rep. 251.

[32] Central R. & B. Co. v. Ryles, 84 Ga. 420; 11 S. E. Rep. 499.

[33] Lent v. New York, etc., R. Co., 120 N. Y. 467; 24 N. E. Rep. 653; 44 Am. & Eng. R. Cas. 373; Sherry v. New York, etc., R. Co., 104 N. Y. 652.

[34] Dimmey v. Wheeling, etc., R. Co., 27 W. Va. 32.

[35] Hays v. Gainesville, etc., R. Co., 70 Texas 602; 8 S. W. Rep. 491; Kerwhacker v. Cleveland, etc., R. Co., 3 Ohio St. 172.

[36] Rigler v. Charlotte, etc., R. Co., 94 N. Car. 604; 26 Am. & Eng.

§ 395. **Any negligence, contributing to injury, bars recovery.**— Where the injury is the result of the mutual fault of the injured person and the defendant, as the law will not attempt any apportionment of the absence of ordinary care between the respective parties, in jurisdictions where the doctrine of comparative negligence does not obtain, nor will it cast all the consequences of the mutual wrongdoing upon the defendant, the plaintiff is denied a recovery, upon a showing of any want of ordinary care, however slight, contributing to the injury, on the part of the injured person.[37] In a well-considered Pennsylvania case,[38] it is said: "Any degree of negligence on the part of the plaintiff, contributing to the injury, destroys his right of recovery. It is the kind of action, not the quantity, on the part of the plaintiff, which prevents the law from measuring between the plaintiff and the defendant, their respective degrees of negligence, when the former comes into a court of justice." If the term negligence, or the absence of ordinary care, has any degrees, which is denied by respectable authority,[39] this case unquestionably presents the general rule upon the subject, for while some authors distinguish between "slight want of ordinary care" and "slight negligence," which latter term is used as a syno-

R. Cas. 386; Lewis v. Baltimore, etc., R. Co., 38 Md. 588; 10 Am. Ry. Rep. 521; Omaha R. Co. v. Doolittle, 7 Neb. 481; Pennsylvania R. Co. v. Righter, 42 N. J. L. 180; 2 Am. & Eng. R. Cas. 220; Baltimore, etc., R. Co. v. Whitacre, 35 Ohio St. 627.

[37] St. Louis, etc., R. Co. v. Dewees (Kan.), 153 Fed. Rep. 56.

"One cannot — nor can one standing in his stead — recover damages for an injury to the commission of which he has directly contributed; and it matters not whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties which, if performed, would have prevented it. If his fault, whether of omission or commission, has been a proximate cause of the injury, he — as also one standing in his stead — is without remedy against another, also in the wrong." St. Louis & S. F. R. Co. v. Dewees (U. S. C. C. A., Kan., 1907), 153 Fed. Rep. 56.

[38] Oil City Co. v. Boundy, 122 Pa. St. 449; 15 Atl. Rep. 865.

[39] 1 Thompson on Negligence, § 18.

nym for the former, and the distinction — if any exists — is not of practical importance, it is very generally agreed that "any want of ordinary care, however slight, will preclude a recovery," [40] when it contributes to effect the injury complained of.

§ 396. **Negligence must contribute proximately to injury.**— If the evidence either of the plaintiff or the defendant clearly shows that the plaintiff was guilty of contributory negligence, which was the direct cause of the injury, there can be no recovery against the defendant.[41] Though the employer be guilty of negligence, yet if the injury to an employee be the

[40] Bailey, Mas. Liab. Inj. Serv., p. 413.

That any degree of negligence, contributing to effect an injury on the part of the injured one, will bar an action therefor, has been affirmed, in the following cases: Memphis, etc., R. Co. v. Copeland, 61 Ala. 376; St. Louis, etc., R. Co. v. Freeman, 36 Ark. 41; 4 Am. & Eng. R. Cas. 608; Long v. Coronado R. Co., 96 Cal. 269; 31 Pac. Rep. 170; Korrady v. Lake Shore, etc., R. Co., 131 Ind. 261; 29 N. E. Rep. 1069; Louisville, etc., R. Co. v. Ader, 110 Ind. 376; 11 N. E. Rep. 437; Cooper v. Central R. Co., 44 Iowa 134; Allen v. Maine Central R. Co., 82 Me. 111; 19 Atl. Rep. 105; Lake Shore, etc., R. Co. v. Bangs, 47 Mich. 470; 11 N. W. Rep. 276; 3 Am. & Eng. R. Cas. 426; Memphis, etc., R. Co. v. Whitfield, 44 Miss. 466; Murray v. Missouri Pacific Ry. Co., 101 Mo. 236; 13 S. W. Rep. 817; Payne v. Chicago, etc., R. Co., 129 Mo. 405; 31 S. W. Rep. 885; Rigler v. Charlotte, etc., R. Co., 94 N. Car. 604; 26 Am. & Eng. R. Cas. 386; Nashville, etc., R. Co. v. Carroll, 6 Heisk. (Tenn.) 347; 12 Am. Ry. Rep. 20; Carrico v. West Virginia, etc., R. Co., 35 W. Va. 389; 14 S. E. Rep. 12; 52 Am. & Eng. R. Cas. 393; Murch v. Concord R. Co., 29 N. H. 9; 61 Am. Dec. 631.

Any negligence will bar a recovery, in Missouri, although the defendant's negligence is negligence *per se*, such as statutory or ordinance negligence. Payne v. Chicago, etc., R. Co., 129 Mo. 405; 31 S. W. Rep. 885.

See, also, State v. Baltimore & O. R. Co., 30 Md. 47, and, for former rule, in Illinois, on contributory negligence as a defense to statutory negligence, see St. Louis, etc., R. Co. v. Andrews, 16 Ill. App. 292.

[41] Cawley v. Winifred, etc., R. Co., 31 W. Va. 116; 5 S. E. Rep. 318; Riley v. West Virginia R. Co., 27 W. Va. 145.

proximate result of his own want of reasonable care for his own protection or safety, he cannot recover.[42]

Where it appears that an employee could have averted an accident by the exercise of ordinary care and he has failed to do so, and an injury is the proximate result of such failure, on his part, it would be offering a premium for the negligence, to allow him to recover, as well as being oppressive to the employer and detrimental to the public interests.[43]

But the contributory negligence of an employee or other person will not prevent a recovery, where the proximate cause of the injury is some act or omission of the employer or the defendant, to which no act of the employee or injured person has contributed.[44] If an employee receive an injury, by reason of the negligent movement of a train, while he is endeavoring, in the line of his duty, to lift or place in shape, a bumper, the fact that it was a defective bumper, will not prevent his recovery,[45] nor will the negligence in running a train through a city at a rate of speed in excess of that provided by ordinance, prevent a recovery, by an employee, where the speed of the train in no way contributes to effect the injury complained of.[46]

§ 397. **Illustrations of proximate and remote negligence.**— In an Iowa case,[47] a brakeman, engaged in switching cars, switched some cars on a side track and left them in such a

[42] Sexton v. Turner, 89 Va. 341; 15 S. E. Rep. 862; Colorado, etc., R. Co. v. Ogden, 3 Colo. 499; Houston, etc., R. Co. v. O'Hara, 64 Texas 600; O'Neal v. Chicago, etc., R. Co., 132 Ind. 110; 31 N. E. Rep. 669.

[43] Callahan v. Louisville, etc., R. Co., 11 Fed. Rep. 536.

[44] Harvey v. New York, etc., R. Co., 19 Hun (N. Y.) 556.

[45] Central, etc., R. Co. v. Lanier, 83 Ga. 587; 10 S. E. Rep. 279.

[46] Lake Shore, etc., R. Co. v. Parker, 131 Ill. 557; 33 Ill. App. 405; 23 N. E. Rep. 237; 41 Am. & Eng. R. Cas. 339.

[47] Newman v. Chicago, etc., R. Co., 80 Iowa 672; 45 N. W. Rep. 1054; 44 Am. & Eng. R. Cas. 555.

and who had control of all such work done by his train, switched some cars on a side track and left them in such a position that while ascending, by order of the conductor, the ladder, at the side of another car, passing on the main track, shortly afterwards, there was not sufficient space to permit his body to pass safely between the cars and he was caught and killed and the court held that his own contributory negligence was the proximate cause of his death. In a similar case,[48] in Massachusetts, where the jury found that it was negligence for an employee to leave a car which was standing near another car which was moving, it was held that the act of leaving the car in such a position, will be deemed the proximate cause of an injury to an employee thereby. And in a Texas case,[49] where the conductor of a freight train, in violation of the known rules of the company, boarded his train while it was moving and while standing on top of a box car, was knocked off and killed by a scaffold suspended over a bridge, it was held that his negligence would preclude a recovery for his death, although the evidence showed a continuous violation of the rule and the impossibility of boarding the train, at the caboose, on account of obstructions near the track at that point.

But the mere fact alone that injuries were received by an employee while he was violating a known rule of the employer, will not prevent a recovery, unless the violation of the rule in some way contributed to cause the injury.[50] Where a section hand stood on the lower step of a car and was injured by striking the lever of a switch, so constructed as to rub the side of the car, it was held that the proximate cause of the injury was the negligent construction of the switch and not the employee's standing where he was, when in-

[48] Dacey v. Old Colony R. Co., 153 Mas. 112; 26 N. E. Rep. 437.

[49] San Antonio, etc., R. Co. v. Wallace, 76 Texas 636; 13 S. W. Rep. 565; 44 Am. & Eng. R. Cas. 564.

[50] San Antonio, etc., R. Co. v. Wallace, *supra*.

jured.[51] And it is held in many cases that an employee's act in being on the side of a moving car is not the proximate cause of his injury, by a negligently constructed obstruction too near the track, but the negligence of the employer in maintaining such a structure, and not the act of the employee in being at the place at the particular time when injured, is the direct cause of the injury.[52] Other illustrations of acts that have and acts that have not been held to be proximate causes of injuries, will be found in the note.[53]

[51] Boss v. Northern Pacific R. Co., 5 Dakota 308; 40 N. W. Rep. 590.

[52] Kansas City, etc., R. Co. v. Burton, 97 Ala. 240; 12 So. Rep. 88; 53 Am. & Eng. R. Cas. 115; Choctaw, etc., R. Co. v. McDade, 191 U. S. 65; 48 L. Ed. 96.

[53] An employee walking so close to a track as to receive an injury while so doing, is held to have been responsible therefor and the employer not liable. Cincinnati, etc., R. Co. v. Long, 112 Ind. 166; 13 N. E. Rep. 659; 31 Am. & Eng. R. Cas. 138. An employee injured by the falling of a stack of lumber, which he and his coemployees had helped to unload, was held responsible for the injury. Langlois v. Maine C. R. Co., 84 Me. 161; 24 Atl. Rep. 804. An employee running a hand car, who worked until his feet froze, was held negligent so as to preclude a recovery, in Iowa. Farmer v. Central Iowa R. Co., 67 Iowa 136; 24 N. W. Rep. 895. A station master who went onto a crossing, for which the engineer failed to sound the whistle or ring the bell, as required by statute, was held negligent, proximately contributing to his injury, in Missouri. Evans v. Atlantic, etc., R. Co., 62 Mo. 49.

But the passive act of the fireman in not seeing that the engineer complied with the rules of the employer, will not preclude a recovery by the fireman, for an injury. New Jersey, etc., R. Co. v. Young, 49 Fed. Rep. 723; 1 U. S. App. 96; 1 C. C. A. 428. A delay of a moment or so, by an employee, in putting on his gloves, is held, in Alabama, not to be such negligence as proximately causes a collision with a projecting rock. Georgia, etc., R. Co. v. Davis, 92 Ala. 300; 9 So. Rep. 252. Negligence cannot be predicated on a mere dangerous act, done in accordance with the employer's rules. Louisville, etc., R. Co. v. Utz, 133 Ind. 265; 32 N. E. Rep. 881; Greenleaf v. Dubuque, etc., R. Co., 33 Iowa 52. A hostler in an engine house was held not negligent in the performance of duties outside the scope of his employment, when injured, in Grannis v. Chicago, etc., R. Co., 81 Iowa 444; 46 N. W. Rep. 1067. The mere fact that a head brakeman was

§ 398. **Doctrine of last clear chance.**— From the distinctions noted in the foregoing section, what is known as the doctrine of last clear chance, or the humanitarian doctrine, has had its origin. This rule of last clear chance is recognized by the courts, as an exception to the general rule that the contributory negligence of the person injured will bar a recovery, without reference to the degree of negligence on his part, and under this exception to the rule it may now be stated to be well established that the injured person, or his representative, may recover damages for an injury resulting from the negligence of the defendant, although the negligence of the injured person exposed him to the danger of the injury sustained, if the injury was more immediately caused by the want of care on the defendant's part, to avoid the injury, after discovering the peril of the injured person.[54]

riding on an engine, in violation of rules, when it was the custom so to do, was held not to be the proximate cause of an injury while so riding. Sprong v. Boston, etc., R. Co., 58 N. Y. 56; 9 Am. Ry. Rep. 475; Booth v. Boston, etc., R. Co., 67 N. Y. 593. Nor would the presence of an employee at a car that he was unloading, be held the proximate cause of his death, by being struck by a car which was shoved against the car where he was at work, without warning to him. Maguire v. Fitzburg, etc., R. Co., 146 Mass. 379; 15 N. E. Rep. 904; 34 Am. & Eng. R. Cas. 146.

[54] Shearm. & Redf. on Neg. (5 ed), § 99; Frazer v. South & N. Ala. R. Co., 81 Ala. 185; Green v. Los Angeles, etc., R. Co., 143 Cal. 31; Lee v. Market St. R. Co., 135 Cal. 293; Harrington v. Los Angeles, etc., R. Co., 140 Cal. 514; Oliver v. Denver, etc., Tr. Co., 13 Colo. App. 543; Griffith v. Denver Con. Tr. Co., 14 Colo. App. 504; Isbell v. New York, etc., R. Co., 27 Conn. 393; Bullard v. Southern R. Co., 116 Ga. 644; Ashworth v. Southern R. Co., 116 Ga. 635; Chicago, etc., R. Co. v. Ryan, 131 Ill. 474; Lake Shore, etc., R. Co. v. Bodemer, 139 Ill. 596; Chicago, etc., R. Co. v. Green, 93 Ill. App. 105; Cleveland, etc., R. Co. v. Lee, 154 Ind. 430; Neet v. Burlington, etc., R. Co., 106 Iowa 248; Crowley v. Louisville, etc., R. Co., 21 Ky. L. R. 1434; 55 S. W. Rep. 434; McClanahan v. Vicksburg, etc., R. Co., 111 La. Ann. 781; Baltimore, etc., R. Co. v. Rifowitz, 89 Md. 338; Aiken v. Holyoke, etc., R. Co., 184 Mass. 269; Snoniker v. Great Northern R. Co., 76 Minn. 306; Fearons v. Kansas City, etc., R. Co., 180 Mo. 208; 79 S. W. Rep. 394; Bunting v. Central Pacific

In other words, the doctrine is, that where A, after discovering that B has carelessly exposed himself to danger, neglects to use ordinary care to avoid injuring him, and injury is inflicted upon B, as a result of A's negligence, then A is liable, notwithstanding the prior negligence of B.[55] This rule is followed in some States where the rule of comparative negligence is condemned,[56] although it is, practically, a species of comparative negligence, especially when the courts fail to note the distinction that the doctrine presupposes the preceding negligence of the injured person and apply the doctrine in the case of contemporaneous negligence of both parties.[57] This rule does not exempt the injured person from the consequences of his own *contemporaneous negligence,* which is an immediate, direct and proximate cause of the injury. When the carelessness of both parties is contemporaneous and the injury results from the mutual want of care on their part, then no recovery can be had under the humanitarian doctrine.[58]

R. Co., 16 Nev. 277; Edgerly v. Union St. R. Co., 67 N. H. 312; Rider v. Syracuse, etc., R. Co., 171 N. Y. 139; McDonald v. Metropolitan St. R. Co., 93 App.. Div. (N. Y.) 238; Bogan v. Carolina Central R. Co., 129 N. C. 154; Erie R. Co. v. McCormick, 69 Ohio St. 45; Shaw v. Salt Lake R. Co., 21 Utah 76; Virginia Midland R. Co. v. White, 84 Va. 498; Meeks v. Ohio River R. Co., 52 W. Va. 99; Dotta v. Northern Pacific R. Co., 36 Wash. 506.

[55] This is practically as Judge Bland states the illustration for the St. Louis Court of Appeals, in Sims v. St. Louis, etc., R. Co., 116 Mo. App. 579.

[56] This is true, of Missouri, Howlerson v. St. Louis, etc., R. Co., 157 Mo. 216; 57 S. W. Rep. 770.

[57] The Kansas City Court of Appeals clearly failed to note this distinction in Burde v. Chicago, etc., R. Co., 100 S. W. Rep. 509, and Mann v. Missouri, etc., R. Co., 100 S. W. Rep. 566.

[58] This is, practically, the language of the Supreme Court of Missouri, in Watson v. Mound City, etc., R. Co., 133 Mo. 246; 34 S. W. Rep. 573. See, also, Howlerson v. St. Louis, etc., R. Co., 157 Mo. 225; 57 S. W. Rep. 770, and cases cited; Beach Con. Neg., § 56 and citations; Sims v. St. Louis, etc., R. Co., 116 Mo. App. 578.

"The burden was on plaintiff to show that the trainmen discovered

§ 399. **Employee must use ordinary prudence.**— An employee is bound to use ordinary care to avoid the dangers

him upon the trestle and his perilous condition in time to avoid injuring him and willfully and recklessly injured him." Adams v. St. Louis, I. M. & S. Ry. Co. (Ark. 1907), 103 S. W. Rep. 725.

"Where one who is guilty of negligence in being too near a railroad track is not discovered by the engineer or fireman in time to prevent striking him by a train running from station to station, there is no actionable negligence." Texas & N. O. R. Co. v. Scarborough (Tex. Civ. App. 1907), 104 S. W. Rep. 408.

"No one will be relieved from liability for injury inflicted by him on another by reason of the fact that such other negligently exposed himself to the danger, if, when that situation was, or ought to have been, apparent to him, he omitted such reasonable precautions as would, if taken, have prevented the injury." Judgment, Klutt v. Philadelphia & R. Ry. Co. (C. C.), 145 F. 965, affirmed; Philadelphia & R. R. Co. v. Klutt (U. S. C. C. A., Pa., 1906), 148 Fed. Rep. 818.

"A railroad company is liable where a watchman at a crossing is seen by an engineer of a moving train on the crossing with a lantern in his hand, if the engineer was carelessly inadvertent as to whether he would get out of the way or not." Betchman v. Seaboard Air Line Ry. (S. C. 1906), 55 S. E. Rep. 140.

The last chance or humanitarian doctrine, has been recognized in the following cases: Chicago, etc., R. Co. v. Ryan, 131 Ill. 474; 23 N. E. Rep. 385; 43 Am. & Eng. R. Cas. 396; Spencer v. Baltimore, etc., R. Co., 4 Mackey (D. C.) 138; 54 Am. Rep. 269; Cincinnati, etc., R. Co. v. Kassen, 49 Ohio St. 230; 31 N. E. Rep. 282; 16 L. R. A. 674; 52 Am. & Eng. R. Cas. 427; Cook v. Central R. Co., 67 Ala. 533; Little Rock, etc., R. Co. v. Cavennesse, 48 Ark. 106; 2 S. W. Rep. 505; Denver, etc., R. Co. v. Dwyer, 3 Colo. App. 408; Romick v. Chicago, etc., R. Co., 62 Iowa 167; 17 N. W. Rep. 458; 15 Am. & Eng. R. Cas. 288; Wooster v. Chicago, etc., R. Co., 74 Iowa 593; 35 Am. & Eng. R. Cas. 152; Baltimore, etc., R. Co. v. Mulligan, 45 Md. 486; Swigert v. Hannibal, etc., R. Co., 75 Mo. 475; 9 Am. & Eng. R. Cas. 322; Dunkman v. Wabash R. Co., 95 Mo. 232; 4 S. W. Rep. 670; Union Pacific R. Co. v. Mertes, 35 Neb. 204; 52 N. W. Rep. 1099; Sweeney v. New York, etc., Co., 117 N. Y. 642; 22 N. E. Rep. 1131; 27 N. Y. S. R. 977; Deans v. Wilmington, etc., R. Co., 107 N. Car. 686; 12 S. E. Rep. 77; 45 Am. & Eng. R. Cas. 45; Troy v. Cape Fear, etc., R. Co., 99 N. Car. 298; 6 S. E. Rep. 77; 6 Am. St. Rep. 521; 34 Am. & Eng. R. Cas. 13; Hays v. Gainesville, etc., R. Co., 70 Texas 602; 8 S. W. Rep. 491; 34 Am. & Eng. R. Cas. 97; Trow v. Vermont, etc., R. Co., 24 Vt. 487; Virginia, etc., R. Co. v. White, 84 Va. 498; 5 S. E.

that arise, whether usually incident to the service or not.[59] He is under the same obligation to provide for his own safety from dangers of which he has notice, or which he

Rep. 573; 34 Am. & Eng. R. Cas. 22; Downey v. Chesapeake, etc., R. Co., 28 W. Va. 732; Radley v. London, etc., R. Co., L. R. 1 App. Cas. 754; 46 L. J. Ex. D. 573; 35 L. T. 637; 25 W. R. 147; Duncan v. Missouri Pacific Ry. Co., 46 Mo. App. 198.

"Even if one was negligent in going on the track of a logging railroad, yet there was no contributory negligence on his part, he having been struck by lightning and rendered unconscious, and the train which ran over him having been far enough away and going slow enough to have allowed him to be seen and train to be stopped in time to avoid the accident, had a lookout been kept." Sawyer v. Roanoke R. & Lumber Co. (N. C. 1907), 58 S. E. Rep. 598.

"Where an injured person was negligent in assuming a position of danger, he may nevertheless recover if the person charged with the injury became aware of his peril in time to avoid injuring him by the proper use of all preventive means at his command and negligently failed to use such means, provided the injured person was himself free from negligence after he became conscious of his danger." Duncan v. St. Louis & S. F. R. Co. (Ala. 1907), 44 So. Rep. 418.

But that the last chance doctrine, as properly applied, is limited to cases of preceding negligence by the plaintiff and that it does not apply in a case of contemporaneous negligence, is affirmed in the following cases: Holmes v. Southern Pacific R. Co., 97 Cal. 161; 31 Pac. Rep. 834; Clark v. Wilmington, etc., R. Co., 109 N. Car. 430; 14 S. E. Rep. 43; 48 Am. & Eng. R. Cas. 546; Lewis v. Baltimore, etc., R. Co., 38 Md. 588; 10 Am. Ry. Rep. 521; Kellny v. Missouri Pacific Ry. Co., 101 Mo. 67; 13 S. W. Rep. 806; 43 Am. & Eng. R. Cas. 186; Howlerson v. St. Louis, etc., R. Co., 157 Mo. 216; 57 S. W. Rep. 770; 50 L. R. A. 850; Louisville, etc., R. Co. v. Wallace, 90 Tenn. 53; 15 S. W. Rep. 921.

"Where plaintiff was injured on a track by the negligence of defendant, but could have avoided it by the exercise of ordinary care, he cannot recover, though defendant ought to have discovered, but did not discover, his peril in time to prevent the accident, where plaintiff's negligence continued up to the very moment he was hurt." Dyerson v. Union Pac. R. Co. (Kan. 1906), 87 Pac. Rep. 680.

"Where plaintiff has been negligent and his negligence continues and concurrently with the negligence of defendant directly contributes to produce the injury, the doctrine of the last chance does not apply." Drown v. Northern Ohio Traction Co. (Ohio 1907), 81 N. E. Rep. 326.

[59] Schroeder v. Chicago, etc., R. Co., 108 Mo. 322; 18 S. W. Rep. 1094; 53 Am. & Eng. R. Cas. 436; Alcorn v. Chicago, etc., R. Co.,

might discover, by the use of ordinary care, that the employer is to provide it for him.[60]

Where the employment sought and accepted is dangerous, it is the duty of the employee to at least exercise reasonable and ordinary care to avoid injury. If the employment is a hazardous service, he is required to use very great precautions to avoid injury,[61] for while there is an implied contract between the employer and the employee that the former will provide suitable and reasonably safe appliances and means for the conduct of the business, and advise the employee of risks that the employee does not have notice of, yet, if the employer fails in this duty, in either respect, this would furnish no excuse for the employee to voluntarily encounter a known danger in the service.[62]

An employee of a railroad company, to recover for a personal injury growing out of the negligence of the employer, must have used ordinary care on his part, that is, such care as a man of ordinary prudence would usually exercise under the same, or like circumstances.[63] If, having notice of dan-

108 Mo. 81; 18 S. W. Rep. 188; 53 Am. & Eng. R. Cas. 87; Darracott v. Chesapeake & O. R. Co., 83 Va. 288; 31 Am. & Eng. R. Cas. 157; Crutchfield v. Richmond, etc., R. Co., 78 N. Car. 300; 16 Am. Ry. Rep. 212.

[60] Wormell v. Maine C. R. Co., 79 Me. 397; 10 Atl. Rep. 49; 31 Am. & Eng. R. Cas. 272; Johnson v. Chesapeake & O. R. Co., 38 W. Va. 206; 18 S. E. Rep. 573; Hughes v. Winona, etc., R. Co., 27 Minn. 137; 6 N. W. Rep. 553.

[61] Union Pacific R. Co. v. Estes, 37 Kansas 715; 16 Pac. Rep. 131; Parker v. Georgia Pacific R. Co., 83 Ga. 539; 10 S. E. Rep. 233; Deppe v. Chicago, etc., R. Co., 36 Iowa 52; Taylor v. Missouri Pacific Ry. Co., 86 Mo. 457; 16 S. W. Rep. 206; Shoner v. Pennsylvania R. Co., 130 Ind. 170; 28 N. E. Rep. 616; St. Louis, etc., R. Co. v. McClain, 80 Texas 85; 15 S. W. Rep. 789; Riley v. Connecticut River R. Co., 135 Mass. 292; 15 Am. & Eng. R. Cas. 181; Corcoran v. Boston, etc., R. Co., 133 Mass. 507; Maher v. Boston, etc., R. Co., 158 Mass. 36; Roll v. Northern C. R. Co., 15 Hun (N. Y.) 496; 80 N. Y. 647.

[62] Simmons v. Chicago, etc., R. Co., 110 Ill. 340; 18 Am. & Eng. R. Cas. 50.

[63] Wabash R. Co. v. Elliott, 98 Ill. 481; 4 Am. & Eng. R. Cas. 651;

ger in his employment, he fails, from inattention, indifference or forgetfulness, to inform himself of the particular facts, or to take the steps necessary to avoid injury — in other words, if he fails to exercise the care, watchfulness and caution which men of ordinary prudence would exercise under the circumstances — he is guilty of contributory negligence.[64]

§ 400. **Voluntarily selecting more dangerous way.**— In all the multiform duties of employees on railroads, if the employee has the choice of two or more ways of performing his duty open to him and he voluntarily selects the more dangerous way to do his work and, as a result thereof sustains injury, he is guilty of such negligence as will bar an action for damages, in failing to take the course attendant with the less risk of injury; and if the danger is so imminent and apparent, in either or all the ways open to him, that a careful and prudent man would not incur the risk, he cannot recover, unless the evidence shows that the injury to him resulted from the reckless, wanton or willful act of the employer.[65]

Schultz v. Chicago, etc., R. Co., 44 Wis. 638; 18 Am. Ry. Rep. 146.

[64] Louisville, etc., R. Co. v. Hall, 87 Ala. 708; 6 So. Rep. 277; 4 L. R. A. 710; 39 Am. & Eng. R. Cas. 298.

"A switchman in full control of a switch, and with authority to control by signal the movements of engines using it, who allowed an engine to come so close to the switch that he did not have time to complete the act of turning the lever before the engine had passed the switch, and struck his hand which was upon the partly turned lever, was guilty of contributory negligence." Eliot v. Kansas City, etc., R. Co. (Mo. 1907), 102 S. W. Rep. 532.

An engineer who had neglected to see that his sand box contained plenty of sand, got off his engine to gather sand and negligently placed his hand on the rail and got it crushed. His own negligence was held to preclude a recovery. Walker v. Louis Werner, etc., Co. (Ark.), 88 S. W. Rep. 988.

[65] Mobile, etc., R. Co. v. George, 94 Ala. 199; 10 So. Rep. 145; Louisville, etc., R. Co. v. Orr, 91 Ala. 548; 8 So. Rep. 360; Memphis, etc., R. Co. v. Graham, 94 Ala. 545; 10 So. Rep. 283; 53 Am. & Eng. R. Cas. 396; St. Louis, etc., R. Co. v. Brennen, 20 Ill. App. 555;

But it is only when it clearly appears, or the facts are undisputed, that the injured employee had voluntarily chosen a dangerous method of doing his work, a safer one having been provided by his employer, that the court can say, as matter of law, that his method of doing his work, or his selection of the way in which to do it, was negligence on his part.[66]

If the injury occurred, not from the way selected to do the work, but from the defect in the appliances used, when, but for such defect, the duty might have been safely performed, the method selected to do the work will not necessarily bar the recovery, but it will be left to the jury to determine whether the employee was guilty of negligence in selecting the way adopted to do his work.[67]

§ 401. **Effect of employee's negligence.**— An employee of a railroad company cannot recover for injuries received in the service, if his own negligence contributed in part to the

Pennsylvania, etc., R. Co. v. O'Shaughnessy, 122 Ind. 588; 23 N. E. Rep. 675; 41 Am. & Eng. R. Cas. 479; Union Pacific R. Co. v. Estes, 37 Kansas 715; 16 Pac. Rep. 131; Dandie v. Southern Pacific R. Co., 42 La. Ann. 686; 7 So. Rep. 792; Schaub v. Hannibal, etc., R. Co., 106 Mo. 74; 16 S. W. Rep. 924; Moore v. Kansas City, etc., R. Co., 146 Mo. 358; 45 S. W. Rep. 896; Kehler v. Schwenk, 144 Pa. St. 348; 22 Atl. Rep. 910; Gowen v. Harley (by Judge Sanborn), 56 Fed. Rep. 973; Kinney v. Corbin, 132 Pa. St. 341; 19 Atl. Rep. 141.

[66] Missouri Pacific Ry. Co. v. McCally, 41 Kansas 639; 21 Pac. Rep. 574.

[67] Louisville, etc., R. Co. v. Pearson, 97 Ala. 211; 12 So. Rep. 176; Schumaker v. St. Paul, etc., R. Co., 46 Minn. 39; 48 N. W. Rep. 559.

"It is the duty of a party imperiled by another's negligence, where two ways of conduct are open, one safe and the other manifestly dangerous, to adopt the course which is least dangerous." Atlantic Coast Line R. Co. v. O'Neill, 56 S. E. Rep. 986; 127 Ga. 685.

"Where a plaintiff testified that a foreman did not order him to get astride a tie to move it, but ordered him to get into a trench, which would have been a safer method, but that he could not lift the tie without getting astride it, there being hardly room in the trench for him to stand in it, the defenses of contributory negligence or assumed

injury.[68] If the employee and the company are equally to blame for the injury, the employer is not liable.[69] When employees, aware of the dangers of their employment, voluntarily use implements which they know, or by the exercise of reasonable care might know, are not so well adapted to the business as other implements, they cannot recover damages for injuries resulting therefrom, which might have been avoided by the use of that ordinary care which it is the duty of every person to use.[70] There is no presumption of negligence on the part of either plaintiff or defendant, but both are presumed to do their duty; where an employee is injured, however, in consequence of a hand car leaving the track, upon which he was riding and running at the time, since the evidence showed that he was himself controlling the car, in order to recover, he must show, affirmatively, that he was free from fault, or that the derailment of the car was due to the negligence of his employer.[71]

But the rule that mutual negligence of the plaintiff and defendant will defeat the plaintiff's recovery, is subject to the qualification that if the defendant might, by the exercise of reasonable care and prudence, after discovery of the danger to the plaintiff, have avoided the injury, then the plea

risk were available to the employer." Reeves v. Galveston, H. & S. A. Ry. Co. (Tex. Civ. App. 1907), 98 S. W. Rep. 929.

[68] Daub v. Northern Pacific R. Co., 18 Fed. Rep. 625; Bauer v. St. Louis, etc., R. Co., 46 Ark. 388; Baltimore, etc., R. Co. v. Jones, 95 U. S. 439; Schofield v. Chicago, etc., R. Co., 114 U. S. 617; Williams v. Chicago, etc., R. Co., 64 Wis. 1; 24 N. W. Rep. 423; Slavin v. New York, etc., R. Co., 63 Conn. 573; Central, etc., R. Co. v. Kitchens, 83 Ga. 83; 9 S. E. Rep. 827; Chicago, etc., R. Co. v. Merckes, 36 Ill. App. 195.

[69] Indianapolis, etc., R. Co. v. Love, 10 Ind. 554; Cornwall v. Charlotte, etc., R. Co., 97 N. Car. 11; 2 S. E. Rep. 659.

[70] Houston, etc., R. Co. v. Conrad, 62 Texas 627.

[71] Central, etc., R. Co. v. Kenney, 58 Ga. 485; 16 Am. Ry. Rep. 131.

of contributory negligence will not obtain,[72] as already explained.[73]

§ 402. **Contributory negligence of volunteer.**— As the contributory negligence of an employer's own employees will defeat a recovery of damages for an injury resulting therefrom to such employee, *a fortiori* will the contributing negligence of a mere volunteer, who receives an injury while volunteering service to a railroad company, defeat a recovery for an injury thereby received.[74]

In a Massachusetts case,[75] a man volunteered to do a service for a railroad company and he was killed while walking on the track, in performance of the voluntary duties undertaken. The evidence showed a want of ordinary care, on his part, and it was held that no recovery could be had for his death. A similar rule was applied in Mississippi,[76]

[72] Grand Trunk R. Co. v. Ives, 144 U. S. 408; 12 Sup. Ct. Rep. 679; Southern Pacific R. Co. v. Lafferty, 57 Fed. Rep. 536; Northern Pacific R. Co. v. Sullivan, 53 Fed. Rep. 219; 10 U. S. App. 473; 3 C. C. A. 506.

[73] See section "Doctrine of Last Clear Chance," sec. 398.

"Where an illegal act of plaintiff places him in a dangerous situation, and he is injured by defendant, the latter is liable for the injury, if inflicted wantonly and recklessly." Black v. New York, etc., R. Co. (Mass. 1907), 79 N. E. Rep. 797.

"Where, in an action for the death of one struck by a train while rescuing a third person from being struck by the same train, there was evidence that a switchman saw the peril of the third person in time to have stopped the train before reaching him, and that he saw the efforts of decedent to rescue the third person, the negligence of the switchman in failing to give the signal to stop the train was the proximate cause of decedent's death." Texas, etc., R. Co. v. Scarborough (Tex. Civ. App. 1907), 104 S. W. Rep. 408.

[74] New Orleans, etc., R. Co. v. Harrison, 48 Miss. 112; Everhart v. Terre Haute, etc., R. Co., 78 Ind. 292; 41 Am. Rep. 567; 4 Am. & Eng. R. Cas. 599; Barstow v. Old Colony, etc., R. Co., 143 Mass. 535; 10 N. E. Rep. 255; 28 Am. & Eng. R. Cas. 473.

[75] Barstow v. Old Colony, etc., R. Co., 143 Mass. 535; 10 N. E. Rep. 255; 28 Am. & Eng. R. Cas. 473.

[76] New Orleans, etc., R. Co. v. Harrison, 48 Miss. 112.

where it was held that a railroad company was not liable for injuries inflicted through the negligence of its employees, upon a stranger to the company, while engaged in the voluntary service of uncoupling its cars, where, by his own negligence he contributed to the injury received.

§ 403. **Effect of plaintiff's lack of skill.**— Ordinarily, when an adult person solicits employment in a particular line of work, the act of solicitation is held to be an assertion by the employee that he is competent to perform the ordinary duties of the service in which he engages. It is generally regarded as an implied condition of all contracts of employment with an adult person that he is competent to discharge the duties for which he is employed. It is, therefore, the fault of the employee, if he undertakes, without sufficient skill, the performance of hazardous duties, or if he applies less skill than the given duties of his service demand.[77]

But where a railroad company has notice of the lack of skill on the part of a given employee, it will not be permitted to defend the action, upon the lack of skill possessed by him, when he is injured by reason of the unskillful use of defective appliances.[78] and where an inexperienced employee is injured while doing work marked out for him and which he was directed to do by an experienced superintendent, and the evidence showed that the plaintiff did not understand or appreciate the danger of doing the work, it is a question for the jury whether or not he was guilty of contributory negligence in the performance of the duties assigned to him and the court ought not to decide, as matter of law, that he was, or was not negligent.[79]

[77] Union Pacific R. Co. v. Estes, 37 Kansas 715; 16 Pac. Rep. 131.
[78] Goins v. Chicago, etc., R. Co., 37 Mo. App. 221.
[79] Texas, etc., R. Co. v. French (Texas Civ. App.), 22 S. W. Rep. 866.

§ 404. **As a defense to statutory negligence.**— An action for an injury from being struck by a moving train, not operated as provided by statute,[80] is held, in Tennessee, not to lie, on behalf of an employee of the railroad company, whose negligence caused, or contributed to the accident or collision occasioning the injury.[81] In an action by an employee, against a railroad company, for a personal injury, alleged to have been received while the employer was violating the statute of Alabama,[82] the defense of contributory negligence was held to be open to the employer.[83] And in Illinois, the defense was formerly held to obtain in an action, for personal injury, received while a statute was being violated,[84] but of recent years this rule has been abandoned and contributory negligence is not a defense in that State in an action for an injury based on statutory negligence.[85] The Constitution of Mississippi,[86] which provides that "knowledge by an employee injured, of the defective or unsafe character or condition of machinery, ways, or appliances, shall be no defense to an action for injury caused thereby," is held to abolish the defense of contributory negligence, except where the negligence of the employee is willful or reckless,[87] and, generally, to constitute a defense, there must be more than a mere showing of notice of the noncompliance with the statute and it must appear that the employee performed his work in a

[80] Tenn. Code, § 1166, *et seq.*

[81] East Tennessee, etc., R. Co. v. Rush, 15 Lea (Tenn.) 145; Louisville, etc., R. Co. v. Robertson, 9 Heisk. (Tenn.) 276; Louisville, etc., R. Co. v. Burke, 6 Coldw. (Tenn.) 45.

[82] Ala. Code, 1886, § 2590.

[83] Mobile, etc., R. Co. v. Holborn, 84 Ala. 133; 4 So. Rep. 146.

[84] Wabash R. Co. v. Thompson, 10 Ill. App. 271.

[85] Riverton Co. v. Shepard, 207 Ill. 395; 69 N. E. Rep. 921; Western C. Co. v. Beaver, 95 Ill. App. 95; 61 N. E. Rep. 335; Carterville Co. v. Abbott, 81 Ill. App. 279; 55 N. E. Rep. 131; Fulton v. Wilmington Star Co., 133 Fed. Rep. 193.

[86] Miss. Con. 1890, § 193.

[87] Welsh v. Alabama, etc., R. Co., 70 Miss. 20; 11 So. Rep. 723.

dangerous manner, or did some act, as distinguished from a mere passive acquiescence in the violation of the statute.[88] Contributory negligence, however, is held to be a defense in most of the States, for actions for injuries based on statutory negligence.[89]

§ 405. **When intoxication bars recovery.**— Contributory negligence resulting from the inebriation of the injured party will exonerate the party inflicting the injury, if there is no fault on his part.[90] A man cannot voluntarily place himself in an intoxicated condition, whereby he loses control of his brain and muscles, and thereby contributes to an injury to himself, and then require of one ignorant of his condition to pay damages therefor.[91] One standing, in a state of intoxication, on a railroad track, at the usual time of the running of a train, in a position of peril, is guilty of negligence [92] and if one, while helpless from drunkenness, is run over and injured by a passing train, he is held to be guilty of such contributory negligence as will prevent a recovery,

[88] Highland Ave. R. Co. v. Waters, 91 Ala. 435; 8 So. Rep. 357; Spiva v. Osage C. & M. Co., 88 Mo. 68.

[89] Dresser, Emp. Liab., §§ 51, 116; White, Per. Inj. Mines, § 254; Taylor v. Carew Co., 142 Mass. 470; Krause v. Morgen, 52 Ohio St. 325; 40 N. E. Rep. 886; Western v. Lackawanna Co., 105 Mo. App. 702; Payne v. Chicago, etc., R. Co., 129 Mo. 405; 31 S. W. Rep. 885; Hogan v. Citizens Ry. Co., 150 Mo. 36; 51 S. W. Rep. 473.

Contributory negligence is held to bar a recovery by an employee, under the Florida fellow-service statute. (Rev. St., § 2346 and Laws 1891, p. 113.) Atlantic Coast Line R. Co. v. Ryland, 40 So. Rep. 24.

[90] Weeks v. New Orleans, etc., R. Co., 32 La. Ann. 615; Illinois, etc., R. Co. v. Cragin, 71 Ill. 177; Chicago, etc., R. Co. v. Lewis, 5 Ill. App. 242; Southwestern R. Co. v. Hankerson, 61 Ga. 114.

[91] Strand v. Chicago, etc., R. Co., 67 Mich. 380; 34 N. W. Rep. 712; 31 Am. & Eng. R. Cas. 54; Fisher v. West Virginia, etc., R. Co., 19 S. E. Rep. 578; 58 Am. & Eng. R. Cas. 337.

[92] Whalen v. St. Louis, etc., R. Co., 60 Mo. 323; 9 Am. Ry. Rep. 224; Houston, etc., R. Co. v. Simpkins, 54 Texas 615; 6 Am. & Eng. R. Cas. 11.

unless his injuries were wantonly or willfully inflicted, after his peril was discovered.[93]

But drunkenness is not a defense by way of contributory negligence, unless it was the proximate cause of the injury. If the person got drunk under circumstances that any reasonably prudent man could foresee would place him in a position of danger, then his drunkenness would be a defense.[94] Intoxication, however, is not a defense *per se,* but is only evidence of contributory negligence on the part of the injured one. It is only a complete defense when it contributes to occasion the injury.[95]

§ 406. **Remaining in service involving danger.**— The employee is charged in law, with a knowledge of such defects as he could have ascertained by the exercise of reasonable care and diligence to inform himself,[96] but unless the risks are patent he is not under the same obligation to know the nature and extent thereof as the employer is.[97]

The negligence on the part of the employee may consist and often does, in failing to *know,* as well as in failing to *do;* and such is always the case, where it is his duty to know the conditions of his surroundings.[98] If the employee knows, or could know, of the defects or dangers in appliances or his surroundings, by the exercise of ordinary care, and still remains in the employment and is injured, this fact would tend to establish contributory negligence, but it would not be con-

[93] Houston, etc., R. Co. v. Simpkins, *supra.*

[94] Davis v. Oregon, etc., R. Co., 8 Oregon 172.

[95] Lynch v. Mayor, etc., 47 Hun (N. Y.) 524; 15 N. Y. S. R. 103.

[96] Ohio, etc., R. Co. v. Pearcy, 128 Ind. 197; 27 N. E. Rep. 479; Hayden v. Sioux City, etc., R. Co. (Iowa), 48 N. W. Rep. 733.

[97] McDonald v. Chicago, etc., R. Co., 41 Minn. 439; 43 N. W. Rep. 380.

[98] Hewitt v. Flint, etc., R. Co., 67 Mich. 61; 34 N. W. Rep. 659; 31 Am. & Eng. R. Cas. 249.

clusive evidence thereof,[99] although so held in some States.[1] Notwithstanding his notice of the danger or the fact that it could have been appreciated and understood, by due care, if the employee has used an honest effort to perform his duty and immediate danger was not obviously incurred by remaining in the service, the opportunity to know of the danger will not prevent a recovery, but the issue of his negligence should be submitted to the jury.[2]

§ 407. **Employee may assume employer's performance of duty.**— Negligence can never be predicated upon the assumption, by the employee, that the employer has performed his duty, as the employee has a legal right to rely upon this presumption.[3] Where an employee, therefore, assumes a posi-

[99] Perigo v. Chicago, etc., R. Co., 55 Iowa 326; 7 N. W. Rep. 627; Deppe v. Chicago, etc., R. Co., 38 Iowa 592; Kansas City, etc., R. Co. v. Burton, 97 Ala. 240; 12 So. Rep. 88; 53 Am. & Eng. R. Cas. 115; Galveston, etc., R. Co. v. Sullivan, 2 Texas Unrep. Cas. 315.

[1] Kitteringham v. Sioux City, etc., R. Co., 62 Iowa 285; 17 N. W. Rep. 585; Olsen v. St. Paul, etc., R. Co., 38 Minn. 117; 35 N. W. Rep. 866; 33 Am. & Eng. R. Cas. 386; Smith v. Memphis, etc., R. Co., 18 Fed. Rep. 304; McDade v. Washington, etc., R. Co., 5 Mackey (D.C.) 144; 26 Am. & Eng. R. Cas. 325; Odell v. New York, etc., R. Co., 120 N. Y. 323; 24 N. E. Rep. 478; Louisville, etc., R. Co. v. Hall, 91 Ala. 112; 8 So. Rep. 371; 48 Am. & Eng. R. Cas. 170; Smith v. Peninsular Car Works, 60 Mich. 501; 27 N. W. Rep. 662; 1 Am. St. Rep. 542.

[2] Fiero v. New York, etc., R. Co., 71 Hun (N. Y.) 213; Louisville, etc., R. Co. v. McCoy, 81 Ky. 403; 15 Am. & Eng. R. Cas. 277; Thorpe v. Missouri Pacific Ry. Co., 89 Mo. 650; 2 S. W. Rep. 3. A brakeman's knowledge of an unsafe rail, in the track, was held, in Missouri, not to defeat a recovery, if it did not threaten immediate injury. Soeder v. St. Louis, etc., R. Co., 100 Mo. 673; 13 S. W. Rep. 714. See, also, Mahaney v. St. Louis, etc., R. Co., 108 Mo. 191; 18 S. W. Rep. 895.

"An employee is guilty of contributory negligence in using a machine which he knows to be dangerous, notwithstanding he has protested against such use, if the danger is such that an ordinarily prudent man under the circumstances would not have incurred it, or the employee in performing his work by his own negligence increases the risk." St. Louis Southwestern Ry. Co. v. Kern (Tex. Civ. App. 1907), 100 S. W. Rep. 971.

[3] Irvine v. Flint, etc., R. Co., 89 Mich. 416; 50 N. W. Rep. 1008;

tion which is not hazardous in itself, but is made so through an act done by the employer, without notice to the employee, the latter cannot be charged with contributory negligence, as he has a right to assume that he will not be placed in danger by some act of the employer, over which he has no control.[4] Where a car repairer was under a car repairing it and his foreman had delegated two coemployees to notify him of approaching trains and they failed in their duty to warn him, it was held that he was not negligent, as he had a right to expect notice, or a performance of this duty.[5]

It was likewise held, that an employee may assume that signals he has properly given will be obeyed and if he goes upon the track, after a proper signal to the employees in charge of the engine to stop, he will not be precluded because of his negligence, if the signal was not obeyed, but the engine was run upon him, as he has the right to assume that his coemployees will obey his signals and perform their duty.[6]

§ 408. **Duty to look and listen for trains.**— Where the facts show that if the plaintiff, or injured person, had looked, he would have seen an approaching train, and that he had facul-

53 Am. & Eng. R. Cas. 210.

[4] Wills v. Cape Girardeau, etc., R. Co., 44 Mo. App. 51.

[5] Missouri Pacific Ry. Co. v. Williams, 75 Texas 4; 12 S. W. Rep. 835.

[6] Steele v. Central R. Co., 43 Iowa 109; Bucklew v. Central Iowa R. Co., 64 Iowa 603; Pringle v. Chicago, etc., R. Co., 64 Iowa 613; 21 N. W. Rep. 108; 18 Am. & Eng. R. Cas. 91; Murphy v. New York, etc., R. Co., 118 N. Y. 527; 23 N. E. Rep. 812.

"Where a railroad rule required cars left on a grade siding to be coupled together, a brakeman walking over such cars in the performance of his duty was entitled to assume that the rule had been complied with, and was not guilty of contributory negligence, either in failing to inspect the cars to ascertain whether they were coupled or in assuming that they were coupled." St. Louis Southwestern Ry. Co. v. Pope (Tex. Civ. App. 1906), 97 S. W. Rep. 534.

ties to understand the danger, he is charged with the knowledge of such danger and is bound to act on that knowledge, as a reasonably prudent man, and his failure to so act is negligence and will defeat his recovery, notwithstanding the negligence of the defendant.[7] A person in possession of his faculties cannot be said to have exercised due care, who goes upon a railroad track, in front of a moving train, where it appears that the usual signals were given;[8] a person who steps against an approaching locomotive, which could have been seen, if he had stopped, looked or listened, is held to be negligent so as to prevent a recovery, for a resulting injury,[9] nor would it furnish any excuse that the plaintiff was absent-minded and did not stop to hear or look to see the approaching cars,[10] or that the defendant was negligent in failing to give the statutory signals.[11]

But the plaintiff need only use ordinary care and is not required to keep a constant lookout for dangers and perils.[12] A person cannot be charged with danger, when, under the existing conditions, he had no reason to anticipate danger at the place where the injury occurred;[13] one is not necessarily guilty of contributory negligence, because he might possibly have perceived the danger, but did not,[14] and the mere fact that plaintiff while walking on a station platform, did not look behind him for an approaching train, is not such negligence as will preclude a recovery for an injury

[7] Glasscock v. Central Pacific R. Co., 73 Cal. 137; 14 Pac. Rep. 518.
[8] Moore v. Boston, etc., R. Co., 159 Mass. 399; 34 N. E. Rep. 366.
[9] Hauser v. Central R. Co., 147 Pa. St. 440; 23 Atl. Rep. 766.
[10] Lake Shore, etc., R. Co. v. Miller, 25 Mich. 274.
[11] McDonald v. International, etc., R. Co. (Texas), 22 S. W. Rep. 939.
[12] Grand Rapids, etc., R. Co. v. Martin, 41 Mich. 667.
[13] Langan v. St. Louis, etc., R. Co., 72 Mo. 392; 3 Am. & Eng. R. Cas. 355.
[14] Baldwin v. St. Louis, etc., R. Co., 63 Iowa 210; 18 N. W. Rep. 884; 15 Am. & Eng. R. Cas. 166.

from a train that approached from behind, without the customary signals.[15]

[15] Langan v. St. Louis, etc., R. Co., 72 Mo. 392; 3 Am. & Eng. R. Cas. 355.

"Failure of a traveler approaching a railroad crossing to look both ways and listen for trains is not excused by the negligence of the railroad company in failing to give proper signals." Porter v. Missouri Pac. Ry. Co. (Mo. 1906), 97 S. W. Rep. 880.

"It is the duty of a traveler approaching a railroad crossing to look and listen in both directions for approaching trains, and to continue his vigilance in that respect until the danger is passed; but, when the circumstances are such that danger is more to be apprehended from one direction, he may, to that extent, relax his vigilance in the opposite direction." St. Louis, I. M. & S. Ry. Co. v. Dillard (Ark. 1906), 94 S. W. Rep. 617.

"A person approached a railroad track by a flight of steps down an embankment, and stepped upon the track in front of a train, whereby she was injured, without looking in either direction to see that the way was clear, although the train which struck her would have been in plain view from the time she started down the steps. *Held*, that she was negligent in going on the track." Duncan v. St. Louis & S. F. R. Co. (Ala. 1907), 44 So. Rep. 418.

The rule exempting a railroad company from liability for an injury to a traveler, injured as a result of crossing a railroad track, without looking or listening for an approaching train, was held not to apply to an employee whose duty placed him upon or near the track, in the following cases: Shoner v. Pennsylvania R. Co., 130 Ind. 170; 28 N. E. Rep. 616; 29 N. E. Rep. 775; Crowley v. Burlington, etc., R. Co., 65 Iowa 658; 20 N. W. Rep. 467; 22 N. W. Rep. 918; Goodfellow v. Boston, etc., R. Co., 106 Mass. 461; McMarshall v. Chicago, etc., R. Co., 80 Iowa 757; 45 N. W. Rep. 1065; Steele v. Central R. Co., 43 Iowa 109; Louisville, etc., R. Co. v. Potts, 92 Ky. 30; 17 S. W. Rep. 185; Erickson v. St. Paul, etc., R. Co., 41 Minn. 500; 43 N. W. Rep. 332; 5 L. R. A. 786.

But the failure to look and listen for approaching trains, was held to preclude a recovery by employees who had failed to discharge such duty, while working upon or near the track, when a collision occurred and the employees in charge of trains were not able to avoid the injury, by reasonable care, after discovery of their peril, in the following cases: Clark v. Boston, etc., R. Co., 128 Mass. 1; 1 Am. & Eng. R. Cas. 134; Holland v. Chicago, etc., R. Co., 18 Fed. Rep. 243; 5 McCrary (U. S.) 549; Chicago, etc., R. Co. v. Houston, 95 U. S. 697; Bertleson v. Chicago, etc., R. Co., 5 Dakota 313; 40 N. W. Rep. 531; Bauer v. St. Louis, etc., R. Co., 46 Ark. 388; Elliott

v. Chicago, etc., R. Co., 5 Dakota 523; 41 N. W. Rep. 758; 3 L. R. A. 363; 38 Am. & Eng. R. Cas. 62; Baltimore, etc., R. Co. v. Depew, 40 Ohio St. 121; Baltimore, etc., R. Co. v. Jones, 95 U. S. 439; Lenix v. Missouri Pacific Ry. Co., 76 Mo. 86; Crowe v. New York, etc., R. Co., 23 N. Y. Supp. 1100; 70 Hun 37; 53 N. Y. S. R. 558; Haden v. Sioux City, etc., R. Co. (Iowa), 48 N. W. Rep. 733; Nave v. Alabama, etc., R. Co., 96 Ala. 264; 11 So. Rep. 391; 54 Am. & Eng. R. Cas. 151; Glass v. Memphis, etc., R. Co., 94 Ala. 581; Aerkfetz v. Humphries, 145 U. S. 418; 12 Sup. Ct. Rep. 835; 53 Am. & Eng. R. Cas. 459; Schaible v. Lake Shore, etc., R. Co., 97 Mich. 318; 56 N. W. Rep. 565; Myers v. Indianapolis, etc., R. Co., 113 Ill. 386; 1 N. E. Rep. 899.

"The fact that an employee working close to a track knows that it had previously been the rule of the company to run trains only in one direction, except under unusual circumstances, does not excuse him for failing to look both ways before crossing the track." Dyerson v. Union Pac. R. Co. (Kan. 1906), 87 Pac. Rep. 680.

"The 'look and listen' rule, applicable to travelers at railroad crossings, does not apply in all strictness to railroad employees required to remain on or about the track." Pittsburgh, C., C. & St. L. Ry. Co. v. Lightheiser (Ind. 1906), 78 N. E. Rep. 1033.

Any person, whether employee, licensee, trespasser, or passenger, who steps upon a railroad track, at a place where trains are accustomed to be run, without stopping, or looking or listening for a train, is negligent as matter of law. Maxey v. Railroad Co., 113 Mo. 1; Zimmerman v. Railroad Co., 71 Mo. 476; Harlan v. Railroad Co., 64 Mo. 480; 65 Mo. 22; Hallihan v. Railroad Co., 71 Mo. 113; Taylor v. Missouri Pacific R. Co., 86 Mo. 457.

And that this rule applies with particular force, to employees in all character of employments, where their duties bring them on or near the railroad track, is apparent from reading the cases.

In Harris v. Missouri Pacific Railway Co. (40 Mo. App. 255), the decedent was engaged with others in building a fence along a railroad track, near a sharp curve. His business was to carry posts from a place where they had been unloaded to the place where they were needed for use in building the fence, and while so engaged, after having deposited a load of posts, standing near the track, for a train to pass, while on his way to get another load of posts, he was struck by a passenger train rounding the curve without signal, and killed. There was no watchman on the work and no precautions were taken to avoid such an injury, but while it was held that this was negligence, on the part of the decedent's foreman, it was also held, in a well-written opinion by Judge Ellison, that the decedent was also negligent in stepping on the track, without looking for this train, and his daughter was denied a recovery for his death.

The Missouri court recently rendered an opinion, where the same rule is applied, by Judge Fox, and all the cases bearing on this rule or the leading decisions in this State are collated. In that case, decedent, who had been working for defendant railroad company in its yards for about two years, was required on the night he was killed to sweep snow from the switches. In order to do this work it was necessary that he go between the tracks. With knowledge of the time that an engine would back out of the roundhouse to pull an incoming passenger train, he allowed himself to be struck and killed thereby, when it was making the ordinary noise of an engine operated by its own steam and running at a speed not exceeding three miles an hour. Decedent's vision or hearing was unimpaired, and even when the engine was 10 feet away from him he could have stepped aside and avoided the collision. *Held*, that decedent was negligent as a matter of law. Cahill v. Chicago & A. Ry. Co., 205 Mo. 393; 103 S. W. 532.

In Hallihan v. Hannibal, etc., R. Co., 71 Mo. 117; 11 Am. & Eng. R. Cas. 117, a car repairer, in a switch yard, who knew the custom of running trains in the yard, stooped down at the end of a car and was struck by the car being pushed by another car shunted against it. It was claimed that a tool house would obstruct the approach of the car and that no notice was given the deceased. The court held, however, that the deceased was himself guilty of negligence preventing a recovery by his wife.

Judge Burgess applied the same rule in the recent case of Evans v. Wabash Ry. Co. (178 Mo. 514), as to a section man, engaged in work that required his constant attention, *right on or adjoining* the track. It was held that the rule enforced as against strangers even, and the general traveling public, on the highway, where they have a right to be, that a railroad track is a place of danger and it is negligence to go upon the track without stopping, or looking or listening for a train, applied peculiarly to railroad employees, more familiar with such surroundings and the uses of the track and that an employee had no right to become so engrossed in his work as to forget the danger of the track. See, also, Loring v. Memphis Ry. Co., 128 Mo. 328, 349; Loeffler v. Missouri Pacific Ry. Co., 96 Mo. 270; Davis v. Railroad Co., 159 Mo. 1; Sharp v. Railroad Co., 161 Mo. 241.

The Kansas City Court of Appeals recently decided a similar case, where this rule was applied, in an opinion by Judge Smith.

"In an action against a railroad by one of its car inspectors for personal injuries resulting from the shunting of a car in on a side track and striking one of two cars between which plaintiff was working, plaintiff testified that the head brakeman of the switching crew, in answer to plaintiff's question, 'Are you done switching?' answered, 'Yes,' and he also testified that he did not know whether the brakeman understood his question, and plaintiff made no pretense that in

this query to the brakeman he embraced the information that he desired to go between the cars then standing on the side track to make repairs, or that the brakeman's answer was made with any such knowledge. It also appeared that the visible facts confronting the plaintiff at the time were sufficient to warn him that either the brakeman had misunderstood him or *vice versa*, and that the switching was not then completed. *Held* insufficient to show that the switching crew knew, or ought to have known, when thy shunted the car in on the side track that plaintiff was then between the cars, and hence the proximate cause of plaintiff's injuries was his own negligence." Whitney v. Chicago, B. & Q. Ry. Co., 109 Mo. App. 123; 83 S. W. 68. See also, Renfro v. Chicago, etc., R. Co., 86 Mo. 302.

Nor is the rule different in other States, but the same denial of liability on the part of a railroad company, is applied to the case of employees injured by getting on the track, where cars are accustom to be run, without adopting precautions necessary to protect themselves against this general manner of conducting the employer's business, by the courts of different States.

In Galveston, etc., R. Co. v. Arispe (81 Texas 517; 17 S. W. Rep. 47; 48 Am. & Eng. R. Cas. 350), the backing of a construction train, in the usual manner, was held not to give a track hand any right of action for an injury resulting from such backing, as the movement of trains in such manner was held to be a risk assumed, as an incident to the employment which all employees understand.

In Wabash, etc., R. Co. v. Conkling (15 Ill. App. 157), a fireman, while cleaning the ash pan of an engine, on a side track, was run over and killed by a train backing in on the siding, in violation of a rule of the company, but he was held to have assumed the risk.

One moving cars with a crow-bar, standing at the end of a car astride the rail, where he was struck by the car being hit by another car, was held guilty of such negligence as precluded a recovery, in Minnesota, in the case of Nordquist v. Great Northern R. Co., 95 N. W. Rep. 322.

Sectionmen shoveling snow were chargeable with the duty of looking out for approaching trains, in Massachusetts. Morris v. Boston, etc., R. Co., 15 Am. Neg. Rep. 8.

A person standing on or near a railroad track, with his back to a stationary freight car, and who was run over and killed, was held negligent, precluding a recovery, in Zirkle v. Missouri Pacific Ry. Co., 14 Am. Neg. Rep. 51.

An employee engaged in pushing a car with a crow-bar, struck and killed by the car, which was hit by other cars, was held guilty of negligence denying a recovery to his representative, in Street v. Railroad Co., 14 Am. Neg. Rep. 644.

A car cleaner, hurt by being thrown from the car by other cars,

§ 409. **Failure to guard against known danger.**— The law requires a person, when approaching a known place of danger, to exercise such care for his safety as an ordinarily prudent man would exercise under the circumstances.[16] When a person knows that he is approaching a place of danger and yet takes no precaution to avoid an injury, until it is too late, he cannot escape the charge of contributory negligence.[17] A failure, under ordinary circumstances, to make diligent use of the available means at one's command to avoid a known and apprehended danger, where it is apparent that such danger might have been avoided if such means had been used, is to be regarded, generally, as concurring negligence, on the part of the injured person.[18]

But where danger is not actually known, nor apparent to ordinary observation, nor reasonably to be apprehended, proof of positive or special care to avoid it is not required, as in the case where the danger is known or is apparent.[19]

§ 410. **Voluntarily assuming position of peril.**— If any person voluntarily and unnecessarily puts himself into a dangerous position, where there are other positions that he may take, that are safer, he cannot recover damages for an injury to which he has thus contributed, by his failure to assume the safer course open to him.[20]

where no precautions were adopted to prevent the collision, was denied a right of recovery, in Setterstorm v. Railroad (Minn.), 14 Am. Neg. Rep. 106.

[16] Chicago, etc., R. Co. v. Hutchinson, 120 Ill. 589; 11 N. E. Rep. 855; 32 Am. & Eng. R. Cas. 82; Chicago, etc., R. Co. v. Clough, 134 Ill. 586.

[17] Nash v. New York, etc., R. Co., 125 N. Y. 715; 51 Hun 594.

[18] Brown v. Milwaukee, etc., R. Co., 22 Minn. 165; 19 Am. Ry. Rep. 298.

[19] Chicago, etc., R. Co. v. Olsen, 12 Ill. App. 245; Snyder v. Pittsburg, etc., R. Co., 11 W. Va. 14; 18 Am. Ry. Rep. 154.

[20] Cunningham v. Chicago, etc., R. Co., 5 McCrary (U. S.) 465; 17 Fed. Rep. 882; 12 Am. & Eng. R. Cas. 217; Darracott v. Chesapeake,

An employee who voluntarily puts himself in a position of danger at a time and place when and where he had no right to be, and when he knew the employer did not require his presence at that place, cannot recover for an injury from the ordinary danger resulting from the movement of a train or engine.[21]

But a person, who, under sudden excitement rushes to the rescue of a human being, is not chargeable with such negligence, as matter of law, as will preclude a recovery, if the circumstances are such that an ordinarily prudent person would act in such manner, as where a mother attempts to rescue her child from being crushed by a passing train,[22] nor will an employee be held guilty of such negligence as to bar a recovery, although he voluntarily and without actual necessity exposes himself to danger, if he incurs such danger in the discharge of a specific duty of the employer and uses due care to avoid injury in the discharge of such duty.[23]

etc., R. Co., 83 Va. 288; 31 Am. & Eng. R. Cas. 157; Frazer v. South & N. Alabama R. Co., 81 Ala. 185; 1 So. Rep. 85; 85 Am. & Eng. R. Cas. 565; Schilling v. Chicago, etc., R. Co., 71 Wis. 255; 34 Am. & Eng. R. Cas. 60. Approaching a place of known danger, in the dark, held negligence, in Pennsylvania, in Ingram v. Lehigh, etc., R. Co., 148 Pa. St. 177; 23 Atl. Rep. 1001.

[21] Loeffler v. Missouri Pacific Ry. Co., 96 Mo. 267; 9 S. W. Rep. 580; Mauerman v. St. Louis, etc., R. Co., 41 Mo. App. 348.

[22] Donahue v. Wabash R. Co., 83 Mo. 560; 53 Am. Rep. 594; Pennsylvania R. Co. v. Langendorf, 48 Ohio St. 316; 28 N. E. Rep. 172; 49 Am. & Eng. R. Cas. 317; Eckert v. Long Island R. Co., 57 Barb. (N. Y.) 555; 43 N. Y. 502.

[23] Jeffrey v. Keokuk, etc., R. Co., 56 Iowa 546; 9 N. W. Rep. 884; 5 Am. & Eng. R. Cas. 568.

Exposing one's self to danger to save life, was held not to be necessarily negligent, if attempted within the scope of an employee's duty, under circumstances which would not amount to rashness, in the judgment of prudent persons, in the following cases: Condiff v. Kansas City, etc., R. Co., 45 Kansas 256; 25 Pac. Rep. 562; 48 Am. & Eng. R. Cas. 417; Schroeder v. Chicago, etc., R. Co., 108 Mo. 322; 18 S. W. Rep. 1094; 53 Am. & Eng. R. Cas. 436.

And, see, as to attempt to save employer's property, as excusing

§ 411. **Crossing track in front of train.**— It is contributory negligence for one to attempt to cross a railroad track immediately in front of a moving train and no recovery can be had for an injury caused by such a rash act on the part of the person injured, regardless of the speed of the train, whether the injured person is an employee,[24] or a third person.[25]

In a Colorado case, [26] a railroad carpenter, desirous of passing across a railroad track, went between two cars, to

otherwise culpable conduct, in the view of the Illinois court, Pullman Car Co. v. Laack, 143 Ill. 242; 32 N. E. Rep. 285.

[24] Collins v. Burlington, etc., R. Co., 83 Iowa 346; 49 N. W. Rep. 848; Mahlen v. Lake Shore, etc., R. Co., 49 Mich. 585; 14 N. W. Rep. 556; 14 Am. & Eng. R. Cas. 687; German v. Suburban Transit Co., 13 N. Y. Supp. 897; 37 N. Y. S. R. 360.

"Where intestate, a railroad man of long experience and observation had habitually passed the crossing where he was killed, and was familiar with defendant's habit in switching cars over the crossing, and at the time of the accident the headlight of the engine could have been distinctly seen for some distance if intestate had looked therefor, he was legally charged with having seen the same." Chicago, M. & St. P. Ry. Co. v. Clarkson (U. S. C. C. A., Iowa 1906), 147 Fed. Rep. 397.

"Plaintiff's intestate drove an express wagon upon a street crossing over the defendant's railroad in front of a string of freight cars which were being backed along a side track, and was struck by such cars and killed. He was well acquainted with the crossing, where there were six parallel tracks in quite constant use. The accident occurred in the daytime, and from any point within 50 feet from the tracks, he could have seen along them in the direction from which the cars were coming for four hundred feet, yet he drove slowly and went upon the tracks without stopping. The cars were moving at a speed of from five to twelve miles an hour. *Held*, that conceding defendant's negligence in respect to the speed of the cars, and the absence of signals, deceased was guilty of negligence in failing to look or listen before driving on the crossing which directly contributed to his death and precluded a recovery therefor." Illinois Cent. R. Co. v. Ackerman (U. S. C. C. A., Iowa 1906), 144 Fed. Rep. 959.

[25] Memphis, etc., R. Co. v. Jobe, 69 Miss. 452; 10 So. Rep. 672; Craddock v. Louisville, etc., R. Co. (Ky.), 16 S. W. Rep. 125.

[26] Lord v. Pueblo, etc., R. Co., 12 Colo. 390; 21 Pac. Rep. 148.

one of which an engine was attached and in the act of backing. He was crushed between the cars, but was held to have caused his own death by his rash act of crossing in front of the moving car. A brakeman [27] or switchman [28] who forgets himself or his surroundings and steps or walks in front of a moving engine or car, is guilty of contributory negligence, as matter of law, the same as a third person is guilty of negligence who drives in front of an approaching engine or car, taking his chances upon being able to cross the track before the car or engine shall strike him.[29] In none of these

[27] Pennsylvania R. Co. v. O'Shaughnessy, 122 Ind. 588; 23 N. E. Rep. 675; 41 Am. & Eng. R. Cas. 479.

[28] Dering v. New York, etc., R. Co., 50 N. Y. S. R. 832; 67 Hun 650; 22 N. Y. Supp. 344.

[29] Prewitt v. Eddy, 115 Mo. 283; 21 S. W. Rep. 742; Guenther v. St. Louis, etc., R. Co., 108 Mo. 18; 18 S. W. Rep. 846; Boyd v. Wabash R. Co., 105 Mo. 371; 16 S. W. Rep. 909.

"To ignore the warning given by gates closed at a crossing tends to show gross negligence." Weaver v. Southern Ry. Co. (S. C. 1907), 56 S. E. Rep. 675; 76 S. C. 49.

"A traveler upon a highway crossing a railway track must exercise that high degree of care the extreme danger of the place requires of every person of ordinary prudence." Fitzhugh v. Boston & M. R. R. (Mass. 1907), 80 N. E. 792.

"A party cannot recover for injuries received at a crossing if guilty of contributory negligence." Louisville & N. R. Co. v. Wilson (Ky. 1907), 100 S. W. Rep. 302.

"The fact that a railway employee works close to a track and has frequent occasion to cross the same does not relieve him from the requirement that in order to be deemed in the exercise of ordinary prudence he must look in both directions for an approaching train before crossing." Dyerson v. Union Pac. R. Co. (Kan. 1906), 87 Pac. Rep. 680.

In a recent Arkansas case, it was held that a person who, on his way to a depot, in attempting to cross the track in front of a moving train, stumbles over a grade stake and falls on the track and is killed by the train, which he knew was coming, is chargeable with contributory negligence as matter of law. St. Louis, etc., R. Co. v. Ferrell, 105 S. W. Rep. 263. See, also, Burns v. St. Louis, etc., R. Co., 76 Ark. 10; 88 S. W. Rep. 824.

In St. Louis, etc., R. Co. v. Ferrell (105 S. W. Rep. 263), Hill, C. J., speaking for the Arkansas Supreme Court, said:

"But, even if the railroad company was guilty of negligence in any of the particulars charged, yet the contributory negligence of Mr. Ferrell would defeat the action. He was twelve inches from the ends of the cross-ties when he stumbled and fell in front of the moving train. He knew the train was coming. He had a good and safe place to travel on the west track; but for some reason he left that route and was either running too near the main track for safety, or else, which is more probable, he was trying to follow his companion across to the east side, on which the depot was located. He would probably have safely crossed as his companion did had it not been that he unfortunately stumbled and met his death. This is a stronger case of contributory negligence than was before the court in Burns v. Railroad, 76 Ark. 10; 88 S. W. Rep. 824, in which the court declared the facts therein as a matter of law showed contributory negligence. The court erred in submitting the case to the jury."

Where one driving on a country road approached a railroad crossing, with an unobstructed view of the track for a mile or more, and, after waiting for a freight train to pass, drove on the track, without either stopping, looking, or listening, he was guilty of contributory negligence, precluding recovery for injuries sustained in a collision with a train following the freight train, though no train was scheduled to pass on the track at that place at that time, and though he acted on the supposition that no other train would immediately follow the freight. Jackson v. Mobile & O. R. Co., 42 So. Rep., 236.

"Where a train of cars partially blocks a street in such way as to suggest that its position was likely to be changed at any moment, it is contributory negligence for a person to attempt to drive behind it when a slight backward movement would result in accident." Chicago Terminal Transfer Co. v. Helberg, 124 Ill. App. 113.

"Where decedent, when approaching a railroad crossing at which he was killed, looked around before going on the track and saw the train, but nevertheless drove directly on the crossing, and urged his horses over the same, he was guilty of contributory negligence as a matter of law." Porter v. Missouri Pac. Ry. Co. (Mo. 1906), 97 S. W. Rep. 880.

"It was contributory negligence, barring recovery against an electric railway company for injuries at a crossing, for one to attempt to ride a horse across the track, where he could have seen the approaching car in time to have avoided a collision, but failed to look." Phillips v. Washington & R. Ry. Co. of Montgomery County (Md. 1906), 65 Atl. Rep. 422.

"Decedent was guilty of contributory negligence barring recovery for her death in collision with a train at a railway crossing, where in the daytime she attempted to drive across the track in a buggy with the top down, and with an unobstructed view of the train's ap-

proach at forty or fifty feet before reaching the crossing, driving in a trot, making no stop, and apparently not looking up the track." Stotler v. Chicago & A. Ry. Co. (Mo. 1907), 103 S. W. Rep. 1.

"A pedestrian, intending to take passage on a train at a station, was struck by a train which did not stop there. No warning was given that the train would not stop. Trains customarily stopped at the station, which fact was known to the pedestrian. The pedestrian first saw the train about seven hundred or eight hundred feet from the station. She next saw it about one hundred and twenty feet from her and instead of attempting to cross there, she walked a distance of thirty-five or forty feet to a place at or near the center of a street and without looking for the approaching train she stepped on the track, and was injured. While walking the distance of thirty-five or forty feet she was in a place of safety and could, at every instant, have commanded a full view of the approaching train. *Held*, that she was guilty of contributory negligence as a matter of law." Judgment, 95 N. Y. S. 169, 107 App. Div. 341, reversed; Cranch v. Brooklyn Heights R. Co., 78 N. E. Rep. 1078; 186 N. Y. 310.

"Decedent, a man thirty-nine years old, possessed of unimpaired senses of sight and hearing, undertook for his own purposes to cross defendant's railroad tracks in a yard on a dark night when he knew engines and cars were liable to be constantly moving on them. On reaching one of the tracks on which a large road engine and tender was backing at the rate of six miles an hour, he stepped on the track and was run over and killed before he could escape. The engine was necessarily making much noise and the bell was being constantly rung, though there was no light on the tender. *Held*, that the physical facts conclusively established that he was guilty of contributory negligence as a matter of law." Rich v. Chicago, M. & St. P. Ry. Co. (U. S. C. C. A., Iowa 1906), 149 Fed. Rep. 79.

"Where deceased, with an unimpeded view of an oncoming train, with hearing and sight not sufficiently impaired to palliate utter lack of attention, while driving a team which were not uncontrollable, kept his team trudging along, either entirely oblivious of his duty to himself or else deluded in the belief that he could pass a railroad crossing safely ahead of an approaching train, he was guilty of contributory negligence, precluding a recovery for his death in a collision ensuing between the train and his vehicle." Judgment (1905), 96 N. Y. S. 431; 109 App. Div. 418, affirmed. Hood v. Lehigh Valley R. Co., 78 N. E. Rep. 1105.

"The fact that the view of one approaching a railroad crossing was obstructed, he being in a position to hear warning signals, and listening for them, did not require him to stop his horse, and go forward on foot to a place where an unobstructed view could be obtained."

instances will the law absolve the injured person from the result of his own contributory negligence or hold the railroad company for the consequences of such rashness.

§ 412. **Standing or walking upon track.**— On a railroad track, where cars frequently pass, every one is bound to be vigilant for his own protection, according to the common experience of men of ordinary prudence, and standing on a railroad track, with one's back to a train of cars, in the absence of anything showing a necessity or excuse for such conduct, is negligence.[30] And the rule obtains as well to an employee as to a third party, for, as said by Judge Gantt, speaking for the Missouri Supreme Court, in a leading case: "If the law exacts of a traveler upon a highway, the duty of looking and listening, *a fortiori* it demands of an employee, familiar with the usages and dangers of a switch yard, that he look before he steps upon a track, upon which his daily experience teaches him a train, or an engine, may pass at any moment."[31] Unless an employee, therefore, is acting

Mitchell v. St. Louis & S. F. R. Co. (Mo. App. 1906), 97 S. W. Rep. 552.

"A traveler approaching a railway crossing in a town has a right to assume that the railway company will obey the speed ordinance of the town, whether he sees or hears the train or not, unless his sight or hearing inform him that the company is running its trains in violation of the ordinance." Southern Ry. Co. v. Stockdon (Va. 1907), 56 E. S. Rep. 713.

"One is not guilty of contributory negligence *per se* in attempting to drive over a railroad crossing in front of an engine standing still, with no sign of an intention to move it." Atchison, T. & S. F. Ry. Co. v. Wilkie (Kan. 1907), 90 Pac. Rep. 775.

[30] Carroll v. Minnesota Valley R. Co., 13 Minn. 30; 14 Minn. 57; Kansas Pacific R. Co. v. Twombly, 3 Colo. 125; 21 Am. Ry. Rep. 447.

"In an action against a railroad for injuries to a person walking on the track, evidence *held* insufficient to show negligence on defendant's part." St. Louis, I. M. & S. Ry. Co. v. London (Ark. 1907), 102 S. W. Rep. 212.

[31] Loring v. Kansas City, etc., R. Co., 128 Mo. 359; 31 S. W.

under orders in remaining on a railroad track, he places himself there at his own peril and cannot recover for an injury there received,[32] nor would it alter the rule that he was engaged in work upon the track, at the time of his injury, for ordinary prudence would compel him to leave the track in time to avoid being injured by an approaching train and if he failed to do so, he would be negligent.[33]

But the want of vigilance arising from standing on a railroad track is always a matter of defense in an action for damages for an injury occasioned thereby and in an Illinois case it was held not to be conclusive proof of negligence, in all cases.[34] Of course, in States where the doctrine of last clear chance has been announced, the company might be liable, notwithstanding such negligence on the part of an employee or third party, if the injury could have been avoided, by reasonable care on the defendant's part, after the danger to the injured person was discovered,[35] and the circumstances may be such as to make it negligence of the defendant to

Rep. 6; Elliott v. Railroad, 150 U. S. 245; Aerkfetz v. Humphries, 145 U. S. 418.

[32] Moore v. Norfolk, etc., R. Co., 87 Va. 489; 12 S. E. Rep. 968; Keyes v. Pennsylvania R. Co. (Pa.), 3 Atl. Rep. 15; Collins v. Burlington, etc., R. Co., 83 Iowa 346; 49 N. W. Rep. 848; Chicago, etc., R. Co. v. Davis, 53 Fed. Rep. 61; 10 U. S. App. 422; 3 C. C. A. 429; 53 Am. & Eng. R. Cas. 461; Harris v. Missouri Pacific R. Co., 40 Mo. App. 255; Chesapeake, etc., R. Co. v. Lee, 84 Va. 642; 5 S. E. Rep. 579; Engleking v. Kansas City, etc., R. Co., 187 Mo. 158; 86 S. W. Rep. 89; Brocksmidt v. St. Louis, etc., R. Co. (Mo.), 103 S. W. Rep. 964.

[33] Evans v. Wabash R. Co., 178 Mo. 508; 77 S. W. Rep. 515; Stephens v. Hannibal, etc., R. Co., 86 Mo. 221; Davies v. People's Ry. Co., 159 Mo. 1; 67 Mo. App. 598; 59 S. W. Rep. 982; Kelly v. Union, etc., R. Co., 11 Mo. App. 1; Baltimore, etc., R. Co. v. Whittington, 30 Grett (Va.), 805; Whitmore v. Boston, etc., R. Co. 150 Mass. 477; 23 N. E. Rep. 220; Sweat v. Boston, etc., R. Co., 156 Mass. 284; 31 N. E. Rep. 296.

[34] Illinois, etc., R. Co. v. Nowickiki, 46 Ill. App. 566.

[35] Sluder v. Transit Co., 189 Mo. 107, § 408, *supra*.

fail to give warning of the movement of its trains, either as to an employee [36] or licensee [37] located on its track.

[36] Lovell v. Kansas City, etc., R. Co., 97 S. W. Rep. 193.

[37] Jacobsen v. Chicago, etc., R. Co., 41 Minn. 206; 42 N. W. Rep. 932.

In Lovell v. Kansas City, etc., R. Co. (97 S. W. Rep. 193), the Kansas City Court of Appeals, in discussing the question of notice in such a case, said:

"In the operation of a railroad it frequently occurs that the disturbance of cars placed for unloading is necessary while the unloading is being performed, but in all such cases it is the duty of the company to warn those occupied in the work of unloading of the contemplated movement in time for them to give heed to their safety. Railway v. Geobel, 119 Ill. 515; 10 N. E. Rep. 369; Jacobson v. Railroad, 41 Minn. 206; 42 N. W. Rep. 932; Ryan v. Railroad (C. C.), 115 Fed. Rep. 197; Railroad v. Shaw, 116 Fed. Rep. 621; 54 C. C. A. 77; Railway v. Duncan, 88 Tex. 611, 32 S. W. Rep. 878; Railway v. Brown's Adm'r, 49 U. App. 101; 79 Fed. Rep. 257; 24 C. C. A. 559. Plaintiff, being in the car rightfully at the invitation of the consignee and engaged in work connected with the process of unloading was entitled to warning of what was coming, provided we find that defendant should have considered the likelihood of his presence in the car."

"Where the intestate stepped onto a railroad track in front of a train and was killed, and the engineer did not see him at all, the fact that the railroad company was negligent in failing to equip the engine with air brakes was not the proximate cause of the accident." Bookman v. Seaboard Air Line Ry. (U. S. C. C. A., S. C. 1907), 152 Fed. Rep. 686.

"In an action for the death of an employee who was killed by a car while working at night repairing defendant's railroad track, the evidence showed that the headlight of the car was burning; that deceased was standing facing the car as it approached; that a workman who was about ten feet behind deceased called to him to look out, and that another workman, who was closer to the car than deceased was, also warned him and himself escaped. *Held*, that as a matter of law deceased was guilty of contributory negligence, causing the accident." McGrath v. St. Louis Transit Co. (Mo. 1906), 94 S. W. Rep. 872.

"A paragraph in a petition for the death of plaintiff's husband, alleged to have been killed by the negligent running of the train of defendant company, which failed to show by what right or in what capacity plaintiff's husband was at or on the defendant's railroad track at the time he was killed, and whether the killing was at a public crossing, and whether he was walking, standing, or lying upon the track, is insufficient." Central of Georgia Ry. Co. v. Brandenburg (Ga. 1907), 58 S. E. Rep. 658.

"Plaintiff, while endeavoring to get a fishing pole from under a platform alongside of a railroad track, knelt beside the platform, his feet extending over one rail of the track about fifty feet from a switch, and, while so engaged, a car was switched on the track and approached him at the rate of three or four miles an hour. He was not aware of the approaching car until an instant before it reached him, and in endeavoring to escape was struck by the brakeman's ladder. *Held*, to constitute contributory negligence." Burde v. Chicago, B. & Q. Ry. Co. (Mo. App. 1907), 100 S. W. Rep. 509.

"Intestate was killed while walking as a licensee along defendant's railroad track. He was aware of the approach of the train, and stepped outside the rails to stand until it should pass him, not appreciating the fact that a curve at the point where he was standing would cause the 'bucking-beam' of the engine pilot to project further than usual. He stood so close to the track that he was hit by the beam, though a single step back would have placed him in a position of safety. *Held*, that intestate was negligent as matter of law." Delaware & H. R. Co. v. Wilkins (U. S. C. C. A., N. Y. 1907), 153 Fed. Rep. 845.

"As against a bare licensee a railroad company may run its trains in the usual way, without special precautions, if the circumstances do not of themselves give warning of his probable presence, and he is not seen until it is too late to prevent injury." Delaware & H. R. Co. v. Wilkins (U. S. C. C. A., N. Y. 1907), 153 Fed. 845.

"One standing on a railroad track and absorbed in watching the passing of a train on another track was negligent." Eppstein v. Missouri Pac. Ry. Co. (Mo. 1906), 94 S. W. Rep. 967.

"One who walks or stands on a railroad track in a street when there is no necessity or occasion for doing so, is guilty of contributory negligence, barring recovery for injury from a moving car not knowingly or wantonly caused." Coy v. Missouri Pac. Ry. Co. (Kan. 1906), 86 Pac. Rep. 468.

"An injured person was not relieved of the duty to use reasonable care for his own safety by the fact that the engineer in charge of the engine that caused the injury was negligent in failing to ring the bell and keep a proper lookout." Byrnes v. New York, N. H. & H. R. Co. (Mass. 1907), 81 N. E. Rep. 187.

"Where an employee of a railway places himself on the track in a position of danger, without any emergency or exigency therefor, he is guilty of negligence, and cannot recover for injuries received, even if defendant were negligent." Caffi v. New York Cent. & H. R. R. Co., 102 N. Y. S. 633.

"It is the duty of a railroad to operate its trains, and it is not required to observe unreasonable precautions to prevent injury. People walking on the tracks must exercise a prudence commensurate with

§ 413. **Walking or standing near the track.**— Contributory negligence will prevent a recovery by an employee or other person, for an injury sustained by him while walking or standing in a notoriously dangerous place, near a railroad track, without keeping a proper lookout for an approaching

the risk, and where the lack of prudence of the party injured was the proximate cause of the injury, he cannot recover, however negligent the railroad company may otherwise have been." Seaboard Air Line Ry. v. Smith (Fla. 1907), 43 So. Rep. 235.

"A trespasser was lying down on the railroad track, and the engineer and fireman saw him eighty or ninety yards from where he was struck by the train. There was nothing to show that the train could have been stopped in time to have saved him, or that the operators did not attempt to stop it as soon as they discovered his position. *Held*, that the railroad as a matter of law was not liable." Southern Ry. Co. v. Gullatt (Ala. 1907), 43 So. Rep. 577.

"Where a railroad engineer was struck and injured while standing between two main tracks at night, an instruction that he was required to exercise such care as persons of ordinary care and prudence would exercise under like circumstances properly stated plaintiff's duty in the premises." Pittsburgh, C., C. & St. L. Ry. Co. v. Lightheiser (Ind. 1906), 78 N. E. Rep. 1033.

"Where one of mature judgment, and good hearing and eyesight, at a time when he knew engines and trains were in frequent passage on a track, and when though it was not fully daylight he could detect the presence of an engine at a distance, went on the track from behind an obstruction, taking only a glance by which he saw an engine, but failed to determine whether it was standing or approaching, he was guilty of contributory negligence as a matter of law, even if the engine was backing over the crossing without a bell rung or a whistle blown, and the engine was running at a speed denounced by ordinance of the city, and the flagman was absent from his post of duty; none of these things under the circumstances being the proximate cause of injury." Mackowik v. Kansas City, St. J. & C. B. R. Co. (Mo. 1906), 94 S. W. Rep. 256.

"The operatives of a railroad train owed no duty to one walking on the track in the nighttime at a place where the track was fenced and in the vicinity of signs warning people to keep off the tracks, where there was nothing to show that notice of any use of the track by pedestrians in the nighttime had been brought to the attention of the company." Frye v. St. Louis, etc., Ry. Co. (Mo.), 98 S. W. Rep. 566.

train.[38] An employee cannot recover for an injury received by reason of his having placed himself between two railroad tracks, at a place where he ought not to have been in the proper discharge of his duty, and with his back toward an approaching train, which strikes him, and it is immaterial that the defendant was also negligent in failing to display a light upon the train and that it was violating a municipal ordinance, at the time of his injury.[39]

But where, either from the circumstances of the case, or by express promise of one in charge of an engine or train, an employee has reason to rely upon the belief that no train will overtake him, it may not be negligence, as matter of law, for an employee to walk or stand near the track, without keeping a lookout for an approaching train, as where an engineer of a train promised that an engine would not start for fifteen minutes and in seven minutes he was struck from behind by the same engine, it was held, by the Supreme Court of Iowa, that it could not be said, as matter of law, that he was negligent in failing to keep a lookout for the engine, as he had a right to repose some confidence in the promise of the party in charge of it.[40]

[38] Heffinger v. Minneapolis, etc., R. Co., 43 Minn. 503; 45 N. W. Rep. 1131; Moore v. Norfolk, etc., R. Co., 87 Va. 489; 12 S. E. Rep. 968; McKenna v. The Missouri Pacific Ry. Co., 54 Mo. App. 161; Mulherrin v. Delaware, etc., R. Co., 81 Pa. St. 366; 15 Am. Ry. Rep. 456; St. Louis, etc., R. Co. v. Monday, 49 Ark. 257; 4 S. W. Rep. 782; 31 Am. & Eng. R. Cas. 424; Tennis v. Inter-State, etc., R. Co., 45 Kansas 503; Little John v. Central R. Co., 74 Ga. 396; Smith v. New York, etc., R. Co., 44 N. Y. S. R. 55; 63 Hun 624; 137 N. Y. 562. See, also, Rigg v. Boston, etc., R. Co., 158 Mass. 309; 33 N. E. Rep. 512.

[39] Ryall v. Central Pacific Ry. Co., 76 Cal. 474; 18 Pac. Rep. 430.

[40] Hawley v. Chicago, etc., R. Co., 71 Iowa 717; 29 N. W. Rep. 787. See, also, Schlereth v. Missouri Pacific R. Co., 115 Mo. 87; 21 S. W. Rep. 1110; Canada Southern R. Co. v. Jackson, 17 Can. Sup. Ct. 316.

"The rule that a railroad employee whose work requires him to be on or near the track need not watch for approaching trains in

§ 414. **Climbing over stationary cars.**— One who attempts to cross between or climb over the cars of a stationary train, which he knows, or might know, by using his natural faculties, is likely to move at any moment, is guilty of negligence and cannot recover for an injury received in such an at-

order to be deemed to be exercising reasonable care does not apply to an employee injured while attempting to cross the track; the circumstances not requiring the crossing to be made at a particular time or place." Dyerson v. Union Pac. R. Co. (Kan. 1906), 87 Pac. Rep. 680.

"A railroad employee, working constantly with an engine in the yards, may not close his eyes to obvious and dangerous conditions or defects therein, and recover for an injury resulting therefrom; but, if an accident occurs, and he pleads ignorance, he must show that his ignorance was not only actual, but excusable." Williams v. Choctaw & R. Co. (U. S. C. C. A. Tenn. 1906), 149 Fed Rep. 104.

"Where an experienced employee was tamping ties on a railroad track when the track became obscured by smoke from a passing train, and, being apprehensive of danger, he stood in the middle of the track, looking into the bank of smoke, when a train suddenly emerged and struck him, he was guilty of contributory negligence." Cannon v. New York, etc., R. Co. (Mass. 1907), 80 N. E. Rep. 450.

"Where plaintiff's intestate was killed by being run over by a backing locomotive, when he went upon the track to fix the lights, he was not guilty of contributory negligence in failing to signal the hostler in charge of the locomotive to stop, where it was already standing still." Northern Alabama Ry. Co. v. Key (Ala. 1907), 43 So. Rep. 794.

"In an action for the death of a section hand who was run over while sweeping snow from a frog, it appearing that the operatives of the locomotive could have seen decedent in his place of danger in time to have averted it by stopping the train or blowing the whistle, but that no efforts in such direction were made, the humanitarian doctrine applied, and, conceding contributory negligence on the part of decedent, there might be a recovery irrespective of wantonness and recklessness on the part of defendant." Johnson v. St. Joseph Terminal Ry. Co. (Mo. 1907), 101 S. W. Rep. 641.

"The employee of a railroad company, who had worked all forenoon near a track on which cars had been passing, and walked upon the track without ascertaining whether cars were approaching, was not in the exercise of due care." Lord v. Boston, etc., R. Co. (N. H. 1906), 65 Atl. Rep. 111.

tempt.[41] In a well-considered Missouri case,[42] which presents the law on this question, a person reached a public street of a city that was obstructed by a freight train and no engine was visible at either end of the train. He attempted to cross between two freight cars and placed a foot on either side of the coupling pins, on the two draw bars of the cars and just as he pulled his body up, the slack was let out of the train and his foot was caught and mashed between the draw heads of the cars. In denying a recovery, because of the contributory negligence of the plaintiff, Judge Sherwood, delivering the opinion of the court, said: "If the plaintiff, with full knowledge of its existence, had deliberately placed his foot on the wire which fires a spring gun, his temerity and his danger would scarcely have been greater. If such conduct does not constitute contributory negligence, how shall it be christened and what shall be its baptismal name? It is no answer to this to say that the defendant was guilty of reprehensible conduct in obstructing the street with its cars beyond the time allowed by ordinance." This decision was followed in a later case,[43] in the same State, and may be stated as presenting the general rule on this subject, as recognized by both courts[44] and text writers.[45] Nor

[41] Lake Shore, etc., R. Co. v. Pinchin, 112 Ind. 592; 13 N. E. Rep. 677; 31 Am. & Eng. R. Cas. 428; Copeland v. Southern, etc., R. Co., 61 Ala. 376; Louisville, etc., R. Co. v. Hocker, 111 Ky. 707; 64 S. W. Rep. 638; 65 S. W. Rep. 119; Southern R. Co. v. Thomas (Ky.), 92 S. W. Rep. 578.

[42] Hudson v. Wabash R. Co., 101 Mo. 13; 14 S. W. Rep. 15; Hudson v. Wabash R. Co., 123 Mo. 445; 27 S. W. Rep. 717.

[43] Corcoran v. St. Louis, etc., R. Co., 105 Mo. 399; 16 S. W. Rep. 411.

[44] Lewis v. Baltimore, etc., R. Co., 38 Md. 588; Gahagan v. New York, etc., R. Co., 1 Allen 187; Lake Shore, etc., R. Co. v. Pinchin, 112 Ind. 592; 13 N. E. Rep. 677; 31 Am. & Eng. R. Cas. 428; Copeland v. Southern, etc., R. Co., 61 Ala. 376; O'Mara v. New York, etc., R. Co., 18 Hun (N. Y.), 193; Chicago, etc., R. Co. v. Dewey, 26 Ill. 255; Southern Ry. Co. v. Clark (Ky.), 105 S. W. Rep. 385.

[45] 1 Thompson on Neg. 429; 2 Rorer on Railroads 1055; Beach on Con. Neg., § 72.

would it be an excuse for such negligence on the part of a person injured, while attempting to pass over stationary cars, that he was invited to do so by a brakeman of the train, for this would not be within the general scope of the duties of such an employee, or excuse the otherwise wrongful act on the part of the injured person.[46]

§ 415. **Under car or locomotive.**— Just as it is contributory negligence for a stranger to climb over stationary cars, because of the great danger involved in the undertaking, it is held contributory negligence for an employee or third person to crawl under a car or locomotive, without first notify-

[46] In passing on this question, the Supreme Court of Kentucky, in Southern Ry. Co. v. Clark (105 S. W. Rep. 385), said:

"There is nothing in the evidence to show that any one in charge of appellant's train knew, or by the exercise of the highest degree of care could have known, that appellee was between the cars when the train was started. It is true that appellee says that the person to whom he spoke was a brakeman; but he says, further, in his testimony, that his reason for presuming that he was a brakeman was because he carried a railroad lantern. He testified, further, however, that at the time that he attempted to cross between the cars this individual had moved away toward the station and was not present; nor does he state that he notified the man with the lantern that he contemplated taking his advice and attempting to cross over. Giving appellee the full benefit of his testimony, and conceding that the person to whom he was talking was a brakeman, yet the company would not be liable because of the invitation of the brakeman to appellee to cross over; for it has been expressly held in the case of Skirvin v. L. & N. R. R. (100 S. W. Rep. 308; 30 Ky. Law Rep. 1208), that a brakeman has not the power by virtue simply of his position to bind his employer, but that the conductor is the representative agent of the company as to the train in his charge, so that, when appellee undertook to pass over or between the cars, he was a trespasser, and the company owed him no consideration until his peril was discovered."

"The negligence of a railroad company in obstructing a street by a railroad train for a period of more than 10 minutes may be the proximate cause of an injury resulting to one seeking to climb over such train." Atchison, etc., Ry. Co. v. Pitts, 123 Ill. App. 607.

ing the party in charge of it of such intention on his part.[47] In an Indiana case, an inexperienced employee, engaged to clean a locomotive, was held to be guilty of negligence in going under the engine, without notifying the engineer, or fireman, in charge of the engine, of his intention so to do.[48]

But an employee would not be held guilty of contributory negligence in going under a car or locomotive, when the proper discharge of his duties compels him to do so, in compliance with the employer's rules, and if he should be injured while so engaged, in the exercise of proper care, on his part, the employer would be responsible in damages for such an injury.[49]

§ 416. **Crossing bridge in front of train.**— It is generally held to be negligence either for an employee or a trespasser or licensee to cross a bridge in front of an approaching train, when, from the circumstances the injured person could have seen or heard the train approaching and the agents in charge of the train could not have avoided the injury after seeing the peril to which the injured person was subjected. In other words, the crossing of the bridge, by the person injured, under such circumstances would be negligence on his part, and the company would not be liable, unless, notwithstanding his negligence, the injury could have been avoided after his peril was discovered.[50]

In an Oregon case,[51] where a track walker saw a train when a sufficient distance away to have avoided the collision, but thought that he could make it across the bridge before he was overtaken by the train, and in an attempt so to do, he

[47] Spencer v. Ohio, etc., R. Co., 130 Ind. 181; 29 N. E. Rep. 915.

[48] Spencer v. Ohio, etc., R. Co., 130 Ind. 181; 29 N. E. Rep. 915.

[49] Berry v. Central, etc., R. Co., 40 Iowa 564; Bucklew v. Central, etc., R. Co., 64 Iowa 603.

[50] Sweeny v. Boston, etc., R. Co., 128 Mass. 5; 1 Am. & Eng. R. Cas. 138; Texas, etc., R. Co. v. Wagner, 2 Texas Civ. App. 291.

[51] Gibson v. Oregon, etc., R. Co., 23 Oregon 493; 32 Pac. Rep. 295.

fell and was injured, it was held that no recovery could be had, on the ground of a failure to give sufficient notice of the approach of the train to the bridge, as it appeared that he could have turned back, after knowledge of the approach of the train, without injury, but instead, continued his course across the bridge.

Where, however, there is an assurance of time to cross a trestle or bridge by a superior employee, before the arrival of a train or engine and in reliance thereon, an employee attempts to cross a bridge and is injured as a result of such assurance or promise, on the part of his superior, if the evidence of his contributory negligence is disputed, or is not all one way, then the assurance of safety, notwithstanding his own act in thus placing himself in a position of peril, will make the issue of his negligence a jury issue and the court would not be justified, as matter of law, in holding that he was guilty of negligence.[52]

§ 417. **Sleeping upon or near railroad track.**— The common-law duty of the employer, with reference to the place of work of his employee, has never yet been so extended by the courts, as to recognize by implication, a duty upon his part to furnish a reasonably safe place for his employees or licensees to sleep, hence it is generally held negligence on the part of an employee to sleep on or near a railroad track, where he is apt to be struck by a passing train, and no recovery can be had for an injury sustained while an employee was asleep on the track, unless the injury could have been avoided, by reasonable care on the part of the employees in charge of the

[52] Amato v. Northern Pacific R. Co., 46 Fed. Rep. 561.

"One struck by a train while walking on a railroad trestle was guilty of contributory negligence precluding recovery, unless the trainmen either injured him wantonly, maliciously, or intentionally, or were guilty of negligence in avoiding injuring him after discovering his peril." Adams v. St. Louis, I. M. & S. Ry. Co. (Ark. 1907), 103 S. W. Rep. 725.

engine, after the danger to the sleeper was discovered.[53]

In a Missouri case,[54] a fireman on an engine lay down between the tracks in a roundhouse and went to sleep, and while asleep, threw one limb across a rail and was so injured by an engine run into the roundhouse that he died. There was no evidence that employees were required to sleep in the roundhouse, and while it was not sufficiently lighted, this fact was known by the employees accustomed to fall asleep there and the contributory negligence of the employee was held to preclude a recovery. And in a Pennsylvania case,[55] it is held to be immaterial that the employee had voluntarily continued in the service until he was exhausted, whereby he fell asleep and thereby sustained injury. But in an Alabama case,[56] distinction is recognized between a continuous service until faintness results and a mere wanton or negligent act, in voluntarily falling asleep in such a place of danger and it is held that a brakeman, required to stand to signal a train, would not be negligent if his sleep was forced upon him by fatigue or failing physical endurance, but that he would be negligent if he otherwise voluntarily fell asleep at his post of duty.

The Appellate Court, of Missouri, in a recent case,[57] apparently overlooking the rule established by the Supreme Court,[58] that no recovery could be had, under the last chance

[53] Price v. Hannibal, etc., R. Co., 77 Mo. 508; 15 Am. & Eng. R. Cas. 168; Nattress v. Philadelphia, etc., R. Co., 150 Pa. St. 527; 24 Atl. Rep. 753; East Tennessee, etc., R. Co. v. Rush, 15 Lea (Tenn.) 145; Helton v. Alabama, etc., R. Co., 97 Ala. 275; 12 So. Rep. 276.

[54] Price v. Hannibal, etc., R. Co., 77 Mo. 508; 15 Am. & Eng. R. Cas. 168.

[55] Nattress v. Philadelphia, etc., R. Co., 150 Pa. St. 527; 24 Atl. Rep. 753.

[56] Helton v. Alabama, etc., R. Co., 97 Ala. 275; 12 So. Rep. 276.

[57] Mann v. Missouri, etc., R. Co., 100 S. W. Rep. 566. See, also, Burde v. Chicago, etc., R. Co., 100 S. W. Rep. 509.

[58] Holwerson v. St. Louis, etc., R. Co., 157 Mo. 216; 57 S. W. Rep. 770.

doctrine, in a case of contemporaneous negligence on the part of the employer and employee, went to the extreme of holding that it would be a jury issue whether or not the agents in charge of an engine could have discovered a sleeping employee at the side of the track, in time to have avoided killing him, by the exercise of ordinary care, in a distance of a few hundred feet, when the physical facts, in connection with the distance shown by the evidence and the speed of the train, would make it extremely improbable if the train could have been stopped, when the sleeper could first have been discovered by the engineer and fireman and there was a total absence of evidence that they did not do all in their power to stop the train, after discovering the sleeper, as the opinion of the court admits. This is, clearly, extending the doctrine of last chance to the extent of holding that wanton conduct on the part of an employee may be overcome by a presumption of negligence on the part of the employer, and is applying the doctrine of comparative negligence with a limit upon the degree of negligence that an employee can be guilty of, and this in a State where this rule is denied.

§ 418. **Walking in dangerous place in dark.**— As a general rule it is held to be such a violation of the rule that an employee must not assume a known dangerous position, voluntarily, to expose oneself to injury by walking in a dangerous place, such as on a railroad track, or along an embankment, in the dark, without a light, as to preclude a recovery, in case of a resulting injury therefrom.[59]

In a Georgia case,[60] which illustrates the rule, a watchman in a railroad yard used a platform appropriated for the transfer of freight, to run along at night, without a lantern, or light, and sustained an injury, and it was held that he

[59] Hamilton v. Richmond, etc., R. Co., 83 Ga. 346; 9 S. E. Rep. 670; Harden v. New York, etc., R. Co., 17 J. & S. (N. Y.) 503.

[60] Hamilton v. Richmond, etc., R. Co., 83 Ga. 346; 9 S. E. Rep. 670.

could not recover therefor. In another case,[61] an employee sustained injuries as a result of walking along a path between a turntable and a water tank, and falling into a pit excavated alongside the path. It was night and he had no lantern, and the court held that by ordinary care he might have avoided the accident, and denied a recovery.

§ 419. **Failure to discover defects in appliances.**— An employee, in the use of appliances and places furnished him by the employer, is bound to take notice of those dangerous defects of which he has knowledge, and those that are obvious to his senses, but he is not bound to investigate for himself a department of the service with which he has nothing to do, and to set his judgment against that of his employer as to the safety of his appliances, or places for work.[62] A switchman is not bound to make a careful inspection of switch frogs;[63] a freight conductor is under no obligation to inspect the cars or machinery of his train,[64] nor is a brakeman chargeable with contributory negligence because he attempts to couple cars before examining the coupling appliances, to see if they are safe.[65]

[61] Countryman v. East Tennessee, etc., R. Co., 89 Ga. 835; 16 S. E. Rep. 84.

[62] Devlin v. Wabash, etc., R. Co., 87 Mo. 545; 28 Am. & Eng. R. Cas. 524; Cleveland, etc., R. Co. v. Walter, 45 Ill. App. 642; McBride v. Indianapolis, etc., R. Co., 5 Ind. App. 482; 32 N. E. Rep. 579; Hungerford v. Chicago etc., R. Co., 41 Minn. 444; 43 N. W. Rep. 324; 41 Am. & Eng. R. Cas. 269; Cutridge v. Missouri Pacific Ry. Co., 105 Mo. 520; 16 S. W. Rep. 943; Chicago, etc., R. Co. v. Mahoney, 4 Ill. App. 262.

[63] Waldhier v. Hannibal, etc., R. Co., 87 Mo. 37.

[64] Ransier v. Minneapolis, etc., R. Co., 32 Minn. 331; 20 N. W. Rep. 332; 21 Am. & Eng. R. Cas. 601; Cincinnati, etc., R. Co. v. McMullen, 117 Ind. 439; 20 N. E. Rep. 287; 38 Am. & Eng. R. Cas. 165. But see, *contra*, Mad River, etc., R. Co. v. Barker, 5 Ohio St. 541.

[65] Mahoney v. New York, etc., R. Co., 39 N. Y. S. R. 911; 60 Hun 586; 131 N. Y. 623; Goodrich v. New York, etc., R. Co., 116 N. Y. 398; 26 N. Y. S. R. 767.

But if an employee of a railroad company is injured by reason of a defect in a car transferred to his employer by another railroad, and his employer's rules, known to him, made it his duty to inspect all foreign cars, he cannot recover for an injury caused simply by his failure to inspect.[66] And in any other case, where the defect in the car or appliance was obvious, and the employee ought to have discovered it, by reasonable care, and did not, or, after discovery, if he failed to report it to his employer, but continued to use it, without complaint, until he received an injury, he will be held negligent in so doing.[67]

However, if the defect is one that would be disclosed only by an expert in that department of the service, the employee not shown to be an expert in such department, will not be chargeable with contributory negligence in using the car or appliance without discovering the existing defect,[68] and where, from the nature of the service he is called upon to perform, he has no reasonable opportunity or time for an inspection sufficient to disclose the defect causing the injury, the failure to discover such defect wil not preclude a recovery.[69]

[66] Ft. Wayne, etc., R. Co. v. Gruff, 132 Ind. 13; 31 N. E. Rep. 460; Roddy v. Missouri Pacific Ry. Co., 104 Mo. 234; 15 S. W. Rep. 1112; Chicago, etc., R. Co. v. Bragomeir, 119 Ill. 51; 7 N. E. Rep. 688.

[67] Chicago, etc., R. Co. v. Bragomeir, 119 Ill. 51; 7 N. E. Rep. 688; Atlanta, etc., R. Co. v. Ray, 70 Ga. 674; 22 Am. & Eng. R. Cas. 281; Way v. Chicago, etc., R. Co., 76 Iowa 393; 41 N. W. Rep. 51; Jennings v. Tacoma, etc., R. Co., 7 Wash. 275; 34 Pac. Rep. 937.

[68] Pratt v. Lake Shore, etc., R. Co., 45 N. Y. S. R. 715; 63 Hun 616; 18 N. Y. Supp. 682; 136 N. Y. 654; 32 N. E. Rep. 1016.

[69] O'Malley v. New York, etc., R. Co., 51 N. Y. S. R. 366; 67 Hun 130; 22 N. Y. Supp. 48.

Using known defective appliances without complaint was held to prevent a recovery, in the following cases: East St. Louis, etc., R. Co. v. McElroy, 29 Ill. App. 504; Texas, etc., R. Co. v. Bradford, 66 Texas 732; 2 S. W. Rep. 595; 28 Am. & Eng. R. Cas. 479; Shields v. New York, etc., R. Co., 4 Silv. App. 162; 30 N. E. Rep. 596; East

§ 420. **Failure to keep appliances under employee's charge in repair.**— As the failure to keep appliances in proper repair is held to be a sufficient breach of duty, on the employer's part, to subject him to a claim for damages, in case of a resulting injury to an employee therefrom, the same failure, where the duty of repair is placed upon the injured employee, will constitute negligence barring his recovery for an injury sustained in consequence thereof.[70]

Where it is the duty of a brakeman to see that a brake rod is in proper repair, an injury by reason of the absence of a nut, which it was his duty to see was kept in place, will bar his right of recovery; but of course, if the injury was caused not by the defective brake rod, which it was his duty to repair, but by another distinct cause, this would not prevent a recovery, for an injury to which his negligence in no way contributed.[71]

Tennessee, etc., R. Co. v. Toppins, 10 Lea (Tenn.) 58; 11 Am. & Eng. R. Cas. 222.

But it is generally necessary that not only the defect, but the danger must be known, to prevent an injury in such a case. Huhn v. Missouri Pacific Ry. Co., 92 Mo. 440; 4 S. W. Rep. 937; 31 Am. & Eng. R. Cas. 221.

Notice of a defective brake was held to preclude a recovery, in Nelson v. Central, etc., R. Co., 88 Ga. 225; 14 S. E. Rep. 210.

But the use of a defective car was held not to bar an action for resulting injury therefrom, in Kane v. Northern, etc., R. Co., 128 U. S. 91; 9 Sup. Ct. Rep. 16; St. Louis, etc., R. Co. v. McClain, 80 Texas 85; 15 S. W. Rep. 789; Bridges v. St. Louis, etc., R. Co., 6 Mo. App. 389; Sioux City, etc., R. Co. v. Finlayson, 16 Neb. 578; 49 Am. Rep. 724.

[70] Illinois, etc., R. Co. v. Jewell, 46 Ill. 99; Harper v. Indianapolis, etc., R. Co., 47 Mo. 567; Chicago, etc., R. Co. v. Bargomeir, 119 Ill. 51; Stroble v. Chicago, etc., R. Co., 70 Iowa 555; 31 N. W. Rep. 63; 28 Am. & Eng. R. Cas. 510.

[71] Illinois, etc., R. Co. v. Jewell, 46 Ill. 99.

In Stroble v. Chicago, etc., R. Co. (70 Iowa 555), an employee was injured by the giving way of certain steps, leading up to a platform used to load coal from. The steps were used by him alone and were under his control and it was held it was his duty to see to their

§ 421. **Unauthorized use of appliances.**— Where an employer furnishes tools or appliances to his employees, which are reasonably safe, if used in a proper manner, and an employee sustains injury by the use of such a tool or appliance in an improper manner, or for purposes not authorized by the employer, as such wrongful use could not have been foreseen by the employer, there will be no right of recovery for such an injury.[72]

In the absence of evidence of a defect in an appliance or machinery, therefore, which could have occasioned the injury, or any other act or neglect, on the employer's part, appearing as a cause for the injury, the fact that an improper use was being made of the tool or appliance at the time of the injury, is generally held sufficient to bar a recovery,[73] and even if the appliance is defective in some particular, if the injured employee has failed to use such reasonable care as would have prevented the accident, his employer is thereby absolved from liability, although but for the defect in the appliance the injury would not have occurred.[74]

§ 422. **Acts in emergencies or situations of peril.**— Persons who act under the impulse of fright, or persons who are in imminent peril and feel obliged to act upon the spur of the moment, are not necessarily to be charged with negligence if they do not do the right thing, for one in a perilous position is not to be held to the same care and prudence as if he were in a place of security. The law makes allowance for the fright and lack of coolness of judgment incident to

proper repair and for a failure of duty, in this respect, on his part, no action would lie, for an injury traceable thereto.

[72] Central, etc., R. Co. v. Attaway, 90 Ga. 656; 16 S. E. Rep. 956.

[73] Sparks v. Kansas City, etc., R. Co., 31 Mo. App. 111.

[74] Washington, etc., R. Co. v. McDade, 135 U. S. 554; 10 Sup. Ct. Rep. 1044; 44 Am. & Eng. R. Cas. 505.

such a peril and a person will be presumed to have used that care and prudence which the law requires and to which human instinct would prompt him, in saving his life.[75]

In view of an impending collision, therefore, the fact that it might have been safer if the engineer had jumped, instead of holding on to and reversing his lever, will not prevent his recovery for an injury sustained in the collision, by remaining at his post;[76] nor will the fact that two engines stopped within a few feet of each other, prevent a recovery by an engineer, who jumped from his engine, in view of the threatened collision, sustaining injuries therefrom.[77] And a brakeman is held not to be precluded from a recovery for an injury incurred in attempting to mount a rapidly moving freight car, after his lantern had gone out, to avoid being left by the train, although it would have been far safer for him to have remained standing on the ground by the side of the train.[78]

But the courts recognize a distinction between acts in sit-

[75] Nichols v. Dubuque, etc., R. Co., 68 Iowa 732; 28 N. W. Rep. 44; 27 Am. & Eng. R. Cas. 183; Goodrich v. New York, etc., R. Co., 116 N. Y. 398; 22 N. E. Rep. 397; 26 N. Y. S. R. 767; 41 Am. & Eng. R. Cas. 259; 5 L. R. A. 750; Kelly v. Chicago, etc., R. Co., 70 Wis. 335; 35 N. W. Rep. 538; Adams v. Hannibal, etc., R. Co., 74 Mo. 553; 7 Am. & Eng. R. Cas. 414; Bunting v. Central Pacific R. Co., 14 Nevada 351; Schultz v. Chicago, etc., R. Co., 44 Wis. 638; 18 Am. Ry. Rep. 146; Fehnrich v. Michigan, etc., R. Co., 87 Mich. 606; 49 N. W. Rep. 890; Cook v. Central, etc., R. Co., 67 Ala. 533; Barry v. Hannibal, etc., R. Co., 98 Mo. 62; 11 S. W. Rep. 308; Wynn v. Central Park, etc., R. Co., 133 N. Y. 575; 30 N. E. Rep. 721; 44 N. Y. S. R. 673; Georgia, etc, R. Co. v. Rhodes, 56 Ga. 645; Roll v. Northern, etc., R. Co., 15 Hun (N. Y.) 496; 80 N. Y. 647.

[76] Cottrill v. Chicago, etc., R. Co., 47 Wis. 634; 3 N. W. Rep. 376; Smith v. Wrightsville, etc., R. Co., 83 Ga. 671; 10 S. E. Rep. 361; 41 Am. & Eng. R. Cas. 320.

[77] Gross v. Pennsylvania, etc., R. Co., 42 N. Y. S. R. 808; 62 Hun 619; 16 N. Y. Supp. 616; Haney v. Pittsburg, etc., R. Co., 38 W. Va. 570; 18 S. E. Rep. 748.

[78] Fox v. Chicago, etc., R. Co., 86 Iowa 368; 53 N. W. Rep. 259; 53 Am. & Eng. R. Cas. 430.

uations of peril, where the danger is due to the act of the injured person himself and situations or conditions due to the fault of another, and while in the case of employer and employee, an employee placed in a position of peril, by the negligence of his employer, is not guilty of negligence in taking a mistakened course, through fear or fright, occasioned by the peril,[79] if the injured person, by his own wrongful act, has placed himself in a position of peril, and being called upon suddenly to act, mistakes his safest course, through an error in judgment, he is not thereby relieved from the original negligence which occasioned the peril.[80]

[79] Richmond, etc., R. Co. v. Brown, 89 Va. 749; 17 S. E. Rep. 132; Kleiber v. People's Ry. Co., 107 Mo. 240; 17 S. W. Rep. 946; 52 Am. & Eng. R. Cas. 531; Lynch v. St. Joseph, etc., R. Co., 111 Mo. 601; Peoria, etc., R. Co. v. Rice, 144 Ill. 227; 33 N. E. Rep. 951; Clark v. Pennsylvania R. Co., 132 Ind. 199; 31 N. E. Rep. 808; Lincoln Transit Co. v. Nichols, 37 Neb. 332; 55 N. W. Rep. 872; 56 Am. & Eng. R. Cas. 584.

[80] Aiken v. Pennsylvania R. Co., 130 Pa. St. 380; 18 Atl. Rep. 619; 41 Am. & Eng. R. Cas. 571; Schneider v. Second Ave. R. Co., 133 N. Y. 583; 30 N. E. Rep. 752; 44 N. Y. S. R. 680; Robinson v. Manhattan R. Co., 5 Misc. (N. Y.) 209; 54 N. Y. S. R. 792; 25 N. Y. Supp. 91.

The failure to jump from an engine, in the face of an impending collision, was held not to constitute negligence, as matter of law, in Pennsylvania R. Co. v. Roney, 89 Ind. 453; 46 Am. Rep. 173; 12 Am. & Eng. R. Cas. 223; Cottrill v. Chicago, etc., R. Co., 47 Wis. 634; 3 N. W. Rep. 376; Central, etc., R. Co. v. Crosby, 74 Ga. 737.

"The fact that a person caught on a bridge by a train attempted, on the spur of the moment, to reach a platform by running in advance of the train, when he might have reached safety by stepping out on a girder running parallel with the track, does not render him as a matter of law negligent in his choice, although he may have chosen the more dangerous course." St. Louis, etc., Ry. Co. v. Stamps (Ark. 1907), 104 S. W. Rep. 1114.

"Where defendant's negligence placed decedent in danger, decedent was not bound to choose at his peril what ultimately would prove the safer course, but was only required to use his best care and judgment as the situation then presented itself to him." Sherwood v. New York Cent., etc., R. Co. (N. Y. Supp. 1907), 105 N. Y. S. 547.

"In determining whether a person traveling on a street and who

§ 423. **Collision due to engineer's negligence.**— Where an injury results to an engineer from a collision of his engine with other cars on the same track, which he knew were there, and not to any failure of duty on the part of the train dispatcher, it is generally held such contributory negligence on the part of the engineer thus causing the collision, as will bar

has lost his life by an accident at a railway crossing was guilty of contributory negligence, the natural instincts of self-preservation may be considered." Elgin, etc., R. Co. v. Hoadley, 122 Ill. App. 165, judgment affirmed; 77 N. E. Rep. 151; 220 Ill. 462.

"Where decedent was assisting in loading a flat car with poles for shipment by his employer, and some one nearby shouted an alarm to stop an approaching train, and decedent left his place, and went around the car to a point where he could see the train, and while there was killed, the jury could presume, in the absence of evidence as to why he went around the car, that he did so through a sense of duty to assist in any emergency that might arise." Chicago, etc., R. Co. v. Pritchard (Ind. 1906), 79 N. E. Rep. 508, transferred from appellate court, 78 N. E. Rep. 1044.

"A person who, in an effort to avoid immediate danger, in the exigency of the moment, suddenly, and without time for reflection, puts himself in the way of other perils without fault, is not guilty of contributory negligence." Simeone v. Lindsay (Del. Super. 1907), 65 Atl. Rep. 778.

"Persons in position of great peril are not required to exercise all of the presence of mind and care of a prudent and careful man; the law makes allowances for them and leaves the circumstances of their conduct to the jury." Chicago & A. Ry. Co. v. O'Leary, 126 Ill App. 311.

"It is not contributory negligence, as a matter of law, for one placed in a dangerous position by another's negligence to adopt in a sudden emergency a perilous alternative in an endeavor to avoid danger to himself or others, though it may turn out that he should have acted differently." McCallion v. Missouri Pac. Ry. Co. (Kan. 1906), 88 Pac. Rep. 50.

"Where plaintiff, a railroad switchman, was injured in a collision between a switch engine and a road engine, plaintiff was not negligent while acting in an emergency in jumping from the footboard of the tender of the switch engine to a station platform, instead of employing the emergency air brakes by means within his reach." Brantner v. Chicago, B & Q. Ry. Co. (Iowa 1907), 112 N. W. Rep. 790.

an action for damages for an injury sustained by him in the collision.[81]

Where the engineer knows that cars are ahead of him on the track it is negligence on his part to round a sharp curve without keeping any lookout for such cars and without slacking the speed of his engine.[82] And the rule in regard to cars upon the track, applies as well to a collision with any other object or substance, of which he has notice, or ought to know, by the exercise of reasonable care, on his part.[83] Accordingly, if a rock falls from a mountain side and is seen, or could have been seen, a sufficient distance ahead, to have enabled the engineer to stop his engine, before striking it, with the means at his command, a failure to stop his engine, before the collision occurs, will prevent an action for damages on his part.[84]

However, mere opportunity to know of the condition of the track, in the absence of actual knowledge thereof and the mere possibility that the engine might have been stopped, after discovery of the obstruction, will not justify the court, as matter of law, in holding the engineer guilty of contributory negligence, in such a case, but the issue should be submitted to the jury, where any such doubt exists.[85]

And, of course, if the collision is due to the negligence of the train dispatcher, instead of that of the engineer, since his neglect would not be the proximate cause of his injury, in States where the common-law rule of coemployees has been abolished, the engineer would not be denied a recovery.[86]

[81] Little Rock, etc., R. Co. v. Ross (Ark), 18 S. W. Rep. 172; Blessing v. St. Louis, etc., R. Co., 7 Mo. App. 594; 77 Mo. 410; Moules v. Delaware, etc., Co., 141 Pa. St. 632; 21 Atl. Rep. 753; Norfolk, etc., R. Co. v. Williams, 89 Va. 165; 15 S. E. Rep. 522.

[82] Blessing v. St. Louis, etc., R. Co., 77 Mo. 410; Moules v. Delaware, etc., R. Co., 141 Pa. St. 632; 21 Atl. Rep. 733.

[83] Little Rock, etc., R. Co. v. Voss (Ark.), 18 S. W. Rep. 172.

[84] Little Rock, etc., R. Co. v. Voss, *supra*.

[85] Little Rock, etc., R. Co. v. Voss, *supra*.

[86] Santa Fe Pacific R. Co. v. Holmes, 202 U. S. 438; 50 L. Ed. 1094.

§ 424. **Injuries from obstructions near the track.**— As a general rule, as to obstructions known to an employee, or those plainly observable by him, if he fails to use such ordinary care as will protect himself from a collision with such known danger, he will be denied a recovery, because of his own contributory negligence, for an injury from striking any object near the track.[87] Upon this question the true test is not in the exercise of care to discover the danger, but whether the obstruction is known, or is plainly observable.[88]

As employees, in the discharge of their duties on trains, often find it necessary to extend their persons beyond the surface of cars, an employee is not guilty of contributory negligence, as matter of law, because his person, at the moment of collision, unnecessarily protruded beyond the outer surface of the car, but for which fact he would not have been

"An engineer on a train, following another train, is guilty of contributory negligence in running into a station without keeping a proper lookout, though he did not know that the preceding train was standing at the station." Judgment (Civ. App.), 95 S. W. Rep. 660, reversed.— International, etc., R. Co. v. Brice (Tex. 1906), 97 S. W. Rep. 461.

The negligence of a railroad company in allowing two trains to run upon the same track, without giving orders, will not excuse the contributory negligence of an operative, whose duty it was to look at the bulletin board and know the exact location of the other train, for failing to do so. Vinson v. Los Angeles, etc., R. Co., 147 Cal. 479; 82 Pac. Rep. 53.

A railway engineer, who was killed as a result of running into a washout on the track, is not guilty of such contributory negligence, as to preclude a recovery for his death, although informed of the unusual rain, because he did not discover the exact washout, or avoid the injury. Western Ry. Co. v. Russell (Ala.), 39 So. Rep. 311.

[87] Devitt v. Pacific, etc., R. Co., 50 Mo. 302; 3 Am. Ry. Rep. 533; Owen v. New York, etc., R. Co., 1 Lans. (N. Y.) 108; Norfolk, etc., R. Co. v. Williams, 89 Va. 165; 15 S. E. Rep. 522; Choctaw, etc., R. Co. v. McDade, 191 U. S. 64; 48 L. Ed. 96.

[88] Texas, etc., R. Co. v. Archibald, 170 U. S. 665; 42 L. Ed. 1118; 18 Sup. Ct. Rep. 777; Choctaw, etc., R. Co. v. McDade, 191 U. S. 64; 48 L. Ed. 96; Texas, etc., R. Co. v. Swearingen, 196 U. S. 51; 49 L. Ed. 382.

injured.[89] Accordingly, an injury from striking a bridge,[90] standing cars,[91] switch stand,[92] water spout,[93] telegraph pole,[94] or other obstruction, maintained by the railroad company near the track, may or may not constitute contributory negligence, on the part of the injured employee, according to the facts and circumstances in connection with the particular injury and the length of service of the given employee and the notice or means of knowledge of the given obstruction.

§ 425. **Striking overhead bridge.**— As in the case of obstructions near the track, the question of an employee's negligence in striking an overhead bridge, or other structure, will depend upon the notice or means of notice of the employee

[89] Kansas City, etc., R. Co. v. Burton, 97 Ala. 240; 12 So. Rep. 88; 53 Am. & Eng. R. Cas. 115.

[90] Illick v. Flint, etc., R. Co., 67 Mich. 632; 35 N. W. Rep. 708.

[91] Kansas City, etc., R. Co. v. Burton, 97 Ala. 240; 12 So. Rep. 88; 53 Am. & Eng. R. Cas. 115.

[92] Johnston v. Oregon, etc., R. Co., 23 Oregon 94; 31 Pac. Rep. 283; Johnson v. St. Paul, etc., R. Co., 43 Minn. 53; 44 N. W. Rep. 884.

[93] Choctaw, etc., R. Co. v. McDade, 191 U. S. 64; 48 L. Ed. 96.

[94] Chicago, etc., R. Co. v. Russell, 91 Ill. 298; Boss v. Northern Pacific R. Co., 2 N. Dakota 128.

For injury from striking a fence and contributory negligence of engineer, see Murphy v. Wabash R. Co., 115 Mo. 111; 21 S. W. Rep. 862.

If a brakeman climbs over the bumpers at the end of the car to use an end ladder to ascend to the top of the car, instead of using the side ladder, and as a result sutains injury, his contributory negligence will bar a recovery. Wilson v. Michigan, etc., R. Co., 94 Mich. 20; 53 N. W. Rep. 797.

But where the employee, a car catcher, had to act promptly and ascended by a side ladder, instead of an end ladder and, as a result, was struck and injured by a stationary car, near the track, on a side track, he was not held negligent as matter of law, in Chase v. Burlington, etc., R. Co., 76 Iowa 675; 39 N. W. Rep. 196; 38 Am. & Eng. R. Cas. 148.

A railroad company is not liable to a brakeman, injured while descending a car, on account of a projection on a bridge the train

of the structure, the length of time he has been in the service and the character of his duties at the time of the injury.[95]

A brakeman, on top of a moving train, is not, as matter of law, charged with contributory negligence, simply because he does not constantly bear in mind the precise location where his train is and where every bridge is along the line of road. The law makes some allowances for the frailty of human memory, in such cases.[96]

But a brakeman cannot recover for injuries sustained by a collision with an overhead bridge, while necessarily on the roof of a freight car, if he knew the bridge was a low one, where he might have avoided it by stooping,[97] nor would the failure to maintain a warning signal at such bridge alter the result, if the injured employee knew the location of the bridge, for this would simply amount to concurrent negligence upon his part and his employer.[98] And where the brakeman had been cautioned about the presence of an overhead bridge and knew its location and knew that he could

was crossing, where he was not required to be in this position at time of injury. Krebbs v. Oregon, etc., R. Co., 40 Wash. 138; 82 Pac. Rep. 130; 84 Pac. Rep. 609.

"A brakeman on a freight train, injured by coming in contact with a water crane maintained near the track, while climbing the ladder of a box car in the train, cannot be charged with negligence on the theory that he mounted the train on the wrong side of the crane, for, having an eye to mount the car, there could be no wrong and right side to the crane." Charlton v. St. Louis, etc., R. Co. (Mo. 1906), 98 S. W. Rep. 529.

[95] Barton v. St. Louis, etc., R. Co., 52 Mo. 253; Devitt v. Pacific R. Co., 50 Mo. 302; Dale v. St. Louis, etc., R. Co., 63 Mo. 435; Elliott v. St. Louis, etc., R. Co., 67 Mo. 272; Clark v. Richmond, etc., R. Co., 78 Va. 709; 49 Am. Rep. 394; 18 Am. & Eng. R. Cas. 78; Rains v. St. Louis, etc., R. Co., 71 Mo. 164; 5 Am. & Eng. R. Cas. 610.

[96] Wallace v. Central, etc., R. Co., 138 N. Y. 302; 52 N. Y. S. R. 351; 33 N. E. Rep. 1069, reversing 63 Hun 632.

[97] Owen v. New York, etc., R. Co., 1 Lans (N. Y.) 108; 47 N. Y. 670.

[98] Fitzgerald v. New York, etc., R. Co., 59 Hun 225; 36 N. Y. S. R. 755.

not stand upright and pass under it safely, on top of a freight car, but when injured was seated on a brake, which elevated him higher than he would otherwise have stood, his negligence was held to preclude his recovery for an injury so sustained.[99]

However, if the employer has failed to maintain a telltale or warning near the bridge or overhead structure, to announce its presence, if the injury occurs at night and the employee's knowledge of the structure is not sufficient to charge him with negligence in failing to note its presence, or that it was too low, or there are other facts or circumstances from which it can be said that his injury was not due to his own carelessness, but to the neglect of the employer, the question of the negligence of an injured employee, in such case, from being struck by an overhead structure, will be for the jury.[1]

§ 426. **Running at immoderate rate of speed.**— While a railroad company is bound to maintain its track and roadbed in a reasonably safe condition for use, yet, where an injury to an employee who had a right to regulate the speed of a train, is due not so much to the bad condition of the track

[99] Devitt v. Pacific R. Co., 50 Mo. 302; 3 Am. Ry. Rep. 533.

[1] McLaughlin v. Grand Trunk R. Co., 12 Ont. 418.

A brakeman, killed while on top of a box car, in daylight, by striking an overhead bridge, who had passed under the bridge daily for three months and had always stooped to avoid it, was held not entitled to recover, although no telltale was maintained by the company near the bridge. Hooper v. Columbia, etc., R. Co., 21 So. Car. 541; 53 Am. Rep. 691; 28 Am. & Eng. R. Cas. 433. See, also, Simms v. South Carolina R. Co., 26 So. Car. 490; 2 S. E. Rep. 486; 31 Am. & Eng. R. Cas. 199. But, see Cleveland, etc., R. Co. v. Walter, 45 Ill. App. 642.

It was held to be contributory negligence for an employee to climb up a freight car higher and wider than ordinary freight cars usually are, without looking to see how near the car will come to the roof of a station, in Platt v. Chicago, etc., R. Co., 84 Iowa 694; 51 N. W. Rep. 254.

as to the immoderate rate of speed at which the train was being run at the time of the injury, this is held to constitute contributory negligence on his part.[2] A brakeman, with the right, by ordinary care, to regulate the speed of approaching cars, cannot recover damages for an injury to which the rate of speed of the cars, contributed;[3] a battered rail, which concurred to cause an injury to an engineer who ran his train faster than allowed to make up lost time, and in consequence of which a wreck occurred, was held not to enable him to recover damages, but his own negligence would prevent a recovery,[4] and a freight conductor will be denied a recovery for an injury due to a reckless rate of speed at which the train was being run, under his direction or control.[5] Just what rate of speed will be held negligence, under the circumstances, of course will depend upon the facts of each case and where the evidence is conflicting or reasonable minds would not agree as to the conclusion from the facts in proof, the issue would be one for the jury. It has been held negligence to approach a bridge in process of construction, at a rate of twenty-five miles an hour;[6] running over a switch, in a dense fog, at fifteen or twenty miles an hour, was held negligence, in one case,[7] and running over a switch at a rate of ten miles an hour in the face of a rule restricting the speed to six miles, was held negligence in another case.[8]

[2] Smith v. Memphis, etc., R. Co., 18 Fed. Rep. 304; So. Louis, etc., R. Co. v. Morgart, 45 Ark. 318; Little Rock, etc., R. Co. v. Voss (Ark.), 18 S. W. Rep. 172; Sweeny v. Minneapolis, etc., R. Co., 33 Minn. 153; 22 N. W. Rep. 289; 22 Am. & Eng. R. Cas. 302; Mantel v. Chicago, etc., R. Co., 33 Minn. 62.

[3] Muldowney v. Illinois, etc., R. Co., 39 Iowa 615; 8 Am. Ry. Rep. 487.

[4] Illinois, etc., R. Co. v. Patterson, 69 Ill. 650.

[5] Gorham v. Kansas City, etc., R. Co., 113 Mo. 408; 20 S. W. Rep. 1060.

[6] Norfolk, etc., R. Co. v. Williams, 89 Va. 165; 15 S. E. Rep. 522.

[7] Wert v. Keim (Pa.), 13 Atl. Rep. 548.

[8] Memphis, etc., R. Co. v. Thomas, 51 Miss. 637.

But of course no rule can be applied to determine the facts of each case, but the conclusion must necessarily differ, with the different elements that go to make up the substantial proof of each case.

§ 427. **Injuries from observance or nonobservance of signals.**— An injury from a failure to heed an authorized signal, or a compliance with an unauthorized signal, may, in connection with the circumstances connected with an injury to a railroad employee, amount to contributory negligence, on his part.

Where the rules of the company required a train to wait at a crossing, until a signal was given to cross another railroad track, and in reliance on a proper signal, a train on the other road was crossing when the conductor of the train on the defendant's road gave a signal for his train to also cross, it was held that his contributory negligence would prevent a recovery for his death, which resulted from the collision.[9] When an engineer is warned by a danger signal not to proceed with his train, and immediately thereafter another signal is given, which indicates that he might proceed with safety, but both signals are continuously displayed together, so as to leave it in doubt which signal to obey, it is negligence for him to go on with his train, and if he does so and a collision ensues in which he loses his life, his widow will not be permitted to recover for his death.[10]

And the consequences of relying on a signal not authorized by the rules of the company is not essentially different from the failure to observe a signal authorized by the rules, and if an employee relies on a signal not authorized by a rule of the company, and in relying

[9] Chicago, etc., R. Co. v. Snyder, 117 Ill. 376; 7 N. E. Rep. 604; 28 Am. & Eng. R. Cas. 611, reversing 18 Ill. App. 640.

[10] Devine v. Savannah, etc., R. Co., 89 Ga. 541; 15 S. E. Rep. 781.

thereon, sustains an injury, no recovery can be had therefor.[11]

Of course, as in other cases, if the giving of the signal or the reliance thereon, or the question of the existence of a rule in derogation of the signal, is in doubt, the issue would be properly left to a jury, as triers of the facts.[12] And if the order or signal is given by a superior employee, whose orders the injured employee is bound to obey, his obedience to the signal would not be held to amount to contributory negligence on his part, unless the danger was so glaring as to have deterred any ordinarily prudent man from assuming it, in pursuance of the signal, or order.[13]

§ 428. **Riding in dangerous places.**— The employee of a railroad company, who voluntarily leaves his post and is injured while upon another part of the train, where the exposure is greater, is presumably guilty of negligence con-

[11] Columbus, etc., R. Co. v. Bridges, 86 Ala. 448; 5 So. Rep. 864; 38 Am. & Eng. R. Cas. 136.

[12] Central, etc., R. Co. v. DeBray, 71 Ga. 406.

[13] Colorado Midland R. Co. v. O'Brien, 16 Colo. 219; 27 Pac. Rep. 701; Miller v. Union Pacific R. Co., 12 Fed. Rep. 600; 4 McCrary 629.

Where an engineer had a right to assume that signals of the brakeman would be given him, when the engine was to be moved, the brakeman had a right to assume that the engine would not be moved, unless signals were given by him. Illinois Central R. Co. v. Cane's Admr., 28 Ky. L. R. 1018; 90 S. W. Rep. 1061.

If a brakeman, repeating signals, stands so close to an approaching train, that the operatives, with due care, cannot stop the train after discovering him, he cannot recover, in Kentucky. Cincinnati, etc., R. Co. v. Hill's Admr., 28 Ky. L. R. 530; 89 S. W. Rep. 523.

A brakeman who is injured because of his own want of care in watching for an approaching train, from the rear, while he is engaged in giving signals, cannot recover. Cincinnati, etc., R. Co. v. Hill's Admr., 28 Ky. L. R. 530; 89 S. W. Rep. 523.

"A fireman on defendant's train not calling the engineer's attention to a signal set against the train which the engineer had failed to observe, *held* guilty of contributory negligence preventing recovery for injuries received." Elmgren v. Chicago, M. & St. P. Ry. Co. (Minn. 1907), 112 N. W. Rep. 1067.

tributing to an injury received while so situated and no recovery can be had for such an injury.[14]

Riding on the pilot of the engine, instead of in a car where the plaintiff belonged, has been held negligence on the part of an employee;[15] riding on a known defective footboard of an engine, when other safer places were open to the injured employee to ride;[16] riding in a sitting position upon the cowcatcher of a road engine;[17] riding upon the tender of an engine, when the employee ought to have been in a caboose;[18] riding in a dangerous position on a moving car, when no duty required the employee's presence, at such a place;[19] riding on a brake wheel, on the platform of a car, when the employee ought to have been in the car;[20] riding on the side of a flat car, with his feet hanging over the edge of the car, after warning not to do so;[21] a passenger voluntarily riding upon the platform of a passenger coach, unnecessarily, instead of in the coach, have all been held negligent acts defeating a recovery in case of an injury.[22]

[14] O'Neill v. Keokuk, etc., R. Co., 45 Iowa 546.

[15] Baltimore, etc., R. Co. v. Jones, 95 U. S. 439; Eliot v. Chicago, etc., R. Co., 5 Dakota 523; 41 N. W. Rep. 758; 38 Am. & Eng. R. Cas. 62; Alabama, etc., R. Co. v. Hawk, 72 Ala. 112; 47 Am. Rep. 403; 18 Am. & Eng. R. Cas. 194; Griggs v. Houston, etc., R. Co., 104 U. S. 553; 8 Am. & Eng. R. Cas. 359; Atchison, etc., R. Co. v. Lindley, 42 Kansas 14; 22 Pac. Rep. 703; 41 Am. & Eng. R. Cas. 72.

[16] Central Trust Co. v. Wabash, etc., R. Co., 26 Fed. Rep. 897.

[17] Glover v. Scotten, 82 Mich. 369; 46 N. W. Rep. 936.

[18] Daggett v. Illinois Central R. Co., 34 Iowa 284; 5 Am. Ry. Rep. 389; Lehigh Valley R. Co. v. Greiner, 113 Pa. St. 600; 6 Atl. Rep. 246; 28 Am. & Eng. R. Cas. 397.

[19] Martensen v. Chicago, etc., R. Co., 60 Iowa 705; 15 N. W. Rep. 569; 11 Am. & Eng. R. Cas. 233.

[20] Martin v. Baltimore, etc., R. Co., 41 Fed. Rep. 125.

[21] St. Louis, etc., R. Co. v. Marker, 41 Ark. 542.

[22] Hickey v. Boston, etc., R. Co., 14 Allen (Mass.) 429; Worthington v. Central, etc., R. Co., 64 Vt. 107; Bon v. Railway Assurance Co., 56 Iowa 664; Houston, etc., R. Co. v. Clemmons, 55 Texas 88; 8 Am. & Eng. R. Cas. 396; Chicago, etc., R. Co. v. Reilly, 40 Ill. App. 416.

But the presumption of negligence in such cases, may be overcome by evidence that such employee or passenger occupied such a dangerous position in performance of a specific duty on his part, or through no fault of his.[23] A switchman was held not necessarily negligent in riding on the footboard of an engine, where his duties could be easier discharged, while so riding;[24] it is not negligence, as matter of law, that a switchman rode on the front footboard, instead of on the rear board;[25] a middle brakeman is not necessarily negligent, because at time of his injury, he did not happen to be exactly in the middle of the train;[26] a brakeman riding on top of a car, sitting at the side, instead of in the middle, is not necessarily negligent, as matter of law,[27] nor will the negligence of the employee in riding in a dangerous place, ever defeat his recovery for an injury incurred while so riding, if the defendant, after notice of his danger, could have avoided the injury, by reasonable care,[28] and whether or not an employee is negligent, in riding in a dangerous place, where the facts are disputed, or his duty is not plain, is an issue properly left to the jury to determine.[29]

[23] Boss v. Northern Pacific R. Co., 2 N. Dakota 128; 49 N. W. Rep. 655.

[24] Lockhart v. Little Rock, etc., R. Co., 40 Fed. Rep. 631.

[25] James v. Northern Pacific R. Co., 46 Minn. 168; 48 N. W. Rep. 783.

[26] Cleveland, etc., R. Co. v. Walter, 45 Ill. App. 642.

[27] Shumaker v. St. Louis, etc., R. Co., 39 Fed. Rep. 174; 17 Wash. L. R. 550.

[28] Au v. New York, etc., R. Co., 29 Fed. Rep. 72.

[29] Meloy v. Chicago, etc., R. Co. (Iowa), 37 N. W. Rep. 335; 33 Am. & Eng. R. Cas. 358.

"Where plaintiff was riding on the pilot of an engine at the time he was injured, in accordance with the custom and by the directions of his superior officers, whether he was guilty of contributory negligence in assuming such position was for the jury." Barschow v. Lake Shore, etc., Ry. Co. (Mich. 1907), 110 N. W. Rep. 1057; 13 Detroit Leg. N. 1060.

"Where an employee of a railway company, voluntarily and unnecessarily takes an exposed position on a train, where the risk was

§ 429. **Boarding moving car or engine.**— An employee of a railroad company cannot recover, in a suit against the company, for injuries received while recklessly attempting to board a moving train, although the train may have been improperly equipped and some of its appliances are defective,[30] nor would the fact that the plaintiff had been in the habit of boarding moving trains, or that he had been seen to do so on previous occasions, avail him, in such a case.[31]

A switchman was held guilty of negligence in attempting to get on a moving engine, by stepping on the front foot-

so obviously dangerous that a prudent man would not think of incurring it, he is guilty of contributory negligence, and there can be no recovery against the railroad company for the injuries he received." State v. Western Maryland R. Co. (Md. 1907), 65 Atl. Rep. 635.

"Where a brakeman of a log train, riding on a bumper over the trucks of one of the cars in accordance with his duty, was thrown from the train and injured by a sudden acceleration of speed, and he was neither warned nor had any reasonable cause to anticipate such acceleration of speed, he was not negligent." Gulf, etc., Ry. Co. v. Harrison (Tex. Civ. App. 1907), 104 S. W. Rep. 399.

"Where a switchman was injured while riding on the footboard at the rear of the tender of a switch engine as it was backing along a Y before daylight in the morning by its colliding with a road engine, he was not negligent as a matter of law in temporarily turning and looking backward to see if his foreman was on the front end of the engine, in the absence of any reason to believe that there was any immediate danger in proceeding along the Y; the crew having been assured by the yardmaster that the Y was clear." Brantner v. Chicago, etc., Ry. Co. (Iowa 1907), 112 N. W. Rep. 790.

Riding an engine pilot, without a rod to hold to, may be a risk assumed, but it is not contributory negligence, as a matter of law, in North Carolina. Biles v. Seaboard Air Line Co., 139 N. C. 528; 52 S. E. Rep. 129.

[30] Dowell v. Vicksburg, etc., R. Co., 61 Miss. 519; 18 Am. & Eng. R. Cas. 42; McMurtry v. Louisville, etc., R. Co., 67 Miss. 601; 7 So. Rep. 401; Chambers v. Western, etc., R. Co., 91 N. Car. 471; Timmonds v. Central, etc., R. Co., 6 Ohio St. 105; Kerwhacker v. Cleveland, etc., R. Co., 3 Ohio St. 172.

[31] Dowell v. Vicksburg, etc., R. Co., 61 Miss. 519; 18 Am. & Eng. R. Cas. 42.

board, in violation of a rule of the employer;[32] there is a want of ordinary care in the voluntary attempt of an engine hostler's assistant to get on the rear step of a moving engine;[33] a flagman who knew of a defective engine step and yet tried to get on the engine by means of this step, when the engine was in motion, is negligent.[34] A brakeman cannot recover for injuries received while attempting to get on the pilot of a moving engine, even when acting in pursuance of orders of a superior employee,[35] nor would a railroad company be liable for an injury to a switchman, who attempts to mount a defective engine step, while the engine is in motion, by standing in the center of the track, in violation of the employer's rules.[36]

But it is not necessarily negligence for a switchman, accustomed to the work, to step upon the footboard of a slowly moving engine, especially where there is no rule forbidding such conduct.[37] And it may properly be left to the jury to determine whether or not a brakeman is negligent, in attempting to mount a rapidly moving freight train, where his lantern had gone out and he was acting under the orders of the conductor of his train, in so doing.[38]

[32] Lake Shore, etc., R. Co. v. Roy, 5 Ill. App. 82.

[33] Union Pacific R. Co. v. Estes, 37 Kansas 715; 16 Pac. Rep. 131.

[34] New York, etc., R. Co. v. Lyons, 119 Pa. St. 324; 13 Atl. Rep. 205; 21 W. N. C. 277; 11 Cent. Rep. 834.

[35] Cornwall v. Charlotte, etc., R. Co., 97 N. Car. 11; 2 S. E. Rep. 659.

[36] O'Mellia v. Kansas City, etc., R. Co., 115 Mo. 205; 21 S. W. Rep. 503.

[37] O'Mellia v. Kansas City, etc., R. Co., 115 Mo. 205; 21 S. W. Rep. 503.

[38] Fox v. Chicago, etc., R. Co., 86 Iowa 368; 53 N. W. Rep. 259; 53 Am. & Eng. R. Cas. 430.

An employee who attempts to board a moving engine when off duty, and is injured by an oil can left on the running board, cannot recover upon the ground of such obstruction, or the absence of a rule regulating it. Wise Ter. R. Co. v. McCormick (Va.), 51 S. E. Rep. 731.

"It is not negligence for a freight brakeman to mount his train when in motion to resume his duties after he had left the train to

§ 430. **Jumping from moving car or engine.**— One who is injured by jumping from a moving train, whether employee or passenger, is generally barred of recovery, by reason of his contributory negligence, in the absence of an invitation or order to jump, on the part of the railroad company's employees in control of the train.[39]

An employee is generally held negligent barring a recovery, if he jumps from a moving train, at such time as to strike an obstruction near the track, which he could have seen, by looking before he leaped;[40] a brakeman cannot recover for an injury received while stepping from a moving engine, at night, at a place he was not familiar with, without his lantern;[41] getting off a moving car or engine, by stepping in the opposite direction from that in which the car or engine is moving, is generally held negligence,[42] and it is such recklessness to step from a moving engine or car, onto the track, directly in front of the oncoming car or engine,

procure a lunch." Charlton v. St. Louis, etc., R. Co. (Mo. 1906), 98 S. W. Rep. 529.

"It is not, under all circumstances, as a matter of law, negligence for a brakeman to dismount from a moving train and attempt to board the locomotive, though the act of dismounting is unnecessary." Creola Lumber Co. v. Mills (Ala. 1906), 42 So. Rep. 1019.

"Where it was negligence for a brakeman to attempt to board a car at the time, in the manner, and under the circumstances under which he did, and his negligence proximately caused or contributed to cause the accident, he is not entitled to recover." Galveston, etc., Ry. Co. v. Worcester (Tex. Civ. App. 1907), 100 S. W. Rep. 990.

[39] Patton v. Western, etc., R. Co., 96 N. Car. 455; 1 S. E. Rep. 863; 31 Am. & Eng. R. Cas. 298. A lady passenger, alighting from a moving train with her baby in her arms, was held negligent, barring a recovery for a resulting injury, in Young v. Missouri Pacific Ry. Co., 93 Mo. App. 267, 276.

[40] Gaffney v. New York, etc., R. Co., 15 R. I. 456; 7 Atl. Rep. 284; 31 Am. & Eng. R. Cas. 265; Thompson v. Boston, etc., R. Co., 153 Mass. 391; 26 N. E. Rep. 1170.

[41] Burgin v. Louisville, etc., R. Co., 97 Ala. 274; 12 So. Rep. 395.

[42] Magee v. Chicago, etc., R. Co., 82 Iowa 249; 48 N. W. Rep. 92.

as will bar a recovery, in case of an injury therefrom.[43]

But where a passenger or employee is invited by the employees of the defendant, or ordered by a superior employee, to alight from a moving train, it not appearing that obedience to the invitation or order at the time would certainly cause injury, it is not usually held to be such contributory negligence as will prevent a recovery.[44] So, if a railroad company invites an employee to board a train to receive his wages and he attempts to alight from the train, which moves off, before he has finished receiving his wages and is injured in consequence of the way he alights and his infirmities, he will not be held negligent, as matter of law,[45] nor would it be held negligence for one to jump from a moving train, to avoid an impending collision, under the sudden fright resulting from the emergency, if the employee had not himself occasioned the collision, by his own want of care.[46]

§ 431. **Injuries while loading and unloading cars.**— An employee familiar with the movement of trains, employed to load or unload cars, who sustains injury, while in or on the car, when he knew the train was apt to be moved at any time, is generally held guilty of negligence barring a recovery for an injury so sustained,[47] and the same result flows from an injury sustained while voluntarily attempting to move a car

[43] Gibbons v. Chicago, etc., R. Co., 66 Iowa 231; 23 N. W. Rep. 644.

[44] Patton v. Western, etc., R. Co., 96 N. Car. 455; 1 S. E. Rep. 863; 31 Am. & Eng. R. Cas. 298; 2 Wood, Ry. Law 1130, 1131, 1132.

[45] Louisville, etc., R. Co. v. Stacker, 86 Tenn. 343; 6 S. W. Rep. 737; 6 Am. St. Rep. 840.

[46] Georgia, etc., R. Co. v. Rhodes, 56 Ga. 645; Central, etc., R. Co. v. Crosby, 74 Ga. 737; Cottrill v. Chicago, etc., R. Co., 47 Wis. 634; Haney v. Pittsburg, etc., R. Co., 38 W. Va. 570; 18 S. E. Rep. 748.

[47] In Forey v. Syracuse, etc., R. Co. (122 N. Y. 667; 12 N. T. S. R. 198; 46 Hun 678), an employee engaged as shoveler on a gravel train, was held guilty of negligence in standing where he was thrown off the car by the shock caused by the stopping of the train,

he is engaged in loading or unloading, in the absence of some defects in the car or track, or a specific order so to move it.[48]

In a Georgia case,[49] plaintiff was engaged to load and unload cars on a side track and was cautioned not to attempt to move them himself; but notwithstanding his orders, he was attempting to move the car he was unloading, with a crowbar, when it was struck by a passing train and he was injured. It was held that his own negligence prevented a recovery. So, an employee voluntarily selecting a board or skid, known to be defective, when safer appliances might have been used, to unload a car with, is generally held to be guilty of such want of care, as will bar a recovery for an injury so sustained.[50]

But of course, as in other cases, if the evidence is disputed as to the defective appliance or as to his notice of the defects therein, or he was acting under a special order in the moving of the car or its contents, the issue as to his negligence, would generally be one for a jury and not for the court, as matter of law.[51]

[48] Quibell v. Union Pacific R. Co., 7 Utah 122; 25 Pac. Rep. 734; Georgia, etc., R. Co. v. Mapp, 80 Ga. 631; 6 S. E. Rep. 24.

[49] Georgia, etc., R. Co. v. Mapp, 80 Ga. 631; 6 S. E. Rep. 24.

[50] Pennsylvania R. Co. v. Lynch, 90 Ill. 333; Gowen v. Harley, 56 Fed. Rep. 973, by Judge Sanborn.

[51] Chase v. Burlington, etc., R. Co., 76 Iowa 675; 39 N. W. Rep. 196; 38 Am. & Eng. R. Cas. 148.

An employee engaged in loading or unloading cars, is held to be engaged in the "operation of a railroad," within the meaning of statutes making the company liable when so engaged, if injured by the negligence of a coemployee. Orenderff v. Terminal Ass'n, 116 Mo. App 348, 353; Chicago, etc., R. Co. v. Pontius, 157 U. S. 209; 39 L. Ed. 675.

Plaintiff selected a known defective board in loading a car, as a gang plank, and was injured by striking it and knocking it down with his truck. It was held he could not recover, as the negligence was that of himself and his fellow workmen. Fewell v. Southern Ry. Co. (Va.), 52 S. E. Rep. 689.

"Though it was customary for persons unloading cars standing on

§ 432. **Negligence in operation of hand cars or tricycles.**— Where an employee on a hand car, or other similar conveyance, in pursuance to orders, or in the discharge of his duties, as such employee, is injured by a defect in the car or track, he will not be denied a recovery for such an injury, in the absence of notice to him of such defect or unless it was such as to be plainly discernable, or one that he ought to have known of, in the proper discharge of his duty to his employer.[52] The duty to furnish a reasonably safe appliance runs with a car the moment a defect is discovered, and repair or warning thereof is the only way this duty can be discharged.[53] This duty, however, is not to furnish the newest or best appliances or cars, but only to furnish those reasonably safe for the use to which they are put, and where this measure of duty is discharged, there is no resulting liability for an improper use of a hand car or tricycle, by which a resulting injury is sustained by an employee.[54]

Although a push car is known not to have a brake, an employee injured by riding it down grade, at a rapid rate of

a railway side track to quit work and get out of the car when cars were being switched on the track, whether plaintiff was guilty of contributory negligence while working in a car through other cars colliding with it must be determined by what a man of ordinary prudence would have done in like circumstances." Missouri, etc., Ry. Co. of Texas v. Smith (Tex. Civ. App. 1907), 101 S. W. Rep. 453.

[52] Banks v. Wabash, etc., R. Co., 40 Mo. App. 458; Lee v. St. Louis, etc., R. Co., 112 Mo. App. 372, an exhaustive opinion, by Judge Nortoni; Smith v. Wrightsville, etc., R. Co., 83 Ga. 671; 10 S. E. Rep. 361; 41 Am. & Eng. R. Cas. 320.

[53] Rodney v. St. Louis, etc., R. Co., 127 Mo. 676; 28 S. W. Rep. 887; 30 S. W. Rep. 150; McKune v. California Southern R. Co., 66 Cal. 302; 5 Pac. Rep. 482; 17 Am. & Eng. R. Cas. 589.

[54] Gardner v. St. Louis, etc., R. Co., 135 Mo. 90; 36 S. W. Rep. 214. In propelling a hand car with a crowbar, instead of the handle, an employee was held negligent, in Powers v. New York, etc., R. Co., 98 N. Y. 274; 21 Am. & Eng. R. Cas. 609.

speed, is negligent as matter of law;[55] so, it has been held reckless to ride a push car down a steep grade, without seeing whether or not the switch at the foot of the grade is properly set;[56] section men riding a hand car around a curve, where a regular train at any time is apt to be encountered, are negligent, if they ride at an excessive rate of speed;[57] a derailment of a hand car caused by dropping off the appliances carried on the car, is negligence on the part of the operatives of the car;[58] injuries sustained while attempting to out-run an approaching train, furnish no cause of action:[59] although it is negligence for a railroad company to run a train without a headlight on the engine at night, no recovery can be had for an injury from a collision by a hand car and such an engine, at night, when the time of the train was known to the operator of the hand car;[60] an operator of a hand car, injured by a collision with a special train, run without notice, cannot recover;[61] the death of a section man on a hand car, resulting from a collision with a belated regular train, furnishes no cause of action for his representatives, where no effort had been made to ascertain the time for arrival of such regular train;[62] it is error to approach a standing train, on a hand car, or tricycle, unless it is known that the train is not likely to move;[63] nor can a section foreman, or other employee, not authorized to ride a tricycle, recover for an injury from a collision from striking an extra

[55] Miller v. Union Pacific R. Co., 2 McCrary (U. S.) 87; 4 Fed. Rep. 768.

[56] York v. Kansas City, etc., R. Co., 117 Mo. 405; 22 S. W. Rep. 1081.

[57] Shepard v. Boston, etc., R. Co., 158 Mass. 174; 33 N. E. Rep. 508.

[58] St. Louis, etc., R. Co. v. Mara (Ark.), 16 S. W. Rep. 196.

[59] Pittsburg, etc., R. Co. v. Goss, 13 Ill. App. 619.

[60] Burling v. Illinois, etc., R. Co., 85 Ill. 18; Hawley v. Chicago, etc., R. Co., 71 Iowa 717; 29 N. W. Rep. 787.

[61] Pennsylvania, etc., R. Co. v. Wachter, 60 Md. 395; 15 Am. & Eng. R. Cas. 187.

[62] Cleveland, etc., R. Co. v. Leech, 41 Ohio St. 388.

[63] Catawissa R. Co. v. Armstrong, 49 Pa. St. 186.

or regular train, where no proper lookout was kept for trains.[64]

However, the compliance or noncompliance with the company's rules or the orders of superior employees is always material in such injuries and if the custom of the service has not been violated, or some rule of the employer, the question of the negligence of the employee in an action for an injury from such a cause, may be a jury issue, instead of one for the court, as matter of law.[65]

[64] Jolly v. Detroit, etc., R. Co., 93 Mich. 370; 53 N. W. Rep. 526. An employee not required by the railroad company, to use a "speeder," but who is permitted to use it, without objection, is a mere licensee, and must operate such a conveyance at his own peril, and must look out for wild trains and is negligent if he does not, in Ohio. Cleveland, etc., R. Co. v. Workman, 12 Am. Neg. Rep. 162. See, also, Chicago, etc., R. Co. v. Healey (Nebraska), 15 Am. Neg. Rep. 385; McGahan v. Transit Co. (Mo.), 100 S. W. Rep. 601; Vaudray v. Chicago, etc., R. Co. (Wis.), 109 N. W. Rep. 926; Hafford v. Illinois, etc., R. Co. (Iowa), 110 N. W. Rep. 446; International, etc., R. Co. v. McCarthy, 64 (Texas) 632; Louisville, etc., R. Co. v. Jolly's Admx. (Ky.), 90 S. W. Rep. 977.

[65] Slette v. Great Northern R. Co., 53 Minn. 341; 55 N. W. Rep. 137; McKune v. California Southern R. Co., 66 Cal. 302; 5 Pac. Rep. 482; 17 Am. & Eng. R. Cas. 589; Pool v. Chicago, etc., R. Co., 56 Wis. 277; 14 N. W. Rep. 46; 8 Am. & Eng. R. Cas. 360.

In Mack v. Chicago, etc., R. Co. (123 Mo. App. 531), the Kansas City Court of Appeals held that it was a jury issue whether or not a section man, under orders of his foreman, was negligent, in remaining on a hand car, without knowing of the time a regular train was due, because belated, where he was injured by the sudden application of the brake, to avoid a collision with the train, as a result of which he was thrown from the car.

An employee engaged in running a hand car, is engaged in the "operation of a railroad," within the meaning a statute making the railroad company liable for the negligence of a coemployee with one so engaged. Stanley v. Chicago, etc., R. Co., 112 Mo. App. 601, 609. But it is error to instruct the jury as matter of law, this is true, if the facts are disputed. Callahan v. Bridge Co., 170 Mo. 482; 71 S. W. Rep. 208; 60 L. R. A. 249; 94 Am. St. Rep. 746.

A section hand, directed by the section foreman, to work a handle bar of a hand car, with his back toward an approaching train, is not, as

§ 433. **Negligence in coupling and uncoupling cars.**— An experienced brakeman is presumed to have knowledge of such matters pertaining to the business in which he is engaged, as are of common information, and if his acts in coupling or uncoupling a car or engine are dangerous or reckless as judged by such general information in the business, he will be held negligent barring a recovery for such an injury.[66] He is presumed to know that a train of cars will move a distance after detached from a moving engine propelling them and if he deliberately steps in front of such cars, after the engine is disconnected, he is negligent.[67] In handling foreign cars, he is charged with notice of all defects that are apparent in the car and if he attempts to couple a lower drawhead onto a higher one, without a crooked link, and sustains an injury, while so engaged, he is generally held negligent.[68] An employee is negligent in coupling an old car with a lower link than other cars ordinarily have, if he does not provide a crooked link to make the connection;[69] it is negligence not to observe a disparity in the heights of

matter of law, negligent. Louisville & N. R. Co. v. Helm, 28 Ky. L. R. 603; 89 S. W. Rep. 709.

"Where plaintiff was injured while working on a hand car, the court properly charged that, if plaintiff could reasonably have used a less dangerous way of working the car, this will not bar his right to recover, unless it appear that he knew he was using a more dangerous way, and that such use was negligent, and that this negligence was the proximate cause of his injuries." Southern Ry. Co. v. McGowan (Ala. 1907), 43 So. Rep. 378.

[66] Gorman v. Minneapolis, etc., R. Co., 78 Iowa 509; 43 N. W. Rep. 303; Savannah, etc., R. Co. v. Barber, 71 Ga. 644.

[67] Burns v. Boston, etc., R. Co., 101 Mass. 50; Arnold v. Delaware, etc., R. Co., 6 N. Y. S. R. 368.

[68] Kelly v. Abbott, 63 Wis. 307; 23 N. W. Rep. 890; 53 Am. Rep. 292; 21 Am. & Eng. R. Cas. 633.

[69] St. Louis, etc., R. Co. v. Higgins, 44 Ark. 293; 21 Am. & Eng. R. Cas. 629; Chicago, etc., R. Co. v. Warner, 108 Ill. 538; 18 Am. & Eng. R. Cas. 100.

drawheads to cars to be coupled together;[70] an employee injured by projecting loads on cars he is coupling, which could have been avoided by stooping, is negligent, where he knew of the projecting loads;[71] a brakeman who knows that couplings are defective and apt to slip past each other, is negligent in going between the cars to make such a coupling;[72] an injury received while coupling cars of different patterns and makes, which were apparent when an observance of the difference between the cars would have avoided the injury, is negligence;[73] riding on a flat car to make a coupling with a combination car, attached, is held negligence;[74] a brakeman who signals the engineer to move ahead, in making a flying switch, before he has extricated the coupling pin, as a result of which he is injured, is negligent;[75] a brakeman, who knowing that two couplings are mismatched, places the pin in the moving car, instead of in the standing car and remains between the cars, to shake the pin in position, instead of letting the concussion place it in position, is negligent;[76] and if a brakeman sees that a train is not going to stop for him to uncouple the cars, and while it is in rapid

[70] Norfolk, etc., R. Co. v. Emmert, 83 Va. 640; 3 S. E. Rep. 145; 31 Am. & Eng. R. Cas. 194; Toledo, etc., R. Co. v. Asbury, 84 Ill. 429; Goulin v. Canada Southern Co., 64 Mich. 190; 31 N. W. Rep. 44.

[71] Toledo, etc., R. Co. v. Black, 88 Ill. 112; 21 Am. Ry. Rep. 290; Lothrop v. Fitchburg, etc., R. Co., 150 Mass. 423; 23 N. E. Rep. 227; 41 Am. & Eng. R. Cas. 327; Brennan v. Michigan, etc., R. Co., 93 Mich. 156; 53 N. W. Rep. 358; Brice v. Louisville, etc., R. Co. (Ky.), 9 S. W. Rep. 288; Northern, etc., R. Co. v. Husson, 101 Pa. St. 1; 12 Am. & Eng. R. Cas. 241.

[72] Toledo, etc., R. Co. v. Asbury, 84 Ill. 429.

[73] Hulett v. St. Louis, etc., R. Co., 67 Mo. 239; Thomas v. Missouri Pacific Ry. Co., 109 Mo. 187; 18 S. W. Rep. 980.

[74] Chicago, etc., R. Co. v. Rush, 84 Ill. 570.

[75] Browne v. New York, etc., R. Co., 158 Mass. 247; 33 N. E. Rep. 650.

[76] Norfolk, etc., R. Co. v. McDonald, 88 Va. 352; 13 S. E. Rep. 706; Towner v. Missouri Pacific Ry. Co., 52 Mo. App. 648.

motion rushes in to make the coupling, as a result of which he is injured, he cannot recover.[77]

But the fact that an employee undertook to uncouple cars under circumstances which rendered the service more dangerous than usual, is not always negligence as matter of law. The issue is whether or not an ordinarily prudent person, under the circumstances, would have made the attempt.[78] In the absence of evidence that it was not customary for switchmen to mount cars to couple them, it cannot be held negligence to do so;[79] it is not always negligence for one not regularly employed to couple cars, to attempt to do so, in exchanging work with a coemployee;[80] it is not negligence, usually, for one not so employed, to attempt to make a coupling, under orders of a superior employee;[81] it is not negligence to attempt to couple a car loaded with a projecting load, in the absence of information of the projecting load;[82] a brakeman has a right to presume that cars he is required to couple are in proper repair, without inspecting them;[83] he has a right to presume that a rule preventing the moving of cars while employees are between them, will be adhered to;[84] he is not negligent in attempting to couple a de-

[77] Marsh v. South Carolina R. Co., 56 Ga. 274; Henry v. Sioux City R. Co., 66 Iowa 52; 23 N. W. Rep. 260; 21 Am. & Eng. R. Cas. 644; Ferguson v. Central Iowa R. Co., 58 Iowa 293; 12 N. W. Rep. 293; 5 Am. & Eng. R. Cas. 614; Ohio, etc., R. Co. v. Bass, 36 Ill. App. 126; Grand v. Michigan, etc., R. Co., 83 Mich. 564; 47 N. W. Rep. 837; 48 Am. & Eng. R. Cas. 383.

[78] Baird v. Chicago, etc., R. Co., 61 Iowa 359; 13 N. W. Rep. 731; 8 Am. & Eng. R. Cas. 128.

[79] Rutledge v. Missouri Pacific R. Co., 110 Mo. 312; 19 S. W. Rep. 38.

[80] Hudson v. Charleston, etc., R. Co., 55 Fed. Rep. 248.

[81] Rahman v. Minnesota, etc., R. Co., 43 Minn. 42; 44 N. W. Rep. 522.

[82] Louisville, etc., R. Co. v. Robinson (Ky.), 16 S. W. Rep. 707.

[83] King v. Ohio, etc., R. Co., 14 Fed. Rep. 277; 11 Biss. (U. S.) 362; 8 Am. & Eng. R. Cas. 119.

[84] Central, etc., v. Harrison, 73 Ga. 744.

fective car, when ignorant of the defect;[85] is not necessarily negligent in making a coupling on the inside of the curve, when signals are given him on that side;[86] nor is it negligence necessarily, for an employee to go in between moving cars to couple them, in the absence of a rule preventing it;[87] and it is ordinarily a question of fact for the jury whether or not a more dangerous method was used in making a coupling and this is especially true, when the facts are disputed.[88]

[85] Louisville, etc., R. Co. v. Buck, 116 Ind. 566; 19 N. E. Rep. 543; 38 Am. & Eng. R. Cas. 152.

[86] Bennett v. Northern Pacific R. Co., 3 N. Dakota 91; 54 N. W. Rep. 314.

[87] Memphis, etc., R. Co. v. Graham, 94 Ala. 545; 10 So. Rep. 283; 53 Am. & Eng. R. Cas. 396.

[88] Peoria, etc., R. Co. v. Puckett, 42 Ill. App. 642.

"Where a brakeman was negligent in going between cars while in motion, he could not recover for injuries, though the engineer was negligent in backing the cars at an unusual and excessive speed." Huggins v. Southern Ry. Co. (Ala. 1906), 41 So. Rep. 856.

"Where a railroad employee had undertaken the business of coupling and uncoupling cars, it was his duty to exercise such care as reasonably prudent men would exercise under like circumstances, and, where he knew, or by exercising such care as a reasonably prudent man would exercise under the circumstances could have known, that engines were backing cars on the track where he was about to couple cars, and he went in between the cars, and his failure to exercise reasonable care contributed to his injuries, he was guilty of contributory negligence." Southern Ry. Co. v. Simmons (Va. 1906), 55 S. E. Rep. 459.

A common laborer in a construction crew is not guilty of negligence in going between cars to couple them, on an order from his foreman, without notice to train crew of so doing. Sorensen v. Power, etc., Co. (Or.), 82 Pac. Rep. 10.

"Plaintiff, an experienced switchman, having full knowledge of the operation of cars in defendant's yards and control of the switch engine with which he was employed, was injured while endeavoring to couple certain cars, equipped with automatic couplers. Plaintiff, with knowledge that it was dangerous so to do, attempted to open the coupler of a moving car attached to the engine, by running in advance of it, and while so doing was caught by a nail projecting from the brake beam, thrown down, and run over. Plaintiff could have stopped the car

§ 434. **Violation of rules, in coupling cars.**— Ordinarily, a brakeman attempting to couple cars, in a manner contrary to the rules of his employer, if injured as a result of such violation of the rules, is held guilty of contributory negligence, preventing his recovery.[89] Where a brakeman was injured, by being thrown from a moving train, while uncoupling the engine and tender and it was shown that it was unnecessary to make such uncoupling while the train was in motion, but that the rules of the company forbade such attempt, this was held to be sufficient evidence of contributory negligence to compel a nonsuit, in an action to recover for the injury received.[90]

Using defective links, to make couplings,[91] or using draw-

opened the coupler on it and then signaled the engineer to back and make the coupling, or he could have signaled for reduced speed and run ahead of the car and opened the coupler of the standing car, either of which methods would have been safe. *Held*, that plaintiff's negligence in selecting a dangerous method to do the work and not the nail protruding from the brake beam, was the proximate cause of the accident, which precluded a recovery." New York, C. & St. L. R. Co. v. Hamlin (Ind. 1907), 79 N. E. Rep. 1040.

"The possibility that a railway employee, while attempting to make a coupling with a car not equipped with an automatic coupler, as required by act March 2, 1893, ch. 196, § 2, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), might miscalculate the height to which he might safely raise his head, is so inevitably and clearly attached to the risk which, under § 8 of that statute, he does not assume, as to prevent a court from holding, as a matter of law, that he was guilty of contributory negligence, which would defeat any recovery in lifting his head a little too high after being warned of the danger." Judgment, 56 Atl. Rep. 417, 207 Pa. 198, reversed. Schlemmer v. Buffalo, etc., Ry. Co., 27 U. S. Sup. Ct. 407; 51 L. Ed. 856.

[89] Louisville, etc., R. Co. v. Watson, 90 Ala. 68; 8 So. Rep. 249; East Tennessee, etc., R. Co. v. Smith, 89 Tenn. 114; 14 S. W. Rep. 1077.

[90] Lockwood v. Chicago, etc., R. Co., 55 Wis. 50; 12 N. W. Rep. 401; 6 Am. & Eng. R. Cas. 151.

[91] St. Louis, etc., R. Co. v. Rice, 51 Ark. 467; 11 S. W. Rep. 699; 4 L. R. A. 173; Bennett v. Northern Pacific R. Co., 2 N. Dakota 112; 49 N. W. Rep. 408; 48 Am. & Eng. R. Cas. 182.

heads of different makes or patterns, without inspection,[92] in violation of the employer's rules, is held negligence; going between moving cars, to make couplings or to uncouple cars, is negligence, when forbidden by a rule of the employer[93] and it is generally held negligence sufficient to prevent a recovery for an injury resulting from a failure to use a coupling stick, instead of the hands, to couple cars with, when the company rules provide for the use of sticks for such purpose and they are furnished to be so used by the employees.[94]

But, as in other cases, an employee is not bound by a rule that has not been properly published, or brought to the attention of the injured employee, prior to his injury, or which is not generally enforced, even if properly published originally.[95] If, when a coupling stick was delivered to an em-

[92] Brooks v. Northern Pacific R. Co., 47 Fed. Rep. 687.

[93] Pryor v. Louisville, etc., R. Co., 90 Ala. 32; 8 So. Rep. 55; Schaub v. Hannibal, etc., R. Co., 106 Mo. 74; 16 S. W. Rep. 924; Northern Pacific R. Co. v. Nickens, 50 Fed. Rep. 718; 53 Am. & Eng. R. Cas. 388; Johnson v. Chesapeake, etc., R. Co., 38 W. Va. 206; 18 S. E. Rep. 573; Sedgwick v. Illinois, etc., R. Co., 76 Iowa 340; 41 N. W. Rep. 35; Gardner v. Michigan, etc., R. Co., 58 Mich. 584; 26 N. W. Rep. 301; 24 Am. & Eng. R. Cas. 435.

[94] Richmond, etc., R. Co. v. Pannill, 89 Va. 552; 16 S. E. Rep. 748; Russell v. Richmond, etc., R. Co., 47 Fed. Rep. 204; Richmond, etc., R. Co. v. Free, 97 Ala. 231; 12 So. Rep. 294; Norfolk, etc., R. Co. v. Briggs (Va.), 14 S. E. Rep. 753; Welsey v. Lake Shore, etc., R. Co., 33 Ohio St. 227; Sloan v. Georgia Pacific Ry. Co., 86 Ga. 15; 12 S. E. Rep. 179; Rome, etc., Con. Co. v. Dempsey, 86 Ga. 499; 12 S. E. Rep. 882; Georgia Pacific R. Co. v. Propst, 83 Ala. 518; 3 So. Rep. 764; Pennsylvania R. Co. v. Whitman, 111 Ind. 212; 12 N. E. Rep. 380; 31 Am. & Eng. R. Cas. 149; Louisville, etc., R. Co. v. Watson, 90 Ala. 68; 8 So. Rep. 249; Darracott v. Chesapeake, etc., R. Co., 83 Va. 288; 2 S. E. Rep. 511; 31 Am. & Eng. R. Cas. 157.

[95] Louisville, etc., R. Co. v. Foley, 94 Ky. 220; 21 S. W. Rep. 866; Fay v. Minneapolis, etc., R. Co., 30 Minn. 231; 15 N. W. Rep. 241; 11 Am. & Eng. R. Cas. 193.

ployee to use, he was advised that it was a mere matter of form, and he need not use it, he would not be held negligent in making a coupling without using the stick;[96] a rule preventing going between cars, when in motion, to couple them, is not violated by standing on the footboard of the tender, to make a coupling,[97] nor would a rule apply to a brakeman, unless especially made to include employees in his class,[98] and where the fact of the promulgation or enforcement of the rule, or the fact whether or not it was being violated or contributed to the cause of the injury, is in doubt, it would be proper to submit such issues to a jury.[99]

§ 435. **Injuries in making couplings, while violating orders.**— If a brakeman has been cautioned to be careful and not give a signal until he is in a safe place, before an engine is moved, and not to pull the coupling pin until he had hold of the handle of the car, and he is injured while violating this order from a superior employee, no recovery can be had.[1] And where a yardmaster ordered a brakeman to uncouple cars that were standing still and then ride them back on a switch, and, instead of obeying the order given him, the brakeman signaled the engineer to back and stepping between the moving cars to uncouple them, got his foot

[96] Louisville, etc., R. Co. v. Foley, 94 Ky. 220; 21 S. W. Rep. 866.

[97] Richmond, etc., R. Co. v. Jones, 92 Ala. 218; 9 So. Rep. 276.

[98] Chicago, etc., R. Co. v. Braggonier, 119 Ill. 51; 7 N. E. Rep. 688.

[99] Carroll v. East Tennessee, etc., R. Co., 82 Ga. 452; 10 S. E. Rep. 163; 41 Am. & Eng. R. Cas. 307; Little Rock, etc., R. Co. v. Leverett, 48 Ark. 333; 3 S. W. Rep. 50; 28 Am. & Eng. R. Cas. 459.

"Where a rule of a railroad prohibited employees from going between moving cars to couple them, a brakeman was guilty of contributory negligence in going between moving cars if the cars could have been coupled without his so doing." Huggins v. Southern Ry. Co. (Ala. 1906), 41 So. Rep. 856.

[1] Gorman v. Minneapolis, etc., R. Co., 78 Iowa 509; 43 N. W. Rep. 303.

fastened in an open frog and was run over and killed, it was held that his disobedience of orders would prevent a recovery for his death.[2]

But before the disobedience of an order will prevent a recovery for an injury in coupling or uncoupling cars, it must be shown that the one giving the order has some power of control or supervision over the injured employee and although a yardmaster may have given a brakeman orders not to go between the rails in making a coupling or in uncoupling cars, where there was no evidence showing that the yardmaster had any authority over the injured brakeman, it would be proper to refuse an instruction denying a recovery on this ground.[3] And neither can contributory negligence be predicated on an obedience of an order of a superior employee, although it might be found that obedience to the order was negligence, unless no reasonably prudent man would have obeyed the order, under the circumstances.[4]

§ 436. **Employee falling from moving car or engine.**— As the mere fact that an employee is injured in the discharge of his duties, does not, of itself, raise an inference of negligence, but the burden is always on the employee, or his representative, to show a breach of duty on the employer's part, directly contributing to effect the injury to the employee, in the case of a suit by an employee or his representative, the rule *res ipsa loquitur* is not generally held to entitle the injured employee to recover damages, but he must show negligence as the basis of his right of recovery, in all cases.[5]

[2] Richmond, etc., R. Co. v. Risdon, 87 Va. 355; 12 S. E. Rep. 786; 48 Am. & Eng. R. Cas. 244.

[3] Hannah v. Connecticut, etc., R. Co., 154 Mass. 529; 28 N. E. Rep. 682.

[4] Rome, etc., R. Co. v. Chasteen, 88 Ala. 591; 7 So. Rep. 94; 40 Am. & Eng. R. Cas. 559.

[5] Kremer v. Mfg. Co., 120 Mo. App. 252.

This being true, a mere showing of an injury to an employee by falling from a moving car or engine, would not, ordinarily, establish a *prima facie* case of negligence, on the employer's part, but it would require, in addition to an injury from such a cause, a showing that the employer was remiss in his duty toward the employee, directly causing such injury. In a Kentucky case,[6] an employee fell from a car, on account of a jerk of the train, but there was nothing to show that it was an unusual jerk, or that the appliances or employees had not used due care in the handling of the train. The trial court had instructed the jury to find a verdict for the railroad company, and this action was affirmed by the Supreme Court, in the course of which it was said: "There is no evidence whatever that the engineer knew that Simmons had fallen off of the train. On the contrary, the inference is clear, owing to the distance and his attention being occupied by the duties appertaining to the management of the engine and train, that he did not know that Simmons had fallen off the car."

§ 437. **Negligence in disobedience of rules, generally.**— Where an employee of a railroad company receives an injury which is caused by his acting in direct violation of a reasonable rule, made by the company for the safety of its employees, of which rule he has notice and has promised to obey, he must be deemed guilty of contributory negligence and cannot recover damages from the company for such injury.[7]

[6] Simmons' Admr. v. Louisville, etc., R. Co., 18 S. W. Rep. 1024.

[7] Overby v. Chesapeake, etc., R. Co., 37 W. Va. 524; 16 S. R. Rep. 813; 53 Am. & Eng. R. Cas. 417; Louisville, etc., R. Co. v. Watson, 90 Ala. 68; 8 So. Rep. 249; Cincinnati, etc., R. Co. v. Lang, 118 Ind. 579; 21 N. E. Rep. 317; 38 Am. & Eng. R. Cas. 25; Francis v. Kansas City, etc., R. Co., 110 Mo. 387; 19 S. W. Rep. 935; 53 Am. & Eng. R. Cas. 410; Zumwalt v. Chicago, etc., R. Co., 35 Mo. App. 661; Pennsylvania R. Co. v. Whitcomb, 111 Ind. 212; 12 N. E. Rep. 380; 31 Am. &

The mere fact that an employee was violating a known rule of the employer, at the time of his injury, will not, of itself, relieve the employer of liability for the injury, but if the violation of the rule, in whole or in part contributed to cause the injury, it will prevent a recovery therefor.[8]

But rules adopted which are not generally prescribed and which are not required to be enforced, will not excuse the employer for an injury due in part to its own negligence;[9] a company cannot avail itself of a rule which it has not properly published and which it has uniformly failed to enforce;[10] it is essential to show that knowledge of the rule has been brought home to the injured employee;[11] a rule

Eng. R. Cas. 149; Wilson v. Michigan, etc., R. Co., 94 Mich. 20; 53 N. W. Rep. 797; International, etc., R. Co. v. Gray, 65 Texas 32; 27 Am. & Eng. R. Cas. 318; Gordy v. New York, etc., R. Co., 75 Md. 297; 23 Atl. Rep. 607; Wolsey v. Lake Shore, etc., R. Co., 33 Ohio St. 227.

[8] San Antonio, etc., R. Co. v. Wallace, 76 Texas 636; 13 S. W. Rep. 565; 44 Am. & Eng. R. Cas. 564; LaCroy v. New York, etc., R. Co., 132 N. Y. 570; 30 N. E. Rep. 391; Gulf, etc., R. Co. v. Ryan, 69 Texas 665; 7 S. W. Rep. 83; 33 Am. & Eng. R. Cas. 289; Reed v. Burlington, etc., R. Co., 72 Iowa 166; 33 N. W. Rep. 451; 31 Am. & Eng. R. Cas. 190; Prather v. Richmond, etc., R. Co., 80 Ga. 427; 9 S. E. Rep. 530; Francis v. Kansas City, etc., R. Co., 110 Mo. 387; 19 S. W. Rep. 935; 53 Am. & Eng. R. Cas. 410; Central, etc., R. Co. v. Kitchens, 83 Ga. 83; 9 S. E. Rep. 827; Pilkinton v. Gulf, etc., R. Co., 70 Texas 226; 7 S. W. Rep. 805; Sutherland v. Troy, etc., R. Co., 125 N. Y. 737; 26 N. E. Rep. 609; Lyon v. Detroit, etc., R. Co., 31 Mich. 429.

[9] Rutledge v. Missouri Pacific Ry. Co., 110 Mo. 312; 19 S. W. Rep. 38.

[10] International, etc., R. Co. v. Hinzie, 82 Texas 623; 18 S. W. Rep. 681; Carroll v. East Tennessee, etc., R. Co., 82 Ga. 452; 10 S. E. Rep. 163; 41 Am. & Eng. R. Cas. 307; Wooden v. Western, etc., R. Co., 46 N. Y. S. R. 77; La Croy v. New York, etc., 132 N. Y. 570; 30 N. E. Rep. 391.

[11] Standard, etc., Co. v. Jones, 94 Ala. 434; 10 So. Rep. 530; Gregory v. Ohio River R. Co., 37 W. Va. 606; 16 S. E. Rep. 819; Memphis, etc., R. Co. v. Graham, 94 Ala. 545; 10 So. Rep. 283; 53 Am. & Eng. R. Cas. 396; Covey v. Hannibal, etc., 27 Mo. App. 170; Little Rock,

cannot be enforced where it appears that such rule was wholly and habitually disregarded by employees, with the knowledge and consent of the employer,[12] nor can negligence be imputed to an employee in disregarding a rule enacted for his protection, when, at the time of the injury, the employee was acting under an inconsistent special order given by a superior employee and which he was called upon to obey.[13]

etc., R. Co. v. Leveritt, 48 Ark. 333; 3 S. W. Rep. 50; 28 Am. & Eng. R. Cas. 459.

[12] Atkyn v. Wabash R. Co., 41 Fed. Rep. 193; Sloan v. Georgia, etc., R. Co., 86 Ga. 15; 12 S. E. Rep. 179; 44 Am. & Eng. R. Cas. 553; Northern Pacific R. Co. v. Bickels, 50 Fed. Rep. 718; 53 Am. & Eng. R. Cas. 388.

[13] Hall v. Chicago, etc., R. Co., 46 Minn. 439; 49 N. W. Rep. 239; Cincinnati, etc., R. Co. v. Lang, 118 Ind. 579; 21 N. E. Rep. 317; 38 Am. & Eng. R. Cas. 250.

"An employee is bound to obey all the reasonable rules and instructions of the employer with reference to the conduct of the business." Brown v. Northern Pac. Ry. Co. (Wash. 1906), 86 Pac. Rep. 1053.

"Where the duties of an employee are specified in reasonable rules of which the employee has knowledge and to which he has assented, his disobedience of them at a time when they are capable of observance is negligence as a matter of law, and is not to be judged by the requirements of ordinary care." Elmgren v. Chicago, M. & St. P. Ry. Co. (Minn. 1907), 112 N. W. Rep. 1067.

"A brakeman whose duty it was under the rules of the company and the instructions of its conductor, when his train went onto a siding, to lock a switch and remain within 10 feet of it, having violated such duty by retiring into a caboose without locking the switch so that another train ran onto the siding and into the caboose, killing the brakeman, he was guilty of contributory negligence, and no recovery could be had for his death." Holland v. Seaboard Air Line Ry. Co. (N. C. 1906), 55 S. E. Rep. 835.

"Where, under a railway rule, a north-bound extra train could not enter a single track without orders or until the engineer and conductor ascertained from a train register that all regularly scheduled south-bound trains due to arrive and not more than 12 hours late had arrived, it was contributory negligence for the engineer to proceed in violation of the rule, barring recovery for his death in collision with a

§ 438. **Violation of particular rules.**— Illustrations cannot be given from nearly all the adjudicated cases, where recovery was denied, because of the violation of specific rules of the employer, at the time of the injury to a railroad employee, but a few from the many cases on this subject will be mentioned.

regular south-bound train." Cogbill v. Louisville & N. R. Co. (Ala. 1907), 44 So. Rep. 683.

"Where the duties of an employee in given circumstances are particularly specified in the unambiguous and reasonable rules of the employer, of which the employee has knowledge and to which he has assented by entering and continuing in the service, his nonobservance or disobedience of them at a time when they are capable of observance is negligence as matter of law, and is not to be judged by the undefined and varying requirements of ordinary care." St. Louis & S. F. R. Co. v. Dewees (U. S. C. C. A., Kan. 1907), 153 Fed. Rep. 56.

"Where a train rule is positive in its requirement that passenger trains shall run at least 10 minutes apart, and, under the rules the first of two passenger trains need not send out a rear flagman at a station until the train is 10 minutes late, the engineer of the second train, acquainted with the rule, with the time, and with the leaving time of the preceding train, is guilty of contributory negligence in running into the forward train standing at a station less than 10 minutes after its leaving time." Judgment (Civ. App.) 95 S. W. Rep. 660, reversed. International & G. N. R. Co. v. Brice (Tex. 1906), 97 S. W. Rep. 461.

"In an action for injuries to an employee of a railroad company, plaintiff's violation of a rule of the company at the time he was injured would not prevent a recovery, unless the violation of such rule proximately contributed to his injury." Pittsburgh, C., C. & St. L. Ry. Co. v. Lightheiser (Ind. 1906), 78 N. E. Rep. 1033.

"The breach of an employer's rule is not negligence *per se* unless it is an act so opposed to the dictates of common prudence that no careful person would commit it." Galveston, H. & S. A. Ry. Co. v. Cherry (Tex. Civ. App. 1907), 98 S. W. Rep. 898.

"In an action for injuries to an employee of a railway company, the fact that plaintiff violated one of the railway company's rules did not constitute negligence *per se*." Rehearing (Civ. App.), 94 S. W. Rep. 1135, denied. Missouri, K. & T. Ry. Co. of Texas v. Parrott (Tex. Civ. App. 1906), 96 S. W. Rep. 950.

"Failure to obey a rule of the company, requiring car repairers to see that blue flags are displayed at each end of the car about which they

An employee injured as a result of a violation of a known rule, regulating the starting or running of trains, cannot recover;[14] an explosion of a boiler, caused by carrying more steam than the employer's rules permit, furnishes no cause of action;[15] an injury sustained by one operating an engine, in violation of a known rule, is without remedy therefor;[16] one riding on an engine, in violation of a rule, who would not otherwise have been injured, cannot recover;[17] a conductor riding on top of a freight car, in violation of a known rule of the employer, injured as a result thereof, is without cause of action for an injury there received;[18] mounting a

are at work, is not excused by the presence of a superior employee of the employer, where the car repairer had agreed with the employer to obey such rule, and failure to obey it is negligence *per se*." New York, C. & St. L. R. Co. v. Ropp (Ohio, 1907), 81 N. E. Rep. 748.

"Where plaintiff, a brakeman, was injured in a railroad collision, resulting from a failure to flag an approaching train as required by the rules, plaintiff having been ordered by his conductor, who was in immediate charge of the train, to proceed on his train, was not negligent in failing to flag, which would have involved a direct conflict with the conductor's orders." Crow v. Northern Pac. Ry. Co. (Wash. 1907), 88 Pac. Rep. 1022.

"The violation by an employee of a known rule laid down by the employer for the protection and safety of the employee does not bar a recovery where the rule has been violated so openly and frequently and for such a length of time that the employee could, by the exercise of ordinary care, have ascertained its nonobservance." Haynes v. North Carolina R. Co. (N. C. 1906), 55 S. E. Rep. 516.

[14] Rose v. Boston, etc., R. Co., 58 N. Y. 217; 9 Am. Ry. Rep. 515; Slater v. Jewett, 85 N. Y. 61; 39 Am. Rep. 627; 5 Am. & Eng. R. Cas. 515.

[15] Hughes v. New Orleans, etc., R. Co., 6 La. Ann. 495; Herman v. New Orleans, etc., R. Co., 11 La. Ann. 5.

[16] Ohio, etc., R. Co. v. Collarn, 73 Ind. 261; 38 Am. Rep. 134; 5 Am. & Eng. R. Cas. 554.

[17] Louisville, etc., R. Co. v. Wilson, 88 Tenn. 316; 12 S. W. Rep. 720; Abend v. Terre Haute, etc., R. Co., 111 Ill. 202; 17 Am. & Eng. R. Cas. 614; Shenandoah Valley, etc., R. Co. v. Lucade, 86 Va. 390; 10 S. E. Rep. 422.

[18] San Antonio, etc., R. Co. v. Wallace, 76 Texas 636; 13 S. W. Rep.

side ladder, on the side of a known obstruction, in violation of a rule, prevents a recovery for an injury therefrom;[19] a switchman, or other employee who attempts to mount a moving engine, by standing in the middle of the track, to step on the footboard, in violation of a rule, is guilty of negligence barring a recovery for an injury so received;[20] a fireman who attempts to mount a moving engine, by catching the tender, in violation of a rule, is without remedy if he sustains an injury;[21] an engineer, injured in a collision or derailment, while violating a rule limiting the speed of his train, is negligent;[22] a brakeman, injured in a collision, who, at the time was away from his post of duty and asleep, in violation of a rule, cannot recover therefor;[23] an employee injured as result of a defective appliance on the car, which he had failed to examine, as required by a rule of the employer, is not entitled to recover therefor,[24] nor can an employee while working upon or under cars, if injured by a collision with an engine or other cars, when he has failed to put up a flag or signal, as required by the employer's rules, for his own protection, recover therefor.[25]

565; 44 Am. & Eng. R. Cas. 564; Chicago, etc., R. Co. v. Mathews, 39 Ill. App. 541.

[19] Chicago, etc., R. Co. v. Crowder, 49 Ill. App. 154.

[20] Francis v. Kansas City, etc., R. Co., 110 Mo. 387; 19 S. W. Rep. 935; 53 Am. & Eng. R. Cas. 410.

[21] Murray v. Gulf, etc., R. Co., 73 Texas 2; 11 S. W. Rep. 125; 38 Am. & Eng. R. Cas. 177.

[22] Savannah, etc., R. Co. v. Folks, 76 Ga. 527; Sutherland v. Troy, etc., R. Co., 125 N. Y. 737; 26 N. E. Rep. 609; Norfolk, etc., R. Co. v. Lindamood (Va.), 14 S. E. Rep. 694.

[23] Eastburn v. Norfolk, etc., R. Co., 34 W. Va. 681; 12 S. E. Rep. 819.

[24] Louisville, etc., R. Co. v. Utz, 133 Ind. 265; 32 N. E. Rep. 881; Badgerow v. Grand Trunk R. Co., 19 Ont. 191; Alexander v. Louisville, etc., R. Co., 83 Ky. 589; 25 Am. & Eng. R. Cas. 458; Kansas City, etc., R. Co. v. Kier, 41 Kansas 661; 21 Pac. Rep. 770; 38 Am. & Eng. R. Cas. 119.

[25] Cypher v. Huntington, etc., R. Co., 149 Pa. St. 359; 24 Atl. Rep.

But where, notwithstanding a rule preventing firemen from operating engines, it was a known custom that they did occasionally do so, an engineer was held not negligent, as matter of law, in permitting his fireman to run the engine for a short distance;[26] a custom to permit other employees to manage the engine when the engineer is sick, will control a rule forbidding such a practice;[27] the fact that a rule preventing another engineer to ride on the engine was being violated when a derailment occurred, will not prevent a recovery, when this is shown not to have occasioned the wreck;[28] that a brakeman was riding in an engine cab, when killed in a collision and was not on a freight car, as required by a rule, will not bar a recovery, when it is shown that this did not effect the cause of the injury;[29] where an overhead structure killed a brakeman and one rule required him to be on top of the car and another forbade it, at such a time of night, his presence on the car was held not to bar a recovery for his death;[30] a rule requiring a conductor of a freight train to remain in the middle of his train, going down grade, would not prevent a recovery for an injury, while he was at the front of the train, when his duties required his presence at that point, at time of the injury;[31] the violation of a rule requiring a stop before reaching a railroad crossing,

225; Louisville, etc., R. Co. v. Hanning, 131 Ind. 528; 31 N. E. Rep. 187; 53 Am. & Eng. R. Cas. 452.

[26] Barry v. Hannibal, etc., R. Co., 98 Mo. 62; 11 S. W. Rep. 308.

[27] East Line, etc., R. Co. v. Scott, 72 Texas 70; 10 S. W. Rep. 298; 38 Am. & Eng. R. Cas. 16.

[28] Central R. Co. v. Mitchell, 63 Ga. 173; 1 Cim. & Eng. R. Cas. 145.

[29] Connors v. Burlington, etc., R. Co., 71 Iowa 490; 32 N. W. Rep. 465.

[30] Chicago, etc., R. Co. v. Matthews, 39 Ill. App. 541.

[31] Somerset, etc., R. Co. v. Galbraith, 109 Pa. St. 32; 1 Atl. Rep. 371; 23 Am. & Eng. R. Cas. 375.

is not, in all cases, conclusive evidence of negligence;[32] the violation of a rule preventing brakemen from alighting from freight cars, on the side where obstructions are located, is not negligence, in the absence of notice of the presence of obstructions by the brakeman injured in so alighting;[33] a dense fog which obstructed the vision and made it dangerous to remain on top of a train, will excuse the violation of a rule by staying below, when an injury occurred;[34] the failure to examine the appliances on a train, as required by a rule, is not negligence, when sufficient time to make such examination was not given;[35] violation of a rule requiring a flag, when repairing a car, will not bar a recovery, when this did not cause the injury,[36] nor will the negligence of the foreman in failing to post a flag, avail the railroad company, when he was in charge of the injured car repairer, at time of his injury.[37]

[32] Hanson v. Minneapolis, etc., R. Co., 37 Minn. 355; 34 N. W. Rep. 223; 32 Am. & Eng. R. Cas. 13.

[33] Chicago, etc., R. Co. v. Russell, 91 Ill. 298.

[34] Phillipps v. Chicago, etc., R. Co., 64 Wis. 475; 25 N. W. Rep. 544; 23 Am. & Eng. R. Cas. 453.

[35] O'Malley v. New York, etc., R. Co., 51 N. Y. S. R. 366; 67 Hun 130; 22 N. Y. Supp. 48.

[36] Texas, etc., R. Co. v. Wynne (Texas), 22 S. W. Rep. 1064.

[37] Richmond, etc., R. Co. v. Hammond, 93 Ala. 181; 9 So. Rep. 577.

The violation of rules by car repairers is held negligence, as matter of law, in an unbroken line of decisions and that such decisions are based upon a sound policy, is just as true, in the case of injuries to employees, from neglect of precautionary measures adopted by the employer, as it is to punish the employer for neglecting to adopt such precautions, in the first place, for the protection of the employees engaged in hazardous employment. Public opinion, with little or no understanding of the facts in such cases, has a constant tendency to blame systems and managements. When a man violates a plain and unmistakable rule, or runs a signal, with disastrous results, the general demand is for additional rules or signals, instead of a compliance with those existing. When it is clear that an existing rule has been violated and an injury results, the employer should not be held

§ 439. **Disobedience of special orders.**— An employee of a railroad company cannot recover for an injury which is the direct result of his own disobedience of a specific order of a superior employee, who has power to control his conduct

negligent, but the blame visited upon the negligent party, just as it would be visited upon the employer, if no reasonable rule had been adopted. That this is the reasoning of the cases, is evident from a perusal of the opinions.

In Schaub v. Hannibal, etc., R. Co. (106 Mo., p. 92), a car coupler, injured while violating a rule of the employer, sued for damages, and the court, speaking by Judge Gantt, said: "The uncontradicted evidence in the case is that there was a rule of the company prohibiting employees from going between the cars to uncouple them while in motion, and this rule had been in force for at least three years and deceased was shown to have had a copy of these rules. Indeed, they were printed on all the time cards. In the absence of all evidence that defendant had knowingly permitted a violation of this rule, it is clear that deceased was bound to observe it, and if he persisted in breaking it, and was hurt in so doing, he could not ask the defendant to make good to him the loss or injury his own recklessness had caused. The court committed manifest error in refusing the defendant's third instruction. If the deceased violated said rule, he was guilty of contributory negligence that will bar the recovery in this case." See, also, Francis v. Kansas City, etc., Ry. Co., 110 Mo. 387; Alcorn v. Chicago, etc., R. Co., 108 Mo. 81, 92, 95.

In Renfro v. Chicago, etc., R. Co. (86 Mo. 302), a car repairer was killed, while at work, under a stationary car. The rules required a flag or personal notice to the operators of engines or cars, but no flag was posted or no notice given. The facts are very similar to those in above case and in denying a recovery for the death of plaintiff's husband, Judge Black, for the court, said: "Reasonable rules were prescribed for the safety of the men, which were not obeyed. It is contended that there is no evidence that deceased knew of these rules, but this is clearly untenable. Express evidence is that there was a general order when two went to work and it took both to do the work, to call for a third. The witnesses all speak of these rules and the deceased did watch so long as there was any immediate danger from the south end of the track. * * * Giving to the evidence every intendment which it will bear, in favor of the plaintiff, we are all agreed that the accident must be attributed to the risks incident to the business in which deceased was engaged, coupled with a want of care on the part of himself and Winters, who, was, beyond doubt, a fellow servant."

Where a carpenter was engaged in repairing a stationary car, and

it was struck by a switch engine, causing his injury, and he knew that the engine was liable at any time, to run in on the switch track, and no flag was posted, to warn the train crew not to strike the car, the contributory negligence of the repairer was held to bar a recovery, in Cypher v. Railroad Co., 149 Pa. St. 359; 24 Atl. Rep. 225.

And where a decedent knew of a rule requiring a flag and he failed to place a flag, so as to warn the train crews not to hit the car where the work was in progress, his negligence was held to prevent a recovery for his death, notwithstanding the negligence of his foreman in failing to provide the flag, in Louisville, etc., R. Co. v. Haning, 131 Ind. 528; 31 N. E. Rep. 187; 53 Am. & Eng. R. Cas. 452.

Under a similar rule to that of the defendant in above case, in a New York case, there was held to be no negligence on the part of the employer and no responsibility for an injury to a car repairer, caused by a failure to post a flag, in Corcoran v. Delaware, etc., R. Co., 126 N. Y. 673; 27 N. E. Rep. 1022.

In Peterson v. Chicago, etc., R. Co. (Mich. 34 N. W. Rep. 260), the plaintiff was injured while repairing a car and sued for damages for the injuries. The defendant had a rule, like that of the defendant in above case, requiring a flag, but no flag was posted and the Circuit Court denied a recovery, and this judgment was affirmed in the Supreme Court. The causes of action were set forth by the plaintiff substantially, as the plaintiff in that case set up her case, the Supreme Court, on this subject saying:

"In the plaintiff's declaration the causes of negligence upon the part of the defendant were alleged as follows: (1) That defendant should have provided a watchman to warn plaintiff of the movement of the cars, and notify other employees of his whereabouts; (2) that a proper signal flag should have been used to give notice of his presence under the cars; (3) that the cars under which he was working should have been 'locked' or placed against a bumper or stationary post; (4) that defendant neglected to provide such watchman, flag, or 'bumper'; (5) that defendant neglected all reasonable means to prevent the movement of the cars while plaintiff was at work under them; (6) defendant negligently required the cars to be repaired on an open track, upon which engines or cars might be run while plaintiff was at work; (7) and negligently exposed plaintiff to the risk from the movement of the cars; (8) that while plaintiff was under the cars, and in the absence of such precautions, without any warning to him, defendant wrongfully caused a number of cars to be pushed in upon the track when plaintiff was at work, by locomotive power, at a high rate of speed, unattached to the locomotive, and insufficiently provided with brakeman. The proof showed that no watchman or 'bumpers' were provided, and no signal used except the red flag, which would undoubtedly have answered the purposes of a sufficient signal had it been re-

moved to the front end of the section last run upon the track."

And because the flag was not removed from the end of the car, away from the approaching train, to that end, a recovery was denied, because of such violation of the rule, the court saying:

"I think it must be considered that this rule, if enforced, was adequately sufficient for the protection of plaintiff, and the men working at the same employment. A similar method of protection is adopted by other roads, and has in one case been judicially determined to be 'a very efficient rule, and, if carefully and faithfully observed, would give reasonable protection to repairmen.' Abel v. President, etc., 103 N. Y., at page 586; 9 N. E. Rep. 325. With this rule in existence, and with instructions to all employees to observe it, it was not, in my opinion, negligence on the part of the defendant in not having a watchman or 'bumpers'; nor was it negligent to run other cars upon the same track where cars were being repaired, when space was left between them, and the red flag was respected according to the rule. While the negligence of Farnum, in detaching the engine from the cars used in 'kicking' the B. O. car upon the main track, had something to do with causing the accident, the real neglect which was the main cause of the injury was the failure of the foremen, or one of them, to remove the flag, and place it at the head of the front section of the cars upon the rear track. If this had been done, none of the cars would have been moved while plaintiff or any of the men were at work repairing the cars, if the rules of the defendant had been obeyed."

In Crowe v. New York, etc., R. Co. (23 N. Y. S. 1100), a track repairer was at work, at night, in a yard where trains were moved and he based his right of recovery for an injury from being struck by a moving car, in the absence of a light on such car, but the court held this was not necessary and in the course of the opinion it was said:

"It is suggested by the plaintiff that there should have been a light placed upon the car. This contention would require a light to be placed upon each and every car being moved in such yard as this. The time consumed in handling such a large number of lamps, and the number of men that would be required to do the work, would make such a rule obviously impracticable. There is no suggestion that any railroad company ever attempted to adopt such a rule, or that it would be practicable if adopted. To require the company to have a man upon each car, or a man to precede each car to announce its approach, in such a yard as this, would be impracticable. Great care and precaution are required on the part of the railroad companies when they are moving cars in places where the general public have a right to pass to in some manner announce their approach, but a different rule obtains in the companies' yards where cars are being distributed and trains made up. The employees about such yards understand the situation. They know the manner of doing the busi-

ness therein; that cars frequently pass along without notice of their approach; and they assume the risks incident to the business as thus conducted."

A regulation of a railroad company requiring car repairers, when at work under or about a car, to see that a blue signal is displayed at each end of the car to protect it from being coupled to or moved, is held, in New York C. & St. L. R. Co. v. Ropp (Ohio), 11 L. R. A. (N. S.) 413, to be a reasonable rule, and binding upon a car repairer who at the time of his employment agreed that he understood the rule and would obey it.

In State v. South Baltimore Car Works (Md. 58 Atl. Rep. 447), a car repairer working under a car, was held to have assumed the risk of an injury from another car being set in on the track where he was at work, where the custom had been to give personal notice of the approach of cars, and no notice was given, at the time of the injury.

"Where a car inspector was required by the company's rules to inspect cars upon a certain track, unless allowed to inspect them elsewhere by the foreman or chief inspectors, and to display a blue flag upon the car, he was guilty of contributory negligence in attempting to repair the car without permission of the foreman or chief inspector, while on another track, and attempting to do so without displaying the flag." Snellen v. Kansas City Southern Ry. Co. (Ark. 1907), 102 S. W. Rep. 193.

"A car inspector who goes between two cars without stationing a man outside for his protection, as required by the company's rules, is guilty of contributory negligence, especially where, if he had looked, he would have seen an engine fifteen feet away backing down on him." Devoe v. New York Cent. & H. R. R. Co., 75 N. Y. S. 136; 70 App. Div. 495.

"Where a car repairer was killed while working on a car which he failed to protect by signals, as required by a rule of his employer, he assumed the risk precluding a recovery for his death." Canadian Pac. Ry. Co. v. Elliott (U. S. C. C. of App., Second Circuit), 137 Fed. Rep. 904.

And it was held that a car repairer could not recover for injuries due wholely to a failure to put out a blue flag, while repairing a car, as required by the rules of his employer, in Coutlett v. Grand Trunk Co., 23 C. S. 242.

And similar holdings were announced in the following cases, upon similar rules, viz.: Latromouille v. Railroad Co., 63 Vt. 336; 22 Atl. Rep. 656; 48 Am. & Eng. R. Cas. 265; Campbell v. Railroad (Pa.), 2 Atl. Rep. 489; 24 Am. & Eng. R. Cas. 427; Southern Pacific R. Co. v. Pool, 160 U. S. 438; Cincinnati, etc., R. Co. v. Long, 112 Ind. 166; 13 N. E. Rep. 659; 31 Am. & Eng. R. Cas. 138; Muller v. Railroad Co.,

in the employment.[38] Nor is an employee entitled in all cases to recover for an injury received while obeying a special order of a superior, unless, in the giving of the order, it could successfully be charged that the order was negligently given.[39]

But for an injury received while obeying an order of a superior, the law will not charge the injured employee with contributory negligence, unless the danger was so glaring that no prudent man would have attempted the service, even under an order by one with authority to give orders, in the particulars to which the duty referred.[40] An employer is generally held estopped to insist that an employee was negligent in refusing to obey a negligent or unauthorized order of an authorized superior;[41] it is no defense that an employee was violating an unauthorized order, when injured, as this is the same as no order at all,[42] nor is it com-

1 Am. Neg. Rep. 503; Lynch v. Boston, etc., R. Co., 159 Mass. 536; 34 N. E. Rep. 1072; Schaibe v. Lake Shore, etc., R. Co., 97 Mich. 318; 56 N. W. Rep. 565.

[38] Knight v. Cooper, 36 W. Va. 232; 14 S. E. Rep. 999; Prather v. Richmond, etc., R. Co., 80 Ga. 427; 9 S. E. Rep. 530; Simmons v. Chicago, etc., R. Co., 110 Ill. 340; 18 Am. & Eng. R. Cas. 50; Carney v. Caraquey, etc., R. Co., 29 New Brun. 425.

[39] Lasky v. Canadian Pacific R. Co., 83 Me. 461; 22 Atl. Rep. 367; Smith v. St. Paul, etc., R. Co., 51 Minn. 86; 52 N. W. Rep. 1068.

[40] Miller v. Union Pacific R. Co., 4 McCrary (U. S.) 115; 12 Fed. Rep. 600; Colorado Midland R. Co. v. O'Brien, 16 Colo. 219; 27 Pac. Rep. 701; 48 Am. & Eng. R. Cas. 235; Davis v. Louisville, etc., R. Co., 69 Miss. 136; 10 So. Rep. 450; Stephens v. Hannibal, etc., R. Co., 96 Mo. 207; Lofrano v. New York, etc., R. Co., 29 N. Y. S. R. 557; 8 N. Y. Supp. 717; Pennsylvania R. Co. v. O'Shaughnessy, 122 Ind. 588; 23 N. E. Rep. 675; 41 Am. & Eng. R. Cas. 479; Stackman v. Chicago, etc., R. Co., 80 Wis. 428; 50 N. W. Rep. 404.

[41] Chicago, etc., R. Co. v. Bayfield, 37 Mich. 205; Galloway v. Western, etc., R. Co., 57 Ga. 512; Keenan v. New York, etc., R. Co., 49 N. Y. S. R. 513; 21 N. Y. Supp. 445.

[42] Georgia, etc., R. Co. v. Rhodes, 56 Ga. 645; Jones v. Lake Shore etc., R. Co., 49 Mich. 573; 14 N. W. Rep. 551; 8 Am. & Eng. R. Cas. 221.

petent to establish the disobedience of an order accompanied by a threat, as this is an order the employee is not bound to obey,[43] although it would not avail the employee that an order being obeyed, at the time of an injury, was accompanied with a threat, as this would constitute no defense, if the employee was nevertheless obeying the improper order.[44]

§ 440. **Contributory negligence of infant employee.**— Negligence upon the part of an infant employee contributing to the injury sustained by him, is as effectual by way of defense, as though he were an adult. What may constitute negligence, however, upon his part, is to be determined by the evidence and the inferences that arise therefrom, measured and graduated by his age and his capacity to appreciate his surroundings.[45]

An infant employee can be held to no higher degree of intelligence and capacity than his youth, inexperience and want of judgment, as known to the employer, would warrant.[46]

[43] Capper v. Louisville, etc., R. Co., 103 Ind. 305; 2 N. E. Rep. 749; 21 Am. & Eng. R. Cas. 525; East Tennessee, etc., R. Co. v. Duffield, 12 Lea. (Tenn.) 63; 47 Am. Rep. 319; 18 Am. & Eng. R. Cas. 35; Westcott v. New York, etc., R. Co., 153 Mass. 460; 27 N. E. Rep. 10.

[44] East Tennessee, etc., R. Co. v. Duffield, *supra*.

"Where plaintiff has been ordered not to dump a slate car until he got orders to do so from the engineer, but violated such instructions and dumped the car while it was moving at some speed one thousand four hundred feet before the dump was reached, resulting in the car being derailed and plaintiff being injured, plaintiff was guilty of contributory negligence as a matter of law." Redus v. Milner Coal & R. Co. (Ala. 1906), 41 So. Rep. 634.

[45] Flynn v. Erie, etc., R. Co., 12 N. Y. S. R. 88; Pennsylvania R. Co. v. Long, 94 Ind. 250; 15 Am. & Eng. R. Cas. 345; Kehler v. Schwenk, 144 Pa. St. 348; 22 Atl. Rep. 910. See Chapter on Injuries to Infant Employees.

[46] St. Louis, etc., R. Co. v. Valarius, 56 Ind. 511; 18 Am. Ry. Rep. 116. This case is criticised in, Lake Shore, etc., R. Co. v. McCormick,

Youth and inexperience are matters of fact to be considered by the jury, when alleged and proved, with all the other facts, in determining whether contributory negligence was shown on the part of the employee and his employer's obligation increases corresponding to the infancy and inexperience of the employee.[47]

But as to an employee of years of discretion and intelligence, who has had sufficient experience in the business to appreciate the dangers of the service, as well as an adult employee, contributory negligence will prevent an action for an injury, the same as in the case of an adult and if the evidence of the negligence is without dispute or is all one way, it will become a question for the court, as in other cases.[48]

74 Ind. 440; Umback v. Lake Shore, etc., R. Co., 83 Ind. 191; 8 Am. & Eng. R. Cas. 98.

[47] International, etc., R. Co. v. Hinzie, 82 Texas 623; 18 S. W. Rep. 681; Hamilton v. Galveston, etc., R. Co., 54 Texas 556; 4 Am. & Eng. R. Cas. 528; Texas, etc., R. Co. v. Brick, 83 Texas 598; 20 S. W. Rep. 511.

[48] Nugent v. Milling Co., 131 Mo. 241; 33 S. W. Rep. 428, a strong decision, by Judge Robinson; Herbert v. Mound City Co., 90 Mo. App. 305, 316; Jackson v. Missouri Pacific Ry. Co., 104 Mo. 448, 456; 16 S. W. Rep. 413.

"A six-year-old child is only bound to exercise such care to avoid danger as may be reasonably expected of one of his age, experience, and discretion." Van Salvellergh v. Green Bay Traction Co. (Wis. 1907), 111 N. W. Rep 1120.

"Special findings *held* to show contributory negligence of a boy thirteen years of age, of ordinary intelligence, injured in attempting to pass in front of a moving freight train which he saw approaching." Chicago, etc., Ry. Co. v. Laughlin (Kan. 1906), 87 Pac Rep. 749.

"Where a boy twelve years old, of average intelligence, who had been employed for six months or more to perform minor duties in connection with his father's employment as section foreman, and who was familiar with the locality and the movement of trains, and knew that the train which struck him was overdue and likely to appear at any moment, went to sleep on a platform in a position where he knew a passing train could strike him, he was negligent as a matter of law."

Mann v. Missouri, etc., Ry. Co. (Mo. App. 1907), 100 S. W. Rep. 566.

"In an action by an infant of tender years, in its own right, for personal injuries arising from negligence of a railway company, the fault or negligence of its mother or a third party, if any, contributory to such injury, cannot be imputed to the child." Atchison, etc., Ry. Co. v. Calhoun (Okl. 1907), 89 Pac. Rep. 207.

"In determining whether a brakeman was negligent, his age, intelligence, and experience as a brakeman should be taken into account." Hayes v. Chicago, etc., Ry. Co. (Wis. 1907), 111 N. W. Rep. 471.

"A minor is only bound to use such care as children of his age, capacity, and intelligence are capable of exercising." Illinois Cent. R. Co. v. Johnson, 123 Ill. App. 300, judgment affirmed (1906) 77 N. E. Rep. 592, 221 Ill. 42.

An instruction as follows: "The court instructs the jury that a child is not required by law to exercise the same degree of care and caution to avoid injury as is a person of mature years, and that a child is only held to the exercise of such degree of care and caution as children of his age, capacity, and intelligence are capable of exercising" — *held*, erroneous, as the jury may have inferred that a child is never required to exercise the same degree of care as an adult. Wabash R. Co. v. Jones, 121 Ill. App. 390.

A child between the age of five and six years cannot be guilty of contributory negligence. Chicago, etc., Ry. Co. v. Freeman, 125 Ill. App. 318.

A child of tender years is not required to exercise the same degree of care and prudence in the presence of danger required of an adult under like circumstances, but is required to exercise such care and prudence as is commensurate with one of his age and intelligence. Kostenbaum v. New York City Ry. Co., 105 N. Y. S. 65.

"A boy of seventeen years, who apprehends the dangerous character of a railroad yard and his duty in crossing it, will be *held*, to have contributed to an accident due in part to his negligent performance of the duty thus recognized by him." Cranbuck v. Delaware, L., etc., R. Co. (N. J. 1907), 65 Atl. Rep. 1031.

"One's recovery for injury by negligence in the operation of a train is barred by contributory negligence though he is only twelve years old, his testimony showing a degree of intelligence, a knowledge of the methods of operating trains, and an appreciation of the danger to which his situation exposed him, such as might be looked for in a person of full maturity." Coy v. Missouri Pac. Ry. Co. (Kan. 1906), 86 Pac. Rep. 468.

"Only that degree of care and prudence is expected of a child that a child of his age or degree of intelligence should exercise, so that what might be ordinary care for such child might be culpable neg-

§ 441. **Pleading contributory negligence.**— In Illinois,[49] Indiana,[50] Massachusetts [51] and Michigan,[52] it has been held that a plaintiff in a personal injury action must both allege and establish, in order to recover, that he was in the exercise of due care, at the time of the injury. But contributory negligence is held to be an affirmative defense which must be alleged and established by a preponderance of the evidence, in Alabama,[53] California,[54] Georgia,[55] Kentucky,[56]

ligence in an adult; and hence the question of contributory negligence of a boy between 9 and 10 years of age, injured by a railroad train backing down upon him, in not looking up and down the track as he walked upon it, was one for the jury under proper instructions." St. Louis, etc., Ry. Co. v. Sparks (Ark. 1906), 99 S. W. Rep. 73.

"In an action for injuries to an eleven-year-old child in a crossing accident, evidence examined, and *held*, that whether the child was guilty of contributory negligence was a question for the jury." St. Louis, etc., Ry. Co. v. Tomlinson (Ark. 1906), 94 S. W. Rep. 613.

"Whether a boy nine years old, who is crossing a street and struck by a team, is *sui juris*, and so capable of being guilty of contributory negligence, is not a question of law, but one for the jury." Gerber v. Boorstein, 99 N. Y. S. 1091.

"Whether a boy seven years of age, injured while walking on a railroad track by being struck by a train, was guilty of contributory negligence, *held*, under the evidence, for the jury." Edwards v. Chicago, etc., Ry. Co. (S. D. 1907), 110 N. W. Rep. 832.

[49] Chicago, etc., R. Co. v. Crowder, 49 Ill. App. 154.

[50] Sherfey v. Evansville, etc., R. Co., 121 Ind. 427; 23 N. E. Rep. 273.

[51] Fuller v. Boston, etc., R. Co., 133 Mass. 491; 14 Am. & Eng. R. Cas. 695.

[52] Thompson v. Flint, etc., R. Co., 57 Mich. 300; 23 N. W. Rep. 820; 23 Am. & Eng. R. Cas. 289.

[53] Mary Lee, etc., R. Co. v. Champbliss, 97 Ala. 171; 11 So. Rep. 897; 53 Am. & Eng. R. Cas. 254.

[54] Robinson v. Western Pacific R. Co., 48 Cal. 409; 7 Am. Ry. Rep. 244.

[55] Georgia Midland R. Co. v. Evans, 87 Ga. 673; 13 S. E. Rep. 580.

[56] Paducah, etc., R. Co. v. Hoehl, 12 Bush. (Ky.) 41; 18 Am. Ry. Rep. 338.

Missouri,[57] Montana,[58] New Hampshire,[59] New York,[60] North Carolina,[61] Ohio,[62] Oregon,[63] South Carolina,[64] Texas,[65] Virginia,[66] Washington,[67] West Virginia[68] and Wisconsin.[69]

Contributory negligence is a defense which implies negligence on the part of the defendant and is therefor a plea in the nature of confession and avoidance.[70] Generally, the facts constituting contributory negligence must be set out and it is not sufficient to allege negligence generally,[71] although in some States this is not necessary.[72] When plaintiff alleges reasonable care on his part and the defendant specifically denies this allegation, the issue is properly framed, without further pleading.[73] If the petition shows negligence of the plaintiff, on its face, no special plea is neces-

[57] Thorpe v. Missouri Pacific Ry. Co., 89 Mo. 650; 2 S. W. Rep. 3.

[58] Higley v. Gilmer, 3 Mont. 90.

[59] Smith v. Eastern R. Co., 35 N. H. 356.

[60] Lee v. Troy, etc., Co., 98 N. Y. 115.

[61] Aycock v. Raleigh, etc., R. Co., 89 N. Car. 321.

[62] Street Railroad Co. v. Nolthenius, 40 Ohio St. 376; 19 Am. & Eng. R. Cas. 191.

[63] Johnston v. Oregon, etc., R. Co., 23 Oregon 94; 31 Pac. Rep. 283.

[64] Donahue v. Enterprise, etc., R. Co., 32 So. Car. 299; 11 S. E. Rep. 95.

[65] Murray v. Gulf, etc., R. Co., 73 Texas 2; 11 S. W. Rep. 125; 38 Am. & Eng. R. Cas. 177.

[66] Norfolk, etc., R. Co. v. Gilman, 88 Va. 239; 13 S. E. Rep. 475.

[67] Northern Pacific R. Co. v. Hess, 2 Wash. 383; 26 Pac. Rep. 866; 48 Am. & Eng. R. Cas. 91.

[68] Carrico v. West Virginia R. Co., 35 W. Va. 389; 14 S. E. Rep. 12; 52 Am. & Eng. R. Cas. 393.

[69] Potter v. Chicago, etc., R. Co., 20 Wis. 533.

[70] Watkinds v. Southern Pacific R. Co., 14 Sawy. (U. S.) 30; Kaminski v. Tudor Iron Works, 167 Mo. 462; 67 S. W. Rep. 221.

[71] Harrison v. Missouri Pacific R. Co., 74 Mo. 364; 41 Am. Rep. 318; 7 Am. & Eng. R. Cas. 382; Murray v. Gulf, etc., R. Co., 73 Texas 2; 11 S. W. Rep. 125; 38 Am. & Eng. R. Cas. 177.

[72] Evansville, etc., R. Co. v. Hiatt, 17 Ind. 103.

[73] Watkinds v. Southern Pacific R. Co., 38 Fed. Rep. 711.

sary, but a demurrer should be interposed [74] and if the evidence of the plaintiff shows his own negligence, it can be taken advantage of, although not specially pleaded as a defense.[75]

[74] Peterson v. Central, etc., R. Co., 85 Ga. 653; 11 S. E. Rep. 872.

[75] Schultz v. Missouri Pacific Ry. Co., 32 Mo. App. 438.

"Contributory negligence is an affirmative defense." Mississippi Cent. R. Co. v. Hardy, 41 So. Rep. 505.

"Contributory negligence is an affirmative defense which must be pleaded." Cook v. Chicago, etc., Ry. Co. (Neb. 1907), 110 N. W. Rep. 718.

"Contributory negligence is a matter of defense, and should be pleaded." Carr v. Minneapolis, etc., Ry. Co. (N. D. 1907), 112 N. W. Rep. 972.

"In an action for damages in negligence cases, the plaintiff is not required to negative his own negligence, but such negligence is a matter to be pleaded by the defendant." Moore v. Lanier (Fla. 1906), 42 So. Rep. 462.

"The burden of the issue on the question of contributory negligence, raised by a general denial in an action for injuries, is on the defendant." Stephens v. American Car & Foundry Co. (Ind. App. 1906), 78 N. E. Rep. 335.

"Contributory negligence is an affirmative defense; the burden of proving which is on the defendant." Stotler v. Chicago, etc., Ry. Co. (Mo. 1906), 98 S. W. Rep. 509.

"In an action for damages, resulting from defendant's negligence, the burden does not rest on plaintiff to prove that he was not guilty of contributory negligence." Houston, etc., R. Co. v. Anglin (Tex. Civ. App. 1907), 99 S. W. Rep. 897.

"The burden of showing contributory negligence is on defendant." Judgment, 76 N. E. Rep. 1117, reversed; City of Indianapolis v. Keeley (Ind. 1906), 79 N. E. Rep. 499.

"Contributory negligence in an action for injuries is an affirmative defense which must be specially pleaded." Goodloe v. Metropolitan Ry. Co. (Mo. App. 1906), 96 S. W. Rep. 482.

"The question of contributory negligence may be raised by demurrer to the complaint." Mangan v. Hudson River Co., 100 N. Y. S. 539; 50 Misc. Rep. 388.

"In order to recover damages for personal injuries caused by negligence, the plaintiff must prove affirmatively that he was in the exercise of ordinary care for his own safety at and prior to the injury complained of." Cleveland, etc., Ry. Co. v. Sparks, 122 Ill. App. 400.

"The burden of establishing the defense of contributory negligence

§ 442. **Contributory negligence as question of law or fact.** — The law only defines what will constitute contributory negligence and the question whether the circumstances exist, sufficient to bring a case within the legal definition of the term is usually for the jury to decide.[76] Except in cases where the facts going to show negligence on the part of the plaintiff are undisputed,[77] or reasonable minds ought to draw no other conclusion than that the plaintiff was negligent,[78]

is on the defendant, except where plaintiff's evidence convicts him *prima facie* of contributory negligence." Texas, etc., Ry. Co. v. Conway (Tex. Civ. App. 1907), 98 S. W. Rep. 1070.

"A complaint, in an action against a street railway company for injuries in a collision with a car, which alleges that the company's servants, while running a car "recklessly and wantonly or intentionally," ran it against the wagon on which plaintiff was driving, is not demurrable on the grounds that it is uncertain whether simple or wanton negligence is charged and that it joins disjunctively in the same count simple negligence and wanton negligence." Garth v. North Alabama Traction Co. (Ala. 1906), 42 So. Rep. 627.

"Where, in an action for negligence, the only answer remaining in the record after the issues were made up consisted of a general denial, plaintiff's contributory negligence was no defense, unless the testimony he introduced so clearly showed that he was negligent in a manner contributing to the accident that the court would have been warranted in denying him relief." Fechley v. Springfield Traction Co. (Mo. App. 1906), 96 S. W. Rep. 421.

[76] Lake Shore, etc., R. Co. v. Johnson, 135 Ill. 641; 26 N. E. Rep. 510; Philadelphia, etc., R. Co. v. Haagland, 66 Md. 149; 7 Atl. Rep. 105; Chaffee v. Boston, etc., R. Co., 104 Mass. 108; Dickson v. Missouri Pacific Ry. Co., 104 Mo. 491; 16 S. W. Rep. 381; Halsey v. Rome, etc., R. Co., 113 N. Y. 622; Fisher v. Monongahela, etc., R. Co., 131 Pa. St. 292; 18 Atl. Rep. 1016; McGill v. Pittsburg, etc., R. Co., 152 Pa. St. 331; 25 Atl. Rep. 540; Gulf, etc., R. Co. v. Moore, 69 Texas 157; 6 S. W. Rep. 631; Smith v. Rio Grande, etc., R. Co., 9 Utah 141; 33 Pac. Rep. 626.

[77] Alabama, etc., R. Co. v. Arnold, 80 Ala. 600; 2 So. Rep. 337; 30 Am. & Eng. R. Cas. 546; MacDougall v. Central R. Co., 63 Cal. 431; 12 Am. & Eng. R. Cas. 143.

[78] Cleveland, etc., R. Co. v. Harrington, 131 Ind. 426; 30 N. E. Rep. 37; 49 Am. & Eng. R. Cas. 358; Wood v. Chicago, etc., R. Co., 68 Iowa 491; 27 N. W. Rep. 473; 24 Am. & Eng. R. Cas. 91.

and in all cases where the facts are disputed or the conclusion is in doubt, the issue should be submitted to the jury.[79]

But if it clearly appears, from the undisputed facts, judged in the light of that common knowledge and experience of which courts are bound to take notice, that a party has not exercised such care as men of common prudence usually exercise in positions of like exposure and danger, the issue is one of law to be decided by the court and should not be submitted to the jury.[80]

[79] Chicago, etc., R. Co. v. Hedges, 105 Ind. 398; 7 N. E. Rep. 801; 25 Am. & Eng. R. Cas. 550; New York, etc., R. Co. v. Steinbrenner, 47 N. J. L. 161; 23 Am. & Eng. R. Cas. 330.

[80] Nehrbas v. Central Pacific R. Co., 62 Cal. 320; 14 Am. & Eng. R. Cas. 670; Orcott v. Pacific Coast R. Co., 85 Cal. 291; 24 Pac. Rep. 661; Central R. Co. v. Moore, 24 N. J. L. 824; Collins v. Burlington, etc., R. Co., 83 Iowa 346; 49 N. W. Rep. 848; Apsey v. Detroit, etc., R. Co., 83 Mich. 440; 47 N. W. Rep. 513; Hudson v. Wabash R. Co., 101 Mo. 13; 14 S. W. Rep. 15; Ecliff v. Wabash, etc., R. Co., 64 Mich. 196; 31 N. W. Rep. 180.

"Diligence of the person injured, and negligence of the person injuring him, are questions peculiarly for the jury." Western, etc., R. Co. v. York (Ga. 1907), 58 S. E. Rep. 183.

"Contributory negligence involves questions of fact for the determination of the jury." Cook v. Chicago, etc., Ry. Co. (Neb. 1907), 110 N. W. Rep. 718.

"The issue of contributory negligence is for the jury, where the minds of reasonable men may differ as to whether such negligence existed." Thomson v. Issaquah Shingle Co. (Wash. 1906), 86 Pac. Rep. 588.

"Where the facts are such that reasonable men of fair intelligence may draw different conclusions from them, the question of negligence must be submitted to the jury." McLean v. Dow, 125 Ill. App. 174.

"Contributory negligence as well as negligence is a question for the jury, unless the facts admit of but one conclusion." Carr v. Minneapolis, etc., Ry. Co. (N. D. 1907), 112 N. W. Rep. 972.

"The question of negligence depending on evidence should not be withdrawn from the jury, except where there is no material conflict, and where there is no room for different minds to form different conclusions." Texas Mexican Ry. Co. v. Higgins (Tex. Civ. App. 1907), 99 S. W. Rep. 200.

"In an action for injuries, *held* that the negligence of the defendant and whether such negligence caused or contributed to the injury, were

questions of fact." Illinois Southern Ry. Co. v. Hayner, 80 N. E. Rep. 316; 225 Ill. 613.

"There is no fixed standard in the law by which a court can arbitrarily say in all cases what conduct shall be considered reasonable and prudent, or what shall constitute ordinary care, and the jury are free to fix the standard for reasonable, prudent, and careful men under the circumstances of the case as they find them according to their judgment and experience of what that class of men do under such circumstances, and to test the conduct involved in the issues by that standard." Southern Ry. Co. v. Stutts (U. S. C. C. A., Ala. 1906), 144 Fed. Rep. 948.

"The question of contributory negligence is a question of fact for the jury, except when all the material facts touching the negligence of the person injured are undisputed, and admit of no rational inference but that of his negligence." Guild v. Pringle (U. S. C. C. A., S. C., 1906), 145 Fed. Rep. 312.

"When there is no room for difference of opinion in the minds of reasonable men as to the existence of contributory negligence, the case should be taken from the jury." Brown v. Northern Pac. Ry. Co. (Wash. 1906), 86 Pac. Rep. 1053.

"Negligence becomes a question of law only when the act complained of is in violation of the statute, or when the undisputed evidence only admits of the inference that the commission of the act in question was negligence." International & G. N. R. Co. v. Wray (Texas), 96 S. W. Rep. 74.

"Where averments of the petition present issues relating to the negligence of the defendant and the diligence of the plaintiff appropriate for the determination of a jury, it was not error to overrule a demurrer to the same." Seaboard Air Line Ry. v. Hood (Ga. 1906), 56 S. E. Rep. 303.

"Whether one injured by an engine on a railroad track was guilty of contributory negligence was a question for the jury, if, from all the evidence favorable to him, whether controverted or not, there could be two views of his conduct entertained by clear-minded men, and a question for the court, if but one view could be so entertained." Markowitz v. Kansas City, etc., R. Co. (Mo. 1906), 94 S. W. Rep. 256.

"In an action for injuries, it is for the court to say whether there is any evidence from which negligence or contributory negligence can be reasonably and legitimately inferred; but it is for the jury to say whether, from the evidence adduced, when submitted to them, any negligence, and whose, ought to be inferred." Wilmington City Ry. Co. v. White (Del. 1907), 66 Atl. Rep. 1009.

"In an action against a railroad for injuries sustained in a crossing accident, *held*, that the question whether plaintiff was guilty of con-

tributory negligence was for the jury." Wilbur v. Michigan Cent. R. Co. (Mich. 1906), 108 N. W. Rep. 713.

"Whether it was negligence for a brakeman, because of a defective coupling apparatus, to go in between moving cars in order to couple them, was a question for the jury." Choctaw, etc., R. Co. v. Thompson (Ark. 1907), 100 S. W. Rep. 83.

"It is only where the material facts are clearly established, and from such facts all reasonable men would draw the same conclusion, that the question of negligence should be withdrawn from the jury." Sealey v. Southern Ry. Co. (U. S. C. C. A., S. C., 1907), 151 Fed. Rep. 736.

"Where the nature and attributes of an act relied on to show contributory negligence can only be determined correctly by considering all the circumstances of the transaction, it is within the province of the jury to pass upon and characterize it." Baltimore, etc., R. Co. v. State (Md. 1906), 64 Atl. Rep. 304.

"Under Revisal N. C. 1905, § 483, which provides that 'contributory negligence must be pleaded and proved by the defendant,' as construed by the Supreme Court of the State, the trial judge cannot direct a verdict on a plea of contributory negligence, but must submit the issue to the jury." United States Leather Co. v. Howell (U. S. C. C. A., N. C., 1907), 151 Fed. Rep. 444.

"On a motion for nonsuit for contributory negligence, which must be deduced from facts in evidence, the question is usually for the jury, and the motion will be refused unless it is established beyond fair debate that plaintiff was negligent and that his negligence contributed to the injury." Turner v. Hall (N. J. Sup. 1906), 64 Atl. Rep. 1060.

"The question of contributory negligence is for the jury, on a consideration of all the evidence relating thereto." Indianapolis St. Ry. Co. v. Demaree (Ind. App. 1907), 80 N. E. Rep. 687.

"Whether the operators of an engine and cars discovered the peril of a person near the track in time to have avoided injury to him by the exercise of proper care, authorizing a recovery, notwithstanding the latter's negligence, *held*, under the facts, for the jury." Texas, etc., R. Co. v. Scarborough (Tex. Civ. App. 1907), 104 S. W. Rep. 408.

"In order to justify a conclusion that plaintiff was guilty of contributory negligence as a matter of law, the evidence must be such as to require a finding that all reasonable men in the exercise of an honest and impartial judgment must draw the conclusion under the facts that he did not exercise ordinary care." Laclede Gaslight Co. v. Cottone (U. S. C. C. A., Mo., 1907), 152 Fed. Rep. 629.

"It is generally held that contributory negligence is a question for the jury, and is one that should never be taken from the jury, unless the case is so clear that in case of a verdict against the defendant it

could not be sustained by the court." Seitten v. Alaska Treadwell Gold Min. Co., 2 Alaska 8.

"Plaintiff, a child, was attracted to a railroad's right of way by clay piled along the track, and while playing thereon in safety his attention was attracted by a passing train, and he began touching, playing with, and running alongside the cars, and finally fell under them. *Held*, that the question as to what was the proximate cause of the injury was not for the jury, as the court properly decided, as a matter of law, that there was no evidence tending to show that the negligence charged was the proximate cause." Seymour v. Union Stockyards, etc., Co., 79 N. E. Rep. 950; 224 Ill. 579.

CHAPTER XVII.

COMPARATIVE NEGLIGENCE.

§ 443. Doctrine not generally recognized.
444. The rule stated.
445. Origin of the doctrine.
446. Rule generally denied in the United States.
447. Burden of proof on the plaintiff.
448. Act of Congress establishing, as to interstate carriers.
449. Conflicting decisions concerning, by federal courts.
450. Held unconstitutional by the Supreme Court.
451. The rule in Georgia, Illinois, Tennessee and other States.
452. Doctrine limited by late case, in Georgia.
453. Plaintiff must have exercised ordinary care, in Illinois.
454. Rule formerly obtained in Kansas.
455. Plaintiff's negligence "slight" and defendant's "gross."
456. When both parties equally negligent.
457. In case of injuries to passengers.
458. Injuries at highway crossings.
459. Instructions on comparative negligence.
460. Comparative negligence generally a jury issue.

§ 443. **Doctrine not generally recognized.**— Courts and text writers generally discourage all attempts to refine or distinguish between different degrees of negligence. One author of many bulky and diffuse books upon the subject admits that he was always "careless, ignorant and indifferent upon this whole subject of the degrees of negligence," because, as he says, "it is plain that such refinements can have no useful place in the practical administration of justice." [1] An able English jurist said, in one case, that "gross negligence" was only simple negligence, with the addition of a "vituperative epithet," [2] and other courts have

[1] Thompson on Negligence, § 18, p. 18.

[2] Baron Rolfe, in Wilson v. Brett, 11 Mees & W. 113.

made similar observations, since all such terms but indicate the absence of the care that was necessary, under the circumstances of a particular case.[3] The United States Supreme Court voiced the expression of many State courts, when it said, in a well-considered decision,[4] that " It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree thus described not only may be confounded with another, but it is quite impracticable exactly to distinguish them."

When it is so difficult for the judges of the higher courts, with their trained legal minds, to differentiate between degrees of negligence and, in tracing the sequence of events and looking for the proper causation, to determine, with nicety, the cause of a particular effect, how much more difficult it must of necessity be for the average jury to understand such refinements and to ascertain, with any degree of precision, which of two negligent persons contributed, more directly, to produce an injury.[5] Any want of ordinary care, on the part of an injured person, contributing to produce the injury, is generally held sufficient to deny a recovery, unless the defendant, after discovery of his peril, could, by reasonable care, have avoided the injury, as the law will not undertake to apportion the degrees of negligence between them.[6] But in a few of the States in the United States, that wholesome general rule is not followed, but the courts and juries are permitted to indulge in the refinements of attempting to ascertain which of the two negligent parties was

[3] Beal v. South Devon R. Co., 3 H. & D. 337; McAdoo v. Richmond, etc., R. Co., 105 N. C. 140; Smith v. New York, etc., R. Co., 24 N. Y. 241; Milwaukee, etc., R. Co. v. Arms, 91 U. S. 495.

[4] New World v. King, 16 How. (U. S.) 469.

[5] 1 Thompson on Negligence, § 18, p. 18; Wharton on Negligence (2 ed.), §§ 59, 63, and cases cited.

[6] See preceding chapter on Contributory Negligence.

the more careless, considering all the circumstances of the accident, along with the sympathies and prejudices of the jury box, and if the defendant is found to have been guilty of gross negligence, while the plaintiff was only slightly negligent, as is generally found to be the case, when the defendant is an unpopular litigant, then a recovery is allowed, according to this theory, notwithstanding the negligence of the plaintiff.[7]

§ 444. **The rule stated.**— In jurisdictions where the doctrine of comparative negligence obtains, it is held that negligence, resulting in an injury, is the subject of comparison and it is not required that the plaintiff shall himself be free from all negligence, or that he shall exercise the highest degree of care or foresight to avoid the injury, in order for him to recover damages, if the evidence shows that the defendant was guilty of a greater degree of negligence than the plaintiff.[8]

But in cases of mutual negligence, to authorize a recovery by the plaintiff, it is generally held that the negligence on the part of the defendant must be so much greater than that of the plaintiff as to clearly preponderate,[9] or, in other words, where the plaintiff has been guilty of negligence contributing to the injury, he cannot recover, unless the negligence of the defendant could be properly denominated "gross" negligence, while that of the plaintiff was but "slight," in comparison.[10]

[7] 1 Thompson on Negligence, § 259, and cases cited.

[8] Galena, etc., R. Co. v. Jacobs, 20 Ill. 478; Chicago, etc., R. Co. v. Payne, 49 Ill. 499; 59 Ill. 534; 11 Am. Ry. Rep. 157.

[9] Chicago, etc., R. Co. v. Payne, 49 Ill. 499; 59 Ill. 534, criticised in Joliet v. Seward, 86 Ill. 402.

[10] Chicago, etc., R. Co. v. Lewis, 5 Ill. App. 242; Pittsburg, etc., R. Co. v. Shannon, 11 Ill. App. 222; Illinois, etc., R. Co. v. Hammer, 85 Ill. 526; Chicago, etc., R. Co. v. Dimick, 96 Ill. 42; 2 Am. & Eng. R. Cas. 201.

§ 445. **Origin of the doctrine.**— One text writer,[11] who took the pains to investigate the origin of the rule of comparative negligence, as applied in Georgia and Illinois, traces the rule to a misunderstanding of the terms used in the law, or a failure to distinguish between the degree of care pre-

Comparative negligence has been defined as "that doctrine in the law of negligence by which the negligence of the parties is compared in the degree of slight, ordinary and gross, negligence, and a recovery permitted, notwithstanding the contributory negligence of the plaintiff, when the negligence of the plaintiff is slight and the negligence of the defendant gross, but refused when the plaintiff has been guilty of a want of ordinary care contributing to his injury, or when the negligence of the defendant is not gross, but only ordinary or slight, when compared, under the circumstances of the case, with the contributory negligence of the plaintiff." This is the rule, as applied in Illinois, 4 Amer. & Eng. Enc. Law 367; Bailey, Mas. Liab Inj. Serv., p. 403, 410; Abend v. Chicago, etc., R. Co., 111 Ill. 203; 53 Am. Rep. 616; Illinois Central R. Co. v. Hetherington, 83 Ill. 510; Chicago, etc., R. Co. v. Dimick, 96 Ill. 42; Rockford, etc., R. Co. v. Delaney, 82 Ill. 198; 25 Am. Rep. 358; Chicago, etc., R. Co. v. Johnson, 103 Ill. 525.

The rule of comparative negligence will not be applied in the case of an injury to a child seven years old, where the parents were not negligent. Chicago, etc., R. Co. v. Welsh, 118 Ill. 572; 9 N. E. Rep. 197.

But otherwise, when the parents are negligent, contributing to the child's injury. Toledo, etc., R. Co. v. Grable, 88 Ill. 441; 21 Am. Ry. Rep. 336.

In jurisdictions where comparative negligence is applied, it obtains in actions by the representatives of a deceased person, killed by the negligence of the defendant, as well as to personal injuries by the injured person himself, and if the decedent was only slightly negligent and the defendant was grossly negligent, by comparison of their acts, a recovery may be had for the death. Rockford, etc., R. Co. v. Delaney, 82 Ill. 198; Chicago, etc., R. Co. v. Johnson, 103 Ill. 512; 8 Am. & Eng. R. Cas. 225; Chicago, etc., R. Co. v. Lee, 87 Ill. 454; 18 Am. Ry. Rep. 378; Pittsburg, etc., R. Co. v. Kuntson, 69 Ill. 103; Peoria, etc., R. Co. v. Clayberg, 107 Ill. 644; 15 Am. & Eng. R. Cas. 356; Toledo, etc., R. Co. v. O'Connor, 77 Ill. 391; Illinois Central R. Co. v. Hoffman, 67 Ill. 287.

[11] 1 Thompson on Negligence, § 270, p. 256.

ceding the injury and the effect thereof as occasioning the injury.

Speaking of the origin of the rule, the late Judge Thompson said: "It arose from the fact of the court mistaking the distinction between the degrees of care or of negligence in the act or omission which preceded the injury and the propinquity of such act to the injury. It mistook causation for negligence. It mistook the rule that the plaintiff may recover where his negligence was but a remote cause of the injury, and that of the defendant a proximate cause of it, for a rule that he may recover, where his negligence was slight and that of the defendant gross." [12]

The first decision where the rule was announced in Illinois,[13] seems to sustain the statement above quoted, as it is said, in that case: "The question of liability does not depend absolutely on the absence of all negligence on the part of the plaintiff, but upon the relative degree of care, or want of care, as manifested by both parties, for all care or negligence is, at best, but relative — the absence of the highest degree of care showing the presence of some negligence, slight as it may be. The true doctrine, therefore, we think is, that in proportion to the negligence of the defendant should be measured the degree of care required of the plaintiff; that is to say, the more gross the negligence manifested by the defendant, the less degree of care will be required of the plaintiff to enable him to recover." This opinion admits that the cases reviewed do not announce this doctrine, but that there is an unexpressed view to the effect that it ought to be announced, running through the cases. The rule, as applied in Georgia,[14] doubtless has the same origin

[12] 1 Thompson on Negligence, § 270, p. 257.

[13] Galena, etc., R. Co. v. Jacobs, by Breese, J., 20 Ill. 478.

[14] Macon, etc., R. Co. v. Davis, 18 Ga. 679; Macon, etc., R. Co. v. Winn. 19 Ga. 440. For full discussion of the early cases in Georgia and the error that the courts fell into in establishing this rule, see

as that administered in Illinois, that is, to an early error of the court, which, when recorded, was followed as a precedent.

§ 446. **Rule generally denied in the United States.**— The doctrine of comparative negligence is denied in most of the United States, because of the impracticability of enforcing the rule in such a way as to mete out substantial justice and having had its origin in an error of the court wherein the rule was first announced, as already seen, it has been generally condemned by courts and text writers, and aside from three or four States where the adherence to precedent has been regarded as of more importance than the establishment of a more salutary rule than the precedents recognized, the courts of the different States in the United States have refused to compare the negligence of the parties to a suit for personal injuries, as an unsatisfactory and unjust measure of the rights of the parties litigant.[15]

To maintain an action for personal injuries, as the law is enforced in the great number of States, some degree of negligence, on the part of the defendant, or those for whose acts it is answerable, is essential, and the injured person must have been free from negligence contributing to bring about the injury. These essential elements of the action are wholly distinct and independent and do not depend upon the conduct of the other party to the cause, in any respect, but unless both are shown, by the evidence, no cause of action is established on the part of the plaintiff. This rule is in

1 Thompson on Negligence, § 268, pp. 251, 255; Wharton on Negligence, § 334.

[15] Atchison, etc., R. Co. v. Henry, 57 Kansas 154; 45 Pac. Rep. 576; Marean v. New York, etc., R. Co., 167 Pa. St. 220; 31 Atl. Rep. 562; Long v. Milford, 137 Pa. St. 122; 20 Atl. Rep. 425; O'Keefe v. Chicago, etc., R. Co., 32 Iowa 467; Denver, etc., Co. v. Reid, 22 Colo. 349; 45 Pac. Rep. 378; Ivens v. Cincinnati, etc., R. Co., 103 Ind. 27; Frazier v. South, etc., R. Co., 81 Ala. 185.

accord with approved precedents and principles, but when the essentials of the action are attempted to be supplied, by any comparison of the conduct of the parties to the cause, all certainty in the enforcement of the law becomes a matter of doubt and indecision, as it is impossible, in a personal injury action, by comparison, to strike a balance by subtracting the lesser from the greater negligence and reaching a conclusion that is at all consistent with simple justice.[16]

§ 447. **Burden of proof on the plaintiff.**— The rule is not different so far as the burden of proof is concerned, in cases of comparative negligence and other cases where simple negligence on the defendant's part and an absence of all negligence on plaintiff's part, must be established, to justify a recovery. The affirmative is still on the plaintiff to make a *prima facie* case, for whether the right to recover depends,

[16] Wilds v. Hudson, etc., R. Co., 24 N. Y. 430; Wells v. New York, etc., R. Co., 24 N. Y. 181.

The rule of comparative negligence has been expressly repudiated in the following cases: Cook v. Central, etc., R. Co., 67 Ala. 533; Frazier v. South, etc., R. Co., 81 Ala. 185; 1 So. Rep. 85; 28 Am. & Eng. R. Cas. 565; Birmingham, etc., R. Co. v. Jacobs (Ala.), 13 So. Rep. 408; 55 Am. & Eng. R. Cas. 299; Prescott, etc., R. Co. v. Rees (Ariz.), 28 Pac. Rep. 1134; Terre Haute, etc., R. Co. v. Graham, 95 Ind. 286; 48 Am. Rep. 719; 12 Am. & Eng. R. Cas. 77; Artz v. Chicago, etc., R. Co., 38 Iowa 293; Matta v. Chicago, etc., R. Co., 69 Mich. 109; 37 N. W. Rep. 54; 32 Am. & Eng. R. Cas. 71; Mynning v. Detroit, etc., R. Co., 59 Mich. 257; 26 N. W. Rep. 514; 23 Am. & Eng. R. Cas. 317; Hurt v. St. Louis, etc., R. Co., 94 Mo. 255; 7 S. W. Rep. 1; 34 Am. & Eng. R. Cas. 422; Brooks v. Hannibal, etc., R. Co., 35 Mo. App. 571; Holwerson v. St. Louis, etc., Ry. Co., 157 Mo. 216; 57 S. W. Rep. 770; 50 L. R. A. 850; Davies v. People's Ry. Co., 159 Mo. 1; 59 S. W. Rep. 982; Pennsylvania R. Co. v. Righter, 42 N. J. L. 180; 2 Am. & Eng. R. Cas. 220; Catawissa, etc., R. Co. v. Armstrong, 49 Pa. St. 186; O'Donnell v. Allegheny, etc., R. Co., 59 Pa. St. 239; Houston, etc., R. Co. v. Corbett, 49 Texas 573; McDonald v. International, etc., R. Co., 22 S. W. Rep. 939; 86 Texas 1; 55 Am. & Eng. R. Cas. 280.

in the first instance upon the proof of a case of negligence on the defendant's part, with an absence of all negligence on plaintiff's part, or a case of slight neglect on plaintiff's part, with gross negligence of the defendant, the affirmative being on the plaintiff, he assumes the burden, in both cases.[17]

As stated in a decision in one State,[18] where this impractical rule obtains: "Neither party, in the first instance, is assumed to have been negligent. The negligence must be proved; and unless it appears from the proof that the plaintiff's case, under all the evidence, is proved as alleged, there can be no recovery."

§ 448. **Act of Congress establishing, as to interstate carriers.**— The Congress of the United States, after the division of the term negligence into kinds or degrees had been generally condemned, by the courts of the different States and general Government, established as to interstate carriers, the doctrine of comparative negligence, in the United States, by recent legislation.[19] Under this act, the doctrine which has for years obtained in some of the States was adopted and a recovery was authorized for the gross negligence of the carrier, although the plaintiff was himself guilty of a want of care.[20] This act was soon attacked as an infringement upon the rights of the States to control and enforce within

[17] Indianapolis, etc., R. Co. v. Evans, 88 Ill. 62; 1 Thompson on Negligence, § 284, p. 267.

[18] Chicago, etc., R. Co. v. Harwood, 90 Ill. 425.

The burden of establishing the relative degrees of negligence sufficient to entitle a recovery, is upon the plaintiff. Chicago, etc., R. Co. v. Harwood, 90 Ill. 425; Chicago, etc., R. Co. v. Warner, 123 Ill. 38; 14 N. E. Rep. 206; Chicago, etc., R. Co. v. Dickson, 88 Ill. 431; 21 Am. Ry. Rep. 328.

[19] Act Relating to Liability of Common Carriers, approved June 11, 1906 (Fed. St. Ann. Supp. 1907, p. 68.)

[20] Chicago, etc., R. Co. v. Dunleavy (Ill.), 39 Amer. & Eng. R. Cas. 381; Toledo, etc., R. Co. v. Cline (Ill.), 45 Am. & Eng. R. Cas. 150.

their limits, the doctrines and procedure best suited to their wants, as the law applied to all railroads "engaged in" interstate commerce, even though the injury sued for was not occasioned by a train while so engaged.[21] The constitutionality of the act may well be questioned, when it is given this scope and effect. It is also to be doubted if any good can come from this refinement and division of a term, by legislation, when the administration of the same doctrine by the courts has been found so unsatisfactory.[22]

This law was held to be unconstitutional, by a federal court, in Kentucky,[23] in that it denied to the different States, the rights guaranteed by the Constitution, and by a federal court, in Tennessee,[24] because it was not "com-

[21] See article of Gerrard B. Winston and Blackburn Esterline, in Cent. Law Jour. for October 12, 1906.

[22] East Tenn., etc., Co. v. Hull (Tenn.), 41 Am. & Eng. R. Cas. 495.

[23] Brooks v. Southern Pacific R. Co., 64 Cent. Law Jour. 52.

[24] Howard v. Illinois Cent. R. Co., 207 U. S. 463; 28 Sup. Ct. Rep. 141.

"Employers' Liability Act (Act Cong. June 11, 1906, ch. 3073, 34 Stat. 232), regulating the liability of interstate carriers for injuries to employees, etc., was prospective only in operation, and did not apply to causes of action existing at the time of its adoption." Hall v. Chicago, R. I. & P. Ry. Co. (U. S. C. C., Iowa, 1906), 149 Fed. Rep. 564.

Judge Evans, for the federal court, for the Western District of Kentucky, held this act of Congress, known as the Federal Employers Liability Act (Act June 11, 1906), unconstitutional, because it did not come within the power of Congress, under the Commerce clause of the Constitution, and if it did, it was an attempt to regulate such *Commerce* wholly within the States. Upon these questions the court said:

* * * * * * * * * *

"Upon the legislation now under discussion two questions arise, each of them of vital importance. The first is, whether the subject-matter of the act, namely, the creation and enforcement of liabilities growing out of the negligence of certain common carriers to their employees, is a regulation of commerce among the States within the meaning of that phrase in the Constitution, and the second is, whether the act, if it does regulate commerce among the States, does not also regulate commerce that is exclusively within the several States, and

merce," to attempt to regulate the procedure in personal injury actions and Congress was without power to regulate such procedure.

§ 449. **Conflicting decisions concerning, by federal courts.** — About the same time that the two decisions were rendered

whether the latter is not so inseparably combined with the former as to condemn the whole act as unwarranted by the Constitution. In the opinion delivered in the case of United States v. Scott, 148 Fed. Rep. 431, we recently had occasion to discuss similar questions, and need not repeat now much of what was said then, though we have industriously re-examined the whole subject."

* * * * * * * * * *

"While the courts would be exceedingly slow to inquire into the mere appropriateness of legislation, they cannot decline the duty of inquiring whether legislation is within the constitutional power of Congress when a proper case demands the investigation, and a most patient consideration of the question in this instance has led us to the conclusion — we think to the inevitable conclusion — that the act of June 11, 1906, only creates and imposes a liability upon certain common carriers to their employees, and in no way prescribes rules for *carrying on* traffic or commerce among the States, and consequently in no way regulates such commerce."

* * * * * * * * * *

"An intelligent consideration of the authorities will lead, we think necessarily, to the conclusions, first, that even if the act regulates commerce in any possible constitutional sense it is too broad and applies not only to interstate commerce, but also to that which is entirely within the States respectively; and, second, that the provisions of the act in these respects are single and altogether inseparable, the one from the other."

* * * * * * * * * *

"In short, the Constitution of the United States, which firmly fixes our form of government, gives Congress the power to regulate interstate commerce, but leaves to the States respectively the exclusive power of regulating that commerce which is carried on altogether within the limits of a State. Here the Congressional enactment attempts, through the same provisions, to regulate commerce generally, including both interstate commerce and that which is purely local to the States. It consequently embraces matters which are within and matters which are not within the reach of Congressional power, and as the matters which are within Congressional competency are

by the federal courts of Kentucky and Tennessee, holding the Employer's Liability Act of Congress invalid, because not authorized by the Constitution, under the interstate commerce clause, the federal court for the Eastern District of the State of Arkansas rendered a decision diametrically opposed to the holdings referred to.

By this decision it was held to be within the power of Congress, under the commerce clause of the Constitution, to regulate the liability of a common carrier to its employees, for personal injuries received while engaged in interstate transportation;[25] the act was held to be a regulation of interstate commerce; it was held to be remedial and not penal[26] and not to be objectionable because it applied to both interstate and intrastate commerce, as its provisions were separable, so as to render it valid, when invoked by an employee engaged on a train actually doing interstate business.[27]

Before the act was finally construed by the Supreme Court, a similar construction was announced by the federal court in Iowa,[28] and it was held that the act was not retroactive, but applied only to causes of action arising in the future and not to causes already existing.

inseparably combined with those which are not, no part of the act can be sustained."

For full text of above decision see Law Notes for February, 1907, p. 208, *et sub;* 64 Cent. Law Jour. 52.

This is believed to be a proper determination of the questions presented in this case.

[25] Spain v. St. Louis & San Francisco R. R. Co., 64 Cent. Law Jour. 269.

[26] The Trade Mark Cases, 100 U. S. 82, were distinguished for this reason.

[27] In closing, the court said:

"So, in the case at bar, the injury suffered by the plaintiff, as alleged in the complaint, was while he was engaged in labor performed on a train engaged in interstate commerce, and therefore brings this case within the foregoing rules of law."

[28] Hall v. Chicago, etc., Ry. Co., 149 Fed. Rep. 564.

§ 450. **Held unconstitutional by the Supreme Court.**—After constructions of the act of Congress by the federal courts in the different jurisdictions above referred to, wherein directly opposite views as to the constitutionality of the act were advanced, the United States Supreme Court, when the statute came before it for adjudication, held that the act was unconstitutional, for practically the same reasons as those advanced by the federal courts of Kentucky and Tennessee.[29]

The decision of the Supreme Court, in this instance, in the construction of this act of Congress, but illustrates the fact that the ideals of justice and equality have not ceased to exist in the courts of our country, but however loud the clamor for a given interpretation of the law, if it cannot be reconciled with the express provisions of organic law, it cannot stand the test. It is a source of regret that the judiciary is perhaps the only branch of Government where these ideals control and that in the legislative department, a wrought-up public sentiment too often prompts unequal and unfair legislation.[30]

The decision was by a divided court, but in the opinion of a majority of the court, the statute was held unconstitutional, in that it denied to the States certain rights guaranteed to them by the Constitution and because Congress exceeded its constitutional powers in attempting, under the interstate commerce clause, to regulate the procedure in personal injury actions as attempted in this act. The majority decision, in the course of the opinion, held that that provision

[29] Howard v. Illinois Central R. Co., 207 U. S. 463; 28 Sup. Ct. 141; 11 Law Notes, p. 204; Brooks v. Southern Pacific R. Co., 207 U. S. 463; 28 Sup. Ct. Rep. 141; 11 Law Notes, p. 204.

[30] See paper of the author, before the Missouri Bar Ass'n, at meeting held at St. Joseph, Missouri, September, 1906, on "The Judiciary and Public Sentiment." See, also, 1 Street on Foundations of Legal Liab., p. 147.

of the statute which enabled the negligent sufferer or his representative to recover, if his negligence was slight, while that of the employer was gross, in comparison, discriminated against the employer, and while authorizing damages in all cases, regardless of the negligence of the employee, attempted to make the employer more careful, by subjecting him to a liability for the negligence of his employees, without limit as to amount, and at the same time proceeded upon the theory that it was immaterial how negligent the employees might be, so long as their negligence was not so great as that of the employer, thus discriminating against the employer and causing confusion and uncertainty in the rules of law applying in the different States.[31] The majority

[31] See paper of Mr. T. H. Calvert, in 11 Law Notes, p. 205, wherein the decision is commented on, as follows: "Moreover, it was said, the statute would create confusion and uncertainty as to the rights of those dwelling within the States; that it would operate injuriously upon all who chose to engage in interstate commerce as common carriers, since those who did so would have become subject to the liability which the statute created, to be tested by the rules of negligence which the statute embodied, although such rules be unknown to the laws of the several States. Besides, the statute, it was urged, discriminated against all who engaged as common carriers in interstate commerce, since it made them responsible, without limit as to the amount, to one servant for an injury suffered by the acts of a coservant, even in a case where the negligence of the injured had contributed to the result, hence placing all employers who were common carriers in a disfavored, and all their employees in a favored class. Indeed, it was insisted the statute proceeded upon contradictory principles, since it imposed the increased responsibility just stated upon the master, presumably in order to make him more careful in the selection of his servants, and yet minimized the necessity for care on the part of the servant by allowing recovery although he may have been negligent. Especially has the wisdom of the provision declaring the doctrine of comparative negligence been questioned."

Justice White intimated that the statute contained some provisions that were constitutional and others which were not, but held that they could not very well be separated, and thought the court could not be expected to rewrite legislation. He pointed out that a law

opinion of the Supreme Court certainly reflects the prevalent sense of right and justice on the part of the bar of the country.

§ 451. **The rule as applied in Illinois, Georgia, Tennessee and other States.**— In Illinois, if the plaintiff's negligence is what is characterized as slight, while that of the railway company, as compared to the negligence of the plaintiff, is considered gross, a recovery can still be had by the plaintiff, notwithstanding his negligence.[32]

covering all the employees of a railroad doing interstate business would touch many clerks, shop hands, and others whose work is a matter of State concern and wholly independent of interstate commerce, and he further said of the law in question:

"It assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution; in other words, with the right to legislate concerning matters of purely State concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which can not be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local; would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the States as to all conceivable matters which from the beginning have been and must continue to be under their control so long as the Constitution endures.

"Concluding as we do, the statute, while it embraces subjects within the authority of Congress to regulate commerce, also includes subjects not within its constitutional power and that the two are so interblended in the statute that they are incapable of separation, we are of the opinion that the courts below rightly held the statute to be repugnant to the Constitution and nonenforceable, and the judgments below are therefore affirmed."

[32] Wabash, St. L. & P. R. Co. v. Wallace, 110 Ill. 114; 19 Am. & Eng. R. Cas. 359; Louisville, New Albany & Chicago R. Co. v. Shires, Admr., 108 Ill. 617; Chicago, B. & Q. R. Co. v. Van Patten, 74 Ill. 91; Chicago & N. W. Ry. Co. v. Sweeney, 52 Ill. 330; Chicago, etc., R. Co. v.

This is practically the same rule as that applied in Georgia and Tennessee, except that in the latter States, the extent of the negligence of the plaintiff may be considered as affecting the measure of recovery.[33] The practical effect of this doctrine is to permit a recovery by the plaintiff for the effect of his own want of care for his protection and to render the defendant responsible for his lack of discretion or care for his own safety. "The law has no scales to determine, in such cases, whose wrongdoing weighed most, in the compound that occasioned the mischief,"[34] and when those trained in the law, by the use of its standards, for determining right and wrong, are unable from a given state of facts, to say which of two persons was the more negligent, or which act was the more directly connected with the resulting injury, it is not to be supposed that those wholly ignorant of such standards can reach a more accurate conclusion. Hence, it is the consensus of judicial opinion that this is a bad rule of law, in that it fails to attain the object of all law, which is justice.[35]

McKean, 40 Ill. 218; Illinois, etc., R. Co. v. Moffitt, 67 Ill. 431; Chicago, etc., R. Co. v. Fears, 53 Ill. 115; Chicago, etc., R. Co. v. Lea, 68 Ill. 576; Illinois Cent. R. Co. v. Goddard, 72 Ill. 567; Illinois Cent. R. Co. v. Benton, 69 Ill. 174; Chicago, etc., R. Co. v. Hatch, 79 Ill. 137; Illinois Cent. R. Co. v. Hammar, 85 Ill. 526; Chicago, B. & Q. Co. v. Lee, 87 Ill. 454; Wabash R. R. Co. v. Hencks, 91 Ill. 406; Chicago & Alton R. Co. v. Bonifield, 8 Am. & Eng. R. Cas. 493; Peoria & P. U. R. Co. v. Clayberg, 15 Am. & Eng. R. Cas. 356.

[33] Augusta, etc., R. Co. v. McElmurry, 24 Ga. 75; Macon, etc., R. Co. v. Davis, 27 Ga. 113; Central R. R. v. Gleason, 69 Ga. 200; Campbell v. Railroad, 53 Ga. 488; Hendricks v. W. & A. R. Co., 52 Ga. 467; Louisville & Nashville R. R. Co. v. Fleming, 14 Lea (Tenn.) 128; 18 Am. & Eng. R. Cas. 347; Railroad v. Walker, 11 Heisk. 383; Beach, Con. Neg., p. 97.

[34] Woodward, J., in Lake Shore & Northern R. R. v. Norton, 24 Pa. St. 465, 469.

[35] Reeves v. Delaware, Lackawanna & W. R. Co., 30 Pa. St. 464; Wilds v. Hudson River R. Co., 24 N. Y. 432; Pennsylvania R. Co. v. Roney, 89 Ind. 453; Pennsylvania R. Co. v. Righter, 42 N. J. L. 180;

§ 452. **Doctrine limited by late case in Georgia.**— The later decisions of the Supreme Court, in Georgia, seem to indicate that the courts of that State have also found the doctrine of comparative negligence impracticable, even as administered in the qualified form in which they applied it. In a recent case,[36] wherein an employee of a railroad company sought to recover from his employer for an injury

Kansas Pac. Ry. Co. v. Peavey, 29 Kan. 170; 11 Am. & Eng. R. Cas. 260; Gothard v. R. R., 67 Ala. 114.

The rule, obtaining in Georgia, which allows a partial recovery against a railroad company, notwithstanding the contributory negligence of the plaintiff, or person injured, was held not to apply to the case of an injury sustained by an employee, in East Tennessee R. Co. v. Maloy, 77 Ga. 237; 2 S. E. Rep. 941; 31 Am. & Eng. R. Cas. 352.

In Illinois, if a railroad employee sues for an injury, and it appears that his own negligence contributed to effect the injury, he cannot recover, unless his negligence was slight and that of defendant, gross, in comparison. Illinois Central R. Co. v. Brookshire, 3 Ill. App. 225.

The rule of comparative negligence has also been recognized in Oregon, in two cases, at least. Bequette v. People's Transportation Co., 2 Oregon 200; Holstine v. Oregon, etc., R. Co., 8 Oregon 164.

"In an action for negligence causing death, contributory negligence of deceased is no defense, if defendant was guilty of wanton or willful misconduct, and he may be guilty of such misconduct without any actual intention to inflict injury." Birmingham Ry., Light & Power Co. v. Ryan (Ala. 1906), 41 So. Rep. 616.

"Rev. St. Fla. 1892 (§ 2345), provides that no person shall recover damages from a railroad company for injury to himself or his property where the same is done by his consent or is caused by his own negligence; but if the complainant and the agents of the company are both at fault, the former may recover, the damages to be diminised by the jury in proportion to the amount of default attributable to complainant. *Held* that, while such section practically eliminates the doctrine of contributory negligence, it does not entitle a complainant to recover without proof that the particular negligence of which defendant was at the time guilty was the proximate cause of the injury." Bookman v. Seaboard Air Line Ry. (U. S. C. C. A., S. C., 1907), 152 Fed. Rep. 686.

[36] Sanders v. Central of Georgia Ry. Co., 123 Ga. 763; 51 S. E. Rep. 728.

alleged to have been received because of a breach of duty toward him, on the part of the company, the court laid down the rule that if the plaintiff was not free from fault he could not recover, but to enable him to recover, the employer must have been guilty of negligence directly producing the injury and that if both parties were negligent, or if both were free from fault, there would be no liability in the case. This rule is more nearly in accord with the principles which have been found most salutary, by the courts of both England and America.

§ 453. **Plaintiff must have exercised ordinary care, in Illinois.**— In Illinois, where the doctrine of comparative negligence obtains, it is held that the rule cannot apply except in cases where the injured person observed ordinary care for his own safety and protection, with reference to the particular circumstances involved.[37]

If the plaintiff has sustained injury because of the want of ordinary care on his part, as this is held to be equivalent to gross negligence, no recovery could be had, unless the defendant had willfully inflicted the injury, since it is an essential element to the right of action for injuries due to the negligence of defendant, that the plaintiff must have exercised ordinary care.[38]

If a person voluntarily and unnecessarily places himself in

[37] Chicago, etc., R. Co. v. Krueger, 23 Ill. App. 639; 124 Ill. 457; Chicago, etc., R. Co. v. Daugherty, 12 Ill. App. 181; Illinois, etc., R. Co. v. Neer, 26 Ill. App. 356; Gardner v. Chicago, etc., R. Co., 17 Ill. App. 262; Wabash, etc., R. Co. v. Moran, 13 Ill. App. 72; Chicago, etc., R. Co. v. Thorston, 11 Ill. App. 631; Toledo, etc., R. Co. v. Cline, 135 Ill. 41; 25 N. E. Rep. 846; 45 Am. & Eng. R. Cas. 150; Louisville, etc., R. Co. v. Johnson, 44 Ill. App. 56.

[38] Chicago, etc., R. Co. v. Lee, 68 Ill. 576; Chicago, etc., R. Co. v. Colwell, 3 Ill. App. 545; Chicago, etc., R. Co. v. Johnson, 103 Ill. 513; 8 Am. & Eng. R. Cas. 225; Union, etc., R. Co. v. Kallahr, 12 Ill. App. 400.

a well-known place of danger and as a result sustains injury, there can be no recovery, even for gross negligence on the part of the defendant, in the absence of a willful or wanton act, on the defendant's part.[39]

The mere fact of running a train at a rate of speed forbidden by an ordinance, is usually held to constitute negligence, yet if the injured party is himself at fault, he could not recover, unless, all the circumstances considered, the defendant could be held guilty of a willful or wanton act and the rate of speed alone would not be sufficient to constitute such willfulness or wantonness,[40] for to enable the plaintiff to recover, on the ground of mere negligence, as distinct from the willful tort of the defendant, it must appear that plaintiff himself exercised ordinary care and if there is a want of ordinary care, on plaintiff's part, the doctrine of comparative negligence does not apply.[41]

§ 454. **Rule formerly obtained in Kansas.**— In an early decision in the State of Kansas,[42] the Supreme Court discussed the question of the different degrees of negligence at some length and adopted the rule of comparative negligence. The court held that it was not essential, for a party to recover for an injury, that he should be entirely free from negligence himself, but that if his own negligence was slight and that of the defendant was gross, in comparison, he might recover, and that it would be a proper issue of fact for the jury to determine the relative degree of negligence or care that characterized the action of the different parties to the cause.[43]

[39] Illinois, etc., R. Co. v. Beard, 49 Ill. App. 232.

[40] Wabash, etc., R. Co. v. Weisbeck, 14 Ill. App. 525; Illinois, etc., R. Co. v. Hetherington, 83 Ill. 516; Schmidt v. Chicago, etc., R. Co., 83 Ill. 410; Wabash, etc., R. Co. v. Henks, 91 Ill. 413.

[41] Chicago, etc., R. Co. v. Rogers, 17 Ill. App. 638.

[42] Union Pacific R. Co. v. Rollins, 5 Kansas 167.

[43] Union Pacific R. Co. v. Rollins, 5 Kansas 167.

This rule, however, is not followed at the present day, in that State, but the courts of Kansas, in common with the courts of most of the other States in the United States, refuse to apply the doctrine of comparative negligence, but hold that any degree of negligence on the part of the plaintiff will bar his recovery and that the essential elements of the cause of action, must be shown to exist, as independent entities, and not by any process of comparison of degrees, on the part of the respective parties to the cause of action.[44]

§ 455. **Plaintiff's negligence "slight" and defendant's "gross."**— Under the rule of comparative negligence, although both parties are at fault, the plaintiff may recover, where it appears that his negligence is "slight" only, while that of the defendant is "gross," [45] as partial or slight negligence or inattention of the injured person will not defeat a recovery, when the defendant was palpably negligent.[46] The words "gross" and "slight," as applied to the acts constituting negligence, in such cases, are to a great degree but relative terms and the determination of the question of which of the two persons was the more negligent often depends largely upon the acts of the other, as the comparison of the negligence of the plaintiff, with that of the defendant, is of the very essence of the rule.[47] If the negligence of

[44] Atchison, etc., R. Co. v. Henry, 57 Kansas 154; 45 Pac. Rep. 576.

[45] Chicago, etc., R. Co. v. Gretzner, 46 Ill. 74; Illinois, etc., R. Co. v. Simmons, 38 Ill. 242; Chicago, etc., R. Co. v. Lee, 68 Ill. 576; Indianapolis, etc., R. Co. v. Evans, 88 Ill. 63; 21 Am. Ry. Rep. 284; Stratton v. Central City R. Co., 95 Ill. 25; 1 Am. & Eng. R. Cas. 115.

[46] Chicago, etc., R. Co. v. Sullivan, 63 Ill. 293; Lake Shore, etc., R. Co. v. Berlink, 2 Ill. App. 427.

[47] Moody v. Peterson, 11 Ill. App. 180; Chicago, etc., R. Co. v. O'Connor, 13 Ill. App. 62; Chicago, etc., R. Co. v. Mason, 27 Ill. App. 450; Chicago, etc., R. Co. v. Krueger, 124 Ill. 457; Chicago, etc., R. Co. v. Clark, 70 Ill. 276; Chicago, etc., R. Co. v. Harwood, 90 Ill. 425; Chicago, etc., R. Co. v. Johnson, 116 Ill. 206; 4 N. E. Rep. 381.

the injured party has contributed to the injury, he cannot recover, unless his negligence was no greater than that defined by the law as "slight" negligence, while that of the defendant was "gross."[48] It is not sufficient that the defendant was guilty of a greater degree of negligence than that of the plaintiff as a mere preponderance of negligence, on defendant's part, will not authorize a recovery.[49] Plaintiff cannot recover, unless his negligence is "slight," as compared with that of the defendant, or unless the negligence of the defendant clearly exceeds that of the plaintiff.[50]

§ 456. **When both parties equally negligent.**— If the mutual negligence producing the injury is equal or nearly so, or that of the plaintiff is greater than that of the defendant, the plaintiff cannot recover of the defendant for the injury sustained by him,[51] for in order to entitle a negligent person to recover of another for an injury that his negligence in part contributed to produce, there must be a disparity between his own wrongful act and that of the defendant.[52]

Where both the plaintiff and the defendant are guilty of gross negligence, no recovery can be had, and it is error for the court to modify this rule where there are no circumstances sufficient to justify such modification, for in cases of

[48] Chicago, etc., R. Co. v. Avery, 8 Ill. App. 133; Chicago, etc., R. Co. v. Dillon, 17 Ill. App. 355; Toledo, etc., R. Co. v. Spencer, 66 Ill. 528.

[49] Chicago, etc., R. Co. v. Van Patten, 64 Ill. 510; Schmidt v. Chicago, etc., R. Co., 83 Ill. 405; Illinois, etc., R. Co. v. Goddard 72 Ill. 567.

[50] Chicago, etc., R. Co. v. Clark, 70 Ill. 276; Chicago etc., R. Co. v. Dunn, 52 Ill. 451; St. Louis, etc., R. Co. v. Britz, 72 Ill. 256.

[51] Chicago, etc., R. Co. v. Murray, 62 Ill. 326; 7 Am. Ry. Rep. 308; Chicago, etc., R. Co. v. Payne, 49 Ill. 499; Chicago, etc., R. Co. v. Lee, 68 Ill. 576.

[52] Parmelee v. Farro, 22 Ill. App. 467; Chicago, etc., R. Co. v. Payne, 49 Ill. 499.

mutual negligence the plaintiff cannot recover, merely because there may have been a greater degree of negligence on the defendant's part.[53]

§ 457. **In case of injuries to passengers.**— In jurisdictions where the rule of comparative negligence is applied, it is applicable to a suit for damages by a passenger, against the carrier, and if the negligence of the passenger was slight, as compared with that of the carrier, he is held entitled to recover for such an injury.[54]

In one case, where a passenger permitted his arm to rest on the base of the window and protrude out of the window and his arm was broken by striking stationary freight cars, passed by the coach in which he was riding, it was held that as his negligence was slight as compared with that of the railroad company in leaving the cars, where they were apt to be struck by the coach, or by passengers thereon, a verdict for the plaintiff was sustained, under this rule of comparative negligence.[55] And it is held, in Illinois, where a jury has found, from the evidence in a case, that the negligence of the passenger was slight and that of the company was gross, the Appellate Court will not look into the evidence, to see if this result was properly arrived at, as the finding of the jury is held to be conclusive on the Appellate Court, on issues of fact.[56]

§ 458. **Injuries at highway crossings.**— In States where

[53] Illinois, etc., R. Co. v. Baches, 55 Ill. 379; 1 Am. Ry. Rep. 585; South, etc., Alabama R. Co. v. Sullivan, 59 Ala. 272; Indianapolis, etc., R. Co. v. Evans, 88 Ill. 63; Chicago, etc., R. Co. v. Mock, 72 Ill. 141.

[54] Galena, etc., R. Co. v. Fay, 16 Ill. 558; Lake Shore, etc., R. Co. v. Brown, 123 Ill. 162; 14 N. E. Rep. 197; 31 Am. & Eng. R. Cas. 61.

[55] Chicago, etc., R. Co. v. Pondrom, 51 Ill. 333, distinguished in Georgia, etc., R. Co. v. Underwood, 90 Ala. 49; Manly v. Wilmington, etc., R. Co., 74 N. Car. 655.

[56] Chicago, etc., R. Co. v. Bonafield, 104 Ill. 223; 8 Am. & Eng. R. Cas. 493.

the rule of comparative negligence obtains, if a person, injured at a highway crossing by a train, has failed to adopt some slight precautions for his safety in approaching the crossing, and the railroad company has omitted all care on its part, to avoid the collision, the plaintiff will not be denied a recovery.[57]

Accordingly, if a person approaches a crossing without looking for a train, but the crossing is in plain sight of the operators of the engine for a distance sufficient for them to have stopped the train and avoid the collision, but the train approaches the crossing at a high rate of speed, a finding that plaintiff was only slightly negligent, while defendant was grossly negligent, will not be interfered with, on appeal.[58]

Of course this rule would not be countenanced in a State where such an inconsistent rule does not obtain, because it is held to be as much the imperative duty of the traveler to look out for the train, as it is for the operatives of the train to watch for travelers at crossings, and it is placing a premium upon negligence of the traveler to permit a recovery for his negligence, because he could not see a train, approaching on the fixed rails of the track, itself a signal of danger, and yet hold that the railroad employees ought to have seen the individual who happened to be at the crossing when the train arrived there, in time to have avoided the injury, notwithstanding his negligence.

§ 459. **Instructions as to comparative negligence.**— The basic principle of the rule of comparative negligence being the comparison of the negligence of the injured person with

[57] Wabash R. Co. v. Wallace, 110 Ill. 114; 19 Am. & Eng. R. Cas. 359.

[58] Chicago, etc., R. Co. v. Still, 19 Ill. 499; disapproved in South, etc., R. Co. v. Sullivan, 59 Ala. 272; Wabash, etc., R. Co. v. Henks, 91 Ill. 406.

that of the alleged wrongdoer, the court should advise the jury, by appropriate instruction, that although the plaintiff was guilty of some negligence, yet, if the defendant was grossly negligent and if the plaintiff's negligence was slight, as compared with that of the defendant, a verdict for the plaintiff should be returned.[59] It is erroneous to omit the element of comparison and to simply advise the jury that if the defendant was more negligent than the plaintiff, the latter is entitled to recover, or that the plaintiff may recover, if his negligence was slight, in comparison with that of the defendant, as the charge should advise the jury that the plaintiff is only entitled to recover, if the negligence of the plaintiff was slight and that of the defendant was gross, in comparison therewith.[60]

Both of the essentials of the action, under the rule of comparative negligence, i. e., the slightness of the plaintiff's negligence and the grossness of the defendant's negligence, as ascertained by comparison, should be embraced in the charge to the jury,[61] and if either element is omitted, it is error, as where the jury were told that a verdict for the plaintiff should be returned, if the defendant, after discovery of the plaintiff's child, in a position of danger, although placed in such position by the negligence of the plaintiff, might have avoided the injury, by the exercise of ordinary care, as this permitted a recovery, although plaintiff was negligent if the defendant was guilty of a lack of ordinary care only, instead of a gross act of negligence.[62]

[59] Chicago v. Stearns, 105 Ill. 554.

[60] Wabash R. Co. v. Jones, 5 Ill. App. 607; Indianapolis, etc., R. Co. v. Evans, 88 Ill. 63; Chicago, etc., R. Co. v. Mason, 27 Ill. App. 450.

[61] Chicago, etc., R. Co. v. Harwood, 90 Ill. 425.

[62] Moody v. Peterson, 11 Ill. App. 180; Chicago, etc., R. Co. v. Avery, 8 Ill. App. 133; 1 Thompson on Negligence, § 282, pp. 265, 266. The trial court cannot be held guilty of error for a failure to instruct

§ 460. **Comparative negligence generally a jury issue.**— In the few States where the confusing doctrine of comparative negligence obtains, it is generally held to be an issue of fact, for the jury to decide, after comparison of the acts of the injured person and those of the defendant, whether the injured person was guilty of slight negligence and the defendant of gross negligence, in comparison.[63] This would necessarily be the true rule, for while the definition of negligence is a function for the court, whether in States where degrees are recognized or in those jurisdictions where all degrees of negligence is discarded, the ascertainment of the ultimate fact of whether or not the acts of the defendant are such as to come within the definition of the term, is an issuable fact, and the rule is not different where the theory of comparison and striking a balance by deducting the negligence of the injured person from that of the defendant, obtains, for in both instances, the existence of the original or remaining quantity depends upon the facts in evidence.

upon the rule of comparative negligence, in the absence of a request for such an instruction. Chicago, etc., R. Co. v. O'Connor, 119 Ill. 586; 9 N. E. Rep. 263.

[63] Chicago, etc., R. Co. v. Warner, 123 Ill. 38; 14 N. E. Rep. 206; Chicago, etc., R. Co. v. Fietsahm, 123 Ill. 518; 15 N. E. Rep. 169; 1 Thompson on Negligence, § 283, p. 267.

CHAPTER XVIII.

COEMPLOYEES AT COMMON LAW.

§ 461. Rule of nonliability for negligence of.
462. Reason for the rule.
463. Conflict of laws regarding.
464. Negligence of coemployee an assumed risk.
465. Scope and extent of the rule.
466. Volunteer subject to rule.
467. Illustrations of rule — Erecting scaffolds, repairing bridges, etc.
468. Negligent operation of engine.
469. Collisions between trains and cars.
470. Limitations upon rule of nonliability for coemployee's neglect.
471. Company's negligence concurring to produce injury.
472. Vice-principal's negligence not assumed.
473. Character of act determines employer's liability.
474. Promises or assurances of vice-principal.
475. Notice to vice-principal, notice to employer.
476. Dual capacity doctrine.
477. The department doctrine.
478. Objections to the department doctrine.
479. Employees in separate departments.
480. Employees in same department.
481. Employees of different companies.
482. Injuries due to incompetency of employees.
483. Liability for retention of incompetent or intemperate employees.
484. Who generally deemed coemployees.
485. Nature of service the proper test.
486. Division superintendent, road-master and other division officers.
487. Employees upon different railroad trains.
488. Train despatcher and other employees.
489. Local telegraph operator and other trainmen.
490. Switchmen, track repairers and trainmen.
491. Conductors and other employees.
492. Engineer and other employees on same train.
493. Yardmen, switchmen and other employees.
494. Status of car inspectors and repairers.

§ 495. Section foreman and section men.
496. Flagman and trainmen.
497. Pullman conductor and porter.
498. Track repairers and trainmen.
499. Station agent and other railway employees.
500. Status of various other employees, in different departments.

§ 461. **Rule of nonliability for negligence of.**— By a very well considered and generally followed English decision,[1] the salutary rule of the common law was early recognized to be that where an employer has used due diligence in the selection of competent employees and has furnished them with a reasonably safe means and place to perform the service for which they are engaged, he has performed the full measure of his legal obligations toward them and is not answerable to one of his employees for a subsequent injury received by him, in consequence of the carelessness of another employee, when both are engaged in the same service.

Wherever the English common law obtains, this rule has followed as a part of the common law and in the absence of a statute changing the rule of nonliability for an injury due to the negligence of a coemployee, the employer is very generally held not to be liable for such an injury. In jurisdictions where the common law obtains, therefore, in an action against a railroad company, for personal injuries, the plaintiff is not entitled to recover, where the only evidence of the injury is of one resulting from the negligence of the plaintiff's fellow employee, not representing the corporation at the time.[2]

This rule has been followed and applied in actions by

[1] Priestley v. Fowler, 3 M. & W. 1.

[2] Hanley v. Grand Trunk R. Co., 62 N. H. 274; Crispin v. Babbitt, 81 N. Y. 516; Warner v. Erie R. Co., 39 N. Y. 468; Hard v. Vermont R. Co., 32 Vt. 473; Neubauer v. New York, etc., R. Co., 101 N. Y. 607; 4 N. E. Rep. 125; Grattis v. Kansas City, etc., R. Co., 153 Mo. 380; 55 S. W. Rep. 108; 77 Am. St. Rep. 721; 48 L. R. A. 399.

employees against railroad companies, for injuries sustained through the negligence of a coemployee, in England [3] and both in the Federal [4] and State courts [5] in the United States.

[3] Vose v. Lancashire, etc., R. Co., 2 H. & N. 728; 4 Jur. N. S. 364; 24 L. J. Ex. 249; Hutchinson v. York, etc., R. Co., 5 Ex. 343; 19 L. J. Ex. 296; 6 Ry. Cas. 580.

[4] Gravelle v. Minneapolis, etc., R. Co., 3 McCrary 352; 10 Fed. Rep. 711; Dillon v. Union Pacific R. Co., 3 Dill. (U. S.) 319; Maryland v. Baltimore, etc., R. Co., 1 Hughes (U. S.) 337; Toten v. Pennsylvania R. Co., 11 Fed. Rep. 564; Crews v. St. Louis, etc., R. Co., 20 Fed. Rep. 87; Chicago, etc., R. Co. v. Ross, 112 U. S. 377; 5 Sup. Ct. Rep. 184; 28 L. Ed. 787; Randall v. Baltimore, etc., R. Co., 109 U. S. 478; 3 Sup. Ct. Rep. 322; 27 L. Ed. 1003; Northern Pacific R. Co. v. Herbert, 116 U. S. 642; 6 Sup. Ct. Rep. 590; 29 L. Ed. 755; Baltimore, etc., R. Co. v. Baugh, 149 U. S. 368; 13 Sup. Ct. Rep. 914; 37 L. Ed. 772; Northern Pacific R. Co. v. Hambly, 154 U. S. 349; 14 Sup. Ct. Rep. 983; 38 L. Ed. 1009; Central R. Co. v. Keegan, 160 U. S. 259; 16 Sup. Ct. Rep. 269; 40 L. Ed. 418; Northern Pacific R. Co. v. Peterson, 162 U. S. 346; 16 Sup. Ct. Rep. 843; 40 L. Ed. 994; Northern Pacific R. Co. v. Porter, 167 U. S. 48; 17 Sup. Ct. Rep. 741; 42 L. Ed. 72; New England R. Co. v. Conroy, 175 U. S. 323; 44 L. Ed. 181.

[5] Alabama, etc., R. Co. v. Carroll, 97 Ala. 126; 11 So. Rep. 803; Smoot v. Mobile, etc., R. Co., 67 Ala. 13; Mobile, etc., R. Co. v. Smith, 59 Ala. 245; St. Louis, etc., R. Co. v. Triplett, 54 Ark. 289; 15 S. W. Rep. 831; 48 Am. & Eng. R. Cas. 283; Little Rock, etc., R. Co. v. Duffey, 35 Ark. 602; 4 Am. & Eng. R. Cas. 637; Long v. Coronado R. Co., 96 Cal. 269; 31 Pac. Rep. 170; Congrave v. Southern Pacific R. Co., 88 Cal. 360; 26 Pac. Rep. 175; 48 Am. & Eng. R. Cas. 337; Colorado, etc., R. Co. v. Ogden, 3 Colo. 499; Summerhays v. Kansas Pacific R. Co., 2 Colo. 484; 20 Am. Ry. Rep. 359; Herbert v. Northern Pacific R. Co., 3 Dakota 38; 13 N. W. Rep. 349; 8 Am. & Eng. R. Cas. 85; Parrish v. Pensacola, etc., R. Co., 28 Fla. 251; 9 So. Rep. 696; Stafford v. Chicago, etc., R. Co., 114 Ill. 244; 2 N. E. Rep. 185; Justice v. Pennsylvania R. Co., 130 Ind. 321; 30 N. E. Rep. 303; 53 Am. & Eng. R. Cas. 604; Bogard v. Louisville, etc., R. Co., 100 Ind. 491; Hunt v. Chicago, etc., R. Co., 26 Iowa 363; Theleman v. Mueller, 73 Iowa 108; 34 N. W. Rep. 765; Kansas Pacific R. Co. v. Salmon, 11 Kansas 83; Louisville, etc., R. Co. v. Collins, 2 Duv. (Ky.) 114; Coffman v. Louisville, etc., R. Co., 18 S. W. Rep. 1012; Cassidy v. Maine Central R. Co., 76 Me. 488; 17 Am. & Eng. R. Cas. 519; Shauck v. Northern Central R. Co., 25 Md. 462; Fitzgerald v. Boston,

§ 462. **Reason for the rule.**— The rule *respondeat superior* only applies to actions sounding in tort, not to those arising from the relation of employer and employee, as this is a contractual relation. In actions by third persons, for injuries due to the negligence of an employee, acting within the scope of his employment, the employer is liable, if at all, upon the theory of an implied agency on the part of the negligent employee, but this rule does not obtain, in the case of an injury to another employee in the common service.[6]

etc., R. Co., 156 Mass. 293; 31 N. E. Rep. 7; O'Brien v. Boston, etc., R. Co., 138 Mass. 387; 52 Am. Rep. 279; Hunn v. Michigan, etc., R. Co., 78 Mich. 513; 44 N. W. Rep. 502; 7 L. R. A. 500; Peterson v. Chicago, etc., R. Co., 67 Mich. 102; 34 N. W. Rep. 260; 31 Am. & Eng. R. Cas. 292; Louisville, etc., R. Co. v. Petty, 67 Miss. 255; 7 So. Rep. 351; 41 Am. & Eng. R. Cas. 444; Thorpe v. Missouri Pacific Ry. Co., 89 Mo. 650; 2 S. W. Rep. 3; Dixon v. Chicago, etc., R. Co., 104 Mo. 413; 16 S. W. Rep. 409; 109 Mo. 413; 19 S. W. Rep. 412; 53 Am. & Eng. R. Cas. 589; Grattis v. Kansas City, etc., R. Co., 153 Mo. 380; 55 S. W. Rep. 108; 77 Am. St. Rep. 721; 48 L. R. A. 399; Harrison v. Central R. Co., 31 N. J. L. 293; Lutz v. Atlantic, etc., R. Co. (N. M.), 30 Pac. Rep. 912; 53 Am. & Eng. R. Cas. 478; Donnelly v. Brooklyn, etc., R. Co., 109 N. Y. 16; 15 N. E. Rep. 733; 34 Am. & Eng. R. Cas. 103; Hobbs v. Atlantic, etc., R. Co., 107 N. C. 1; 12 S. E. Rep. 124; Ell v. Northern Pacific R. Co., 1 N. Dakota 336; 48 Am. & Eng. R. Cas. 318; Little Miami R. Co. v. Fitzpatrick, 42 Ohio St. 318; Anderson v. Bennett, 16 Oregon 515; 19 Pac. Rep. 765; 8 Am. St. Rep. 311; 38 Am. & Eng. R. Cas. 87; Johnston v. Pittsburg, etc., R. Co., 114 Pa. St. 443; 7 Atl. Rep. 184; Boatright v. Northeastern R. Co., 25 So. Car. 128; Gates v. Chicago, etc., R. Co., 2 S. Dakota 422; 50 N. W. Rep. 907; 53 Am. & Eng. R. Cas. 245; Gulf, etc., R. Co. v. Blohn, 73 Texas 637; 11 S. W. Rep. 867; 4 L. R. A. 764; Beuhring v. Chesapeake, etc., R. Co., 37 W. Va. 502; 16 S. E. Rep. 435; Dwyer v. American Express Co., 82 Wis. 307; 52 N. W. Rep. 304; 53 Am. & Eng. R. Cas. 612; Peschel v. Chicago, etc., R. Co., 62 Wis. 338; 21 N. W. Rep. 269; 17 Am. & Eng. R. Cas. 545.

"The fellow-servant rule is recognized and enforced as a part of the common law." Southern Ry. Co. v. Elliott (Ind.), 82 N. E. Rep. 1051; transferred from Appellate Court, 81 N. E. Rep. 1180.

[6] Ohio, etc., R. Co. v. Hammersley, 28 Ind. 371; Chicago, etc., R. Co. v. Hoyt, 16 Ill. App. 237,

Among employees of the same class, no one of them, as between himself and his equals, is the employer's agent and the employer is not liable to one employee for injuries arising from the wrongful acts or omissions of another employee of the same class, although each of the given employees would be held to be the agent of the employer, were the action by a third party.[7] The different employees are rather regarded as the agents of each other, in the work of accomplishing the common service and the negligence of one, because of this implied agency, will be imputed to the injured employee, so to speak, so that no responsibility for the unauthorized wrongful act exists on the part of the employer.[8]

Hence, it is that in an action by an employee against his employer, for an injury due to the act of a coemployee, the suit must be based on the actual negligence of the employer or of some employee representing him who is held in law to personate him in the doing of the wrongful act. And where the business of the employer requires the services of a large number of employees, beyond the possible constant supervision of either the employer or his representative, he cannot be held negligent unless in the failure to use reasonable care in choosing his employees or representatives, or in failing to use reasonable care to guard against such perils of the employment as he might reasonably have apprehended would occur.[9]

§ 463. **Conflict of laws regarding.**— It may be stated as

[7] Louisville, etc., R. Co. v. Collins (Ky.), 2 Duv. 114; Chicago, etc., R. Co. v. Ross, 112 U. S. 377; Louisville, etc., R. Co. v. Brooks, 83 Ky. 129; Louisville, etc., R. Co. v. Cavens, 9 Bush. (Ky.) 559.

[8] Casey v. Louisville, etc., R. Co., 84 Ky. 79; Louisville, etc., R. Co. v. Cavens, 9 Bush. (Ky.) 559.

[9] Smith v. Potter, 46 Mich. 258; 9 N. W. Rep. 273; 2 Am. & Eng. R. Cas. 140.

a generally accepted proposition, sustained both by principle and authority, that the common-law rule, as interpreted by the courts of a State, in which a given transaction had its situs, will be applied in another State, where the cause of action is pending, although the rule of law may be differently applied in the forum, as to causes of action having their origin in that State, unless the enforcement of the *lex loci* is opposed to the public policy of the forum.[10] The reason for this rule is manifest, for if the courts of the different States are to give force to their own precedents in determining what the rule of the common law is, then it operates to subject the transaction to a rule other than that which obtained at its situs, and hence, the substantive rights of the parties may vary according to the jurisdiction where the action happens to be brought.[11]

In accordance with this rule, the courts have very generally agreed that precedents established by the decisions of the courts in a State where an injury happened, upon questions of who are coemployees, will be followed, although the issue turned upon the rules of the common law, as interpreted in the given States.[12] Of course this rule does not

[10] Forepaugh v. Delaware, etc., R. Co., 128 Pa. St. 217; 18 Atl. Rep. 503; 15 Am. St. Rep. 672; 5 L. R. A. 508; Limerick Bank v. Howard, 71 N. H. 13; 51 Atl. Rep. 641; 93 Am. St. Rep. 489; Roe v. Jerome, 18 Conn. 158; Tollman Co. v. Reed, 115 Mich. 71; 72 N. W. Rep. 1104; Inge v. Murphy, 10 Ala. 885; Fogarty v. St. Louis Transfer Co., 180 Mo. 490; 79 S. W. Rep. 664; Lee v. Missouri Pacific Ry. Co., 195 Mo. 400; 92 S. W. Rep. 614; Walsh v. New York, etc., R. Co., 160 Mass. 571; 36 N. E. Rep. 584; 39 Am. St. Rep. 514; Brewster v. Chicago, etc., R. Co., 114 Iowa 144; 86 N. W. Rep. 221; 89 Am. St. Rep. 348; Helton v. Alabama Midland R. Co., 97 Ala. 275; 12 So. Rep. 276; Alexander v. Pennsylvania R. Co., 48 Ohio St. 623; 30 N. E. Rep. 69; Turner v. St. Clair Tunnel Co., 111 Mich. 578; 70 N. W. Rep. 146; 66 Am. St. Rep. 397; 36 L. R. A. 134.

[11] Limerick Bank v. Howard, 71 N. H. 13; 51 Atl. Rep. 641; 93 Am. St. Rep. 489; Forepaugh v. Delaware, etc., R. Co., 128 Pa. St. 217; 18 Atl. Rep. 503; 15 Am. St. Rep. 672; 5 L. R. A. 508.

[12] Walsh v. New York, etc., R. Co., 160 Mass. 571; 36 N. E. Rep.

obtain in the federal courts, as to cases falling within their original jurisdiction, for in the federal courts, regardless of the rules in the States as to who are coemployees, the rule of the common law, as applied in the federal courts, is applied.[13] Nor is the rule, as stated above, of universal application, even in the State courts, as the court of Missouri, in a recent opinion,[14] and the Supreme Court of Georgia,[15] refused to follow this generally accepted rule, as to who are coemployees, according to the law of the place of the accident, but determined the question according to the law of the State where the action was tried. These cases, however, admit that the rule prescribed by statute law of the State of the accident, would control, in all other jurisdictions, although this is but the written law, in another form, and that it would defer in other matters to the rules of law of the States where the transaction had its situs; but pushed to its legitimate extreme, if the rules followed in the two States noted were to be generally followed, it would cause untold confusion in the decisions and as stated by the New Hampshire court, in a well-considered case,[16] "while it is doubtless competent for the Supreme Court of the United States to determine the law governing the interpretation of

584; 39 Am. St. Rep. 514; Chicago, etc., R. Co. v. Tuite, 44 Ill. App. 535; Voshefsky v. Hillside Coal Co., 21 App. Div. 168; 47 N. Y. Supp. 386; Alexander v. Pennsylvania R. Co., 48 Ohio St. 623; 30 N. E. Rep. 69; Nashville, etc., R. Co. v. Foster, 10 Lea (Tenn.) 351; Eingarten v. Illinois, etc., Co., 94 Wis. 70; 68 N. W. Rep. 664; 59 Am. St. Rep. 859; 34 L. R. A. 503.

[13] Hough v. Texas, etc., R. Co., 100 U. S. 213, 226; 25 L. Ed. 618.

[14] Root v. Kansas City, etc., R. Co., 195 Mo. 348; 92 S. W. Rep. 621; 6 L. R. A. (N. S.) 212. But see, to contrary, in same State, Fogarty v. St. Louis Transfer Co., 180 Mo. 490; 79 S. W. Rep. 664.

[15] Krogg v. Atlanta, etc., R. Co., 77 Ga. 207; 4 Am. St. Rep. 79. But to contrary, in same State, see the earlier well-considered case of Atlanta, etc., R. Co. v. Tanner, 68 Ga. 384.

[16] Limerick Bank v. Howard, 71 N. H. 13; 51 Atl. Rep. 641; 93 Am. St. Rep. 489.

Vermont contracts, without regard to the decisions applicable in that State, it would be little less than usurpation for a court of New Hampshire to decide what, in its opinion, ought to be the commercial law of Vermont." It is to be regretted that the courts of any State would depart from such a well settled rule of law as that established by the

For learned discussion of the cases opposed to the decision in that case, the note by the editor to Root v. Kansas City, etc., R. Co. (195 Mo. 348; 92 S. W. Rep. 621), as reported in 6 L. R. A. (N. S.) may be profitably read.

In the still more recent case of Rahm v. Chicago, etc., Ry. Co. (108 S. W. Rep. 370), a well-considered case by the Kansas City Court of Appeals, Judge Johnson, said:

"The rule is settled in this State that 'in a transitory common-law action, where suit is brought in a State other than where the injury happened, the interpretation of the common law obtaining in the State where the cause of action accrued, the *lex loci* will govern.' Root v. Railway, 195 Mo. 348; 92 S. W. 621; 6 L. R. A. (N. S.) 212. Recently, in the case of Chandler v. Railway (Mo. App.), 106 S. W. Rep. 553, we had this precise question before us.

* * * * * * * * * *

"In our discussion of the subject now under consideration, we said, in part: 'The vital question is, did plaintiff have a cause of action in the Indian Territory which the courts of that jurisdiction, under their view of the law, would enforce? If he had no cause of action there, certainly he could not acquire one by entering this State. If naked when he came to our border, the mere act of stepping over an imaginary line would not clothe him. His cause of action must be measured not by our own standard, but by that fixed by the rules and principles recognized by the courts of the place where he was injured. If there is no law giving him a right of action in the place where the alleged wrongful act was committed, no action can be maintained here, though the laws of this State would have given him a right of action had the same acts been committed without our boundaries. To hold otherwise would be to say that one State could prescribe rules, no matter how arbitrary, to govern persons and things in another State, and thus contravene the fundamental principles maintained by all nations that every independent State has an exclusive right to regulate persons and things within its own territorial limits, and that the laws of the State or country' can have no intrinsic force *proprio vigore* except within the territorial limits and jurisdiction of that country.'"

precedents of the best considered cases of the different State courts, upon this subject.

§ 464. **Negligence of coemployee an assumed risk.**— An employer is not liable to his employee for injuries occasioned by the negligence of a coemployee, in the course of their common employment, provided the employer exercised reasonable care in the employment and retention of the negligent employee and he is a person of competent skill and care, because when the injured employee engaged in the service of the employer he undertook, as between himself and the employer, to incur all the ordinary and incidental risks of the service, which includes, in law, the negligence of his coemployees in the same employment.[17]

As between the employer and his employees, there is no implied contract of guaranty of the care and diligence that the different employees shall observe toward each other, but each must observe for himself the risks of the business resulting from the negligence of ordinarily careful employees and guard himself accordingly.[18]

Employees standing in the relation to each other as coemployees are alone responsible for injuries occasioned by one to the other [19] and if an employee of mature years and ordinary intelligence and experience, on being directed to do

[17] Smoot v. Mobile, etc., R. Co., 67 Ala. 13; St. Louis, etc., R. Co. v. Triplett, 54 Ark. 289; 15 S. W. Rep. 831; 48 Am. & Eng. R. Cas. 283; Brodeur v. Valley Falls R. Co., 16 R. I. 448; 17 Atl. Rep. 55; Schaub v. Hannibal, etc., R. Co., 106 Mo. 74; 16 S. W. Rep. 924; Darrigan v. New York, etc., R. Co., 52 Conn. 285; Carlson v. Oregon, etc., R. Co., 21 Oregon 450; Miller v. Southern Pacific R. Co., 20 Oregon 285; 26 Pac. Rep. 70; 48 Am. & Eng. R. Cas. 294.

[18] Moss v. Missouri Pacific Ry. Co., 49 Mo. 167; 1 Am. Ry. Rep. 576; Sizer v. Syracuse, etc., R. Co., 7 Lans. (N. Y.) 67.

[19] Cleveland, etc., R. Co. v. Keary, 3 Ohio St. 201; Pullman Palace Car Co. v. Laack, 143 Ill. 242; 32 N. E. Rep. 285; O'Connell v. Baltimore, etc., R. Co., 20 Md. 212.

a temporary piece of work outside the scope of the regular duties he was engaged to perform, and while obeying the order, without objection on his part, is injured, because of his own want of knowledge, skill or experience in the given service, by the negligent act of a coemployee, there is no resulting liability on the part of the employer, but the risk was one assumed by the injured employee.[20]

§ 465. **Scope and extent of the rule.**— The rule of nonliability for the acts of an employee, by which a coemployee sustains injury, is not extended beyond acts received while the negligent employee was in the performance of some duty or his omission to perform some act, made his duty to perform, by the employer.[21] Where an employee of a railroad company is injured by the negligence of another employee in running a train, the employer is only liable for a failure to exercise ordinary care in the employment of such employee,[22] and if the negligence of the injured employee con-

[20] Cole v. Chicago, etc., R. Co., 71 Wis. 114; 37 N. W. Rep. 84; 5 Am. St. Rep. 201; 33 Am. & Eng. R. Cas. 271; Hogan v. Northern Pacific R. Co., 53 Fed. Rep. 519; 53 Am. & Eng. R. Cas. 384.

The slipping of a maul from the hand of a fellow-workman, by which the plaintiff is struck and injured, is an inevitable accident, for which the employer is not liable. Wright v. Illinois Cent. R. Co., 119 Ill. App. 132.

The common-law rule obtains in Oklahoma and an employee cannot recover from the employer for an injury due solely to the negligence of a coemployee. Mollhoff v. Chicago, R. I. & P. R. Co., 82 Pac. Rep. 733.

"A common-law employer was not responsible to an employee for the negligent acts of another employee exercising superintendence in the management and detail of the work, such person being deemed a fellow workman." Chisholm v. Manhattan Ry. Co., 101 N. Y. S. 622.

[21] Slatterly v. New York, etc., R. Co., 21 N. Y. S. R. 552; 51 Hun 638; 4 N. Y. Supp. 910; Yeamans v. Contra Costa Steam, etc., Co., 44 Cal. 71; Gates v. Chicago, etc., R. Co., 2 S. Dakota 422; 50 N. W. Rep. 907; 53 Am. & Eng. R. Cas. 245.

[22] Pittsburg, etc., R. Co. v. Ruby, 38 Ind. 294; 10 Am. Ry. Rep. 199.

curred to produce the injury, the rule would not be different.[23] The rule is not affected by the fact of the minority of the injured employee, and where the injured person, was, at the time of his injury, in the employment of a railroad company and his injury resulted from his own and the negligence of a coemployee, his employer is not liable for the injury.[24] Nor is the relation affected by the fact that the duties being performed, at the time of the injury, were in violation of a Sunday law of the State where the labor was rendered, as this would not affect the employee's common-law contract of assumption of the risk of a competent employee's negligence.[25]

§ 466. **Volunteer subject to rule.**— If a person undertakes voluntarily to perform services for a railroad company, and an agent of the company assents to the performance of the labor, the volunteer stands in the relation of an employee while so engaged and the rule of nonliability on the employer's part, for an injury occasioned by the negligence of a fellow employee in the course of the common employment, applies to such volunteer.[26]

[23] Renfro v. Chicago, etc., R. Co., 86 Mo. 302; Chicago, etc., R. Co. v. Snyder, 117 Ill. 376; 18 Ill. App. 640; 7 N. E. Rep. 604; 28 Am. & Eng. R. Cas. 611; Capper v. Louisville, etc., R. Co., 103 Ind. 305; 2 N. E. Rep. 749; 21 Am. & Eng. R. Cas. 525.

[24] Chicago, etc., R. Co. v. Harney, 28 Ind. 28; Fisk v. Central Pacific R. Co., 72 Cal. 38; 13 Pac. Rep. 144; Johnson v. Richmond, etc., R. Co., 84 Va. 713; 5 S. E. Rep. 707; Houston, etc., R. Co. v. Miller, 51 Texas 270; Gartland v. Toledo, etc., R. Co., 67 Ill. 498; King v. Boston, etc., R. Co., 9 Cush. (Mass.) 112.

[25] Houston, etc., R. Co. v. Rider, 67 Texas 267.

"The fact that one employee receives injuries by the act of a fellow workman does not necessarily relieve the employer from legal responsibility for the accident." Smith v. Rock Island, etc., R. Co. (La. 1907), 44 So. Rep. 290.

[26] Barstow v. Old Colony R. Co., 143 Mass. 535; 10 N. E. Rep. 255; 28 Am. & Eng. R. Cas. 473; Degg v. Midland R. Co., 1 H. & N. 773;

In an Indiana case,[27] the plaintiff was requested by a brakeman to ascend a moving car of the defendant's and set a brake and while engaged on this voluntary service, he was injured by other employees of the defendant, negligently running other cars against the car he was upon, but it was held that the employer was not responsible for the injury so received, as he occupied the same relation as if he had been a regular employee, in the rendition of the voluntary service, so far as the resulting liability of the company was concerned. And this would seem to be the reasonable rule, under such circumstances, for whether the volunteer is rendering services in pursuance to an unauthorized invitation of the employees of the company, or his presence is not known by them, his status toward the employer would be the same and he ought not to occupy a stronger position than a regular employee or be entitled to any more protection, for as toward a mere volunteer there is no contractual relation, out of which the correlative duty would arise.[28]

§ 467. **Illustrations of rule — Erecting scaffolds, repairing bridges, etc.**— Where a railroad company employs competent men to erect scaffolds or temporary staging, without selecting the material itself, or through its own delegated representatives selects the materials therefor, but intrusts the duty of erecting the scaffold or staging to such employees, as a part of their services, the company would not be liable for an injury to one of the workmen from the falling of the scaffold, but his injury would be held an assumed risk.[29]

3 Jur. N. S. 395; 26 L. J. Ex. 171; Flower v. Pennsylvania R. Co., 69 Pa. St. 210; New Orleans, etc., R. Co. v. Harrison, 48 Miss. 112.

[27] Everhart v. Terre Haute, etc., R. Co., 78 Ind. 292; 41 Am. Rep. 567; 4 Am. & Eng. R. Cas. 599.

[28] Chicago, etc., R. Co. v. Lammert, 12 Ill. App. 408.

[29] Bowen v. Chicago, etc., R. Co., 95 Mo. 268; 8 S. W. Rep. 230; Peschel v. Chicago, etc., R. Co., 62 Wis. 338; 21 N. W. Rep. 269; 17

The same result follows, for an injury to a bridge builder, from the falling of a portion of the bridge, due to the negligence of his foreman and coemployees,[30] and an employee engaged in carrying a steel rail, or other heavy substance, injured as a result of the negligence of his coemployee in failing to properly carry his part of such substance, or in dropping it too soon, is an assumed risk within this rule,[31] as is, likewise, an injury to an employee from an improper use of an appliance in reasonably safe condition for proper use,[32] for in such case the only negligence is that of the employee using the appliance and not that of the employer.

Am. & Eng. R. Cas. 545; Holden v. Fitchburg, etc., R. Co., 129 Mass. 268; 37 Am. Rep. 343; 2 Am. & Eng. R. Cas. 94; Elliott v. Chicago, etc., R. Co., 5 Dakota 523; 41 N. W. Rep. 758; 3 L. R. A. 363; 38 Am. & Eng. R. Cas. 62.

[30] Yager v. Receivers, 4 Hughes (U. S.) 192; Texas & Pacific R. Co. v. Rogers, 57 Fed. Rep. 378; Johnson v. St. Paul, etc., R. Co., 43 Minn. 222; 45 N. W. Rep. 156.

[31] Coffman v. Louisville, etc., R. Co. (Ky.), 18 S. W. Rep. 1012; Coyne v. Union Pacific R. Co., 133 U. S. 370; 33 L. Ed. 651; American Bridge Co. v. Seeds, 144 Fed. Rep. 605; Haviland v. Kansas City, etc., R. Co., 172 Mo. 115; 72 S. W. Rep. 515.

[32] Ling v. St. Paul, etc., R. Co., 50 Minn. 160; 52 N. W. Rep. 378; Worheide v. Missouri, etc., Co., 32 Mo. App. 367; Collyer v. Pennsylvania R. Co., 49 N. J. L. 59; 6 Atl. Rep. 437; Texas, etc., R. Co. v. Scott, 64 Texas 549; St. Louis, etc., R. Co. v. McLain, 80 Texas 85; 15 S. W. Rep. 789.

In Coyne v. Union Pacific Company (133 U. S. 370; 33 L. Ed. 651), it was held by the court, through Mr. Justice Blatchford:

"Where the method of loading a rail was by lifting it and walking with it to the car, halting, dressing and then in concert lifting the rail, at the word of command from the boss, and throwing it on the floor of a flat car, * * * and in the course of such loading the injury to the plaintiff occurred, no negligence can be complained of."

For, as said by the learned justice, in the conclusion of his opinion:

"Whatever negligence there was, was the negligence either of the plaintiff himself or of his fellow servants who, with him, had hold of the rail."

In a similar case, in Missouri, upon a similar injury, from carrying a steel rail, the court said:

§ 468. **Negligent operation of engine.**— Where the employer has used reasonable care in the employment of competent employees and in supplying and keeping in repair, suitable engines and structures, and giving proper directions and adoption of precautions for their use, he is generally held not liable for an injury to one of his employees for the negligent manner in which the engines or cars are handled by other employees.[33]

Railroad companies have therefore been held not to be liable for an injury to an employee resulting from the negligence of a fireman while handling the engine;[34] for an injury resulting from a stick being thrown from the engine;[35] for a boiler explosion due to the neglect of the engineer;[36] for an injury due to a failure to expose the headlight of the engine on a foggy night;[37] for a failure to properly sand the engine;[38] for the negligent compliance with orders,

"The physical facts and plaintiff's own testimony completely nullify all such expert testimony and show that it is unreliable, and, in addition, they show that if the plaintiff strained his back, he did so without being compelled, ordered or expected to do so by anyone, and without any apparent reason for doing so, and, therefore, he did not make out a *prima facie* case." Haviland v. Kansas City etc., R. Co., 172 Mo. 115.

Upon a very similar injury, in a Kentucky case, the court held:

"Where plaintiff and two other employees of defendant were moving a cross-tie and one of the men stumbled, causing the tie to fall on plaintiff, there was nothing to render the defendant liable for plaintiff's injuries." Lee v. R. R. Co., 1 Amer. Neg. Rep. 60.

[33] Holden v. Fitchburg, etc., R. Co., 129 Mass. 268; 37 Atl. Rep. 343; 2 Am. & Eng. R. Cas. 94.

[34] Parrish v. Pensacola, etc., R. Co., 28 Fla. 251; 9 So. Rep. 696.

[35] Whalen v. Mad River R. Co., 8 Ohio St. 249.

[36] Nashville, etc., R. Co. v. Handman, 13 Lea (Tenn.) 423; Murphy v. Boston, etc., R. Co., 88 N. Y. 146; 24 Hun 142; 59 How. Pr. 197; 8 Am. & Eng. R. Cas. 510.

[37] Pennsylvania R. Co. v. Wachter, 60 Md. 395; 15 Am. & Eng. R. Cas. 187.

[38] Louisville, etc., R. Co. v. Petty, 67 Miss. 255; 7 So. Rep. 351; 41 Am. & Eng. R. Cas. 444.

in running the engine;[39] for the negligent moving of the engine, without signals,[40] or in disobedience of signals;[41] for running at too high a rate of speed;[42] for negligently backing the engine against an employee,[43] or against other cars,[44] causing an injury, or for running the engine in violation of the company's rules or orders,[45] for in all such instances, according to the rule of the common law, the engineer, or person operating the engine, is a coemployee with the injured employee and the risk is one assumed.

§ 469. **Collisions between trains and cars.**— Where the common-law rule is applied, there is no liability on the part of a railroad company for an injury to an employee resulting from a collision between trains or cars, due to the negligent management or operation of a coemployee of the injured person.[46]

In the absence of negligence in the employment of the

[39] Baltimore, etc., R. Co. v. Baugh, 149 U. S. 368; 13 Sup. Ct. Rep. 914; 54 Am. & Eng. R. Cas. 328; St. Louis, etc., R. Co. v. Mogart, 45 Ark. 318.

[40] Long v. Coronado R. Co., 96 Cal. 269; 31 Pac. Rep. 170.

[41] Chicago, etc., R. Co. v. Rush, 84 Ill. 570; Whitman v. Wisconsin, etc., R. Co., 58 Wis. 408; 17 N. W. Rep. 124; 12 Am. & Eng. R. Cas. 214.

[42] Stetler v. Chicago, etc., R. Co., 46 Wis. 497; 21 Am. Ry. Rep. 402; Van Wickle v. Manhattan R. Co., 23 Blatchf. (U. S.) 422; 32 Fed. Rep. 278.

[43] New York, etc., R. Co. v. Hyde, 56 Fed. Rep. 188.

[44] Toms v. Buffalo Creek R. Co., 70 Hun 84; 53 N. Y. S. R. 640; 23 N. Y. Supp. 1112.

[45] Henry v. Lake Shore, etc., R. Co., 49 Mich. 495; 13 N. W. Rep. 832; 8 Am. & Eng. R. Cas. 110; Enright v. Toledo, etc., R. Co., 93 Mich. 409; 53 N. W. Rep. 536.

[46] Texas, etc., R. Co. v. Berry, 67 Texas 238; 5 S. W. Rep. 817; 31 Am. & Eng. R. Cas. 147; Slater v. Jewett, 85 N. Y. 61; 39 Am. Rep. 627; 5 Am. & Eng. R. Cas. 515; Lyon v. Cumberland Valley R. Co., 23 Pa. St. 384; Relyea v. Kansas City, etc., R. Co., 112 Mo. 86; 20 S. W. Rep. 480; 53 Am. & Eng. R. Cas. 578.

engineer, therefore, no recovery can be had for the wrecking of a train, by collision with other cars or a train, properly equipped and manned, as a result of which an injury is sustained by an employee on the wrecked train.[47] The result is the same, so far as the right of a coemployee injured by the act of an engineer is concerned, whether the collision is due to a neglect to comply with specific orders,[48] or the failure to wait for orders,[49] for in either case, it is the neglect of the coemployee bringing about the injury. If the derailment results from the excessive speed of the engine, it is but another form of negligence on his part, for which his employer is not responsible,[50] and whether the collision occurs between other cars or engines,[51] or with a hand car,[52] or similar appliance, the result is the same and no recovery can be had.

[47] Parker v. Hannibal, etc., R. Co., 109 Mo. 362; 19 S. W. Rep. 1119; 50 Am. & Eng. R. Cas. 521; Boldt v. New York, etc., R. Co., 18 N. Y. 432; Pennsylvania R. Co. v. Wachter, 60 Md. 395; 15 Am. & Eng. R. Cas. 187; St. Louis, etc., R. Co. v. Welsh, 72 Texas 298; 10 S. W. Rep. 529; 2 L. R. A. 839; 38 Am. & Eng. R. Cas. 81; Sullivan v. Toledo, etc., R. Co., 58 Ind. 26; Prather v. Richmond, etc., R. Co., 80 Ga. 427; 9 S. E. Rep. 530; Becker v. Baltimore, etc., R. Co., 57 Fed. Rep. 188; Louisville, etc., R. Co. v. Martin, 87 Tenn. 398; 10 S. W. Rep. 772; 3 L. R. A. 282; Ewald v. Chicago, etc., R. Co., 70 Wis. 420; 36 N. W. Rep. 12; 33 Am. & Eng. R. Cas. 336; Collins v. St. Paul, etc., R. Co., 30 Minn. 31; 8 Am. & Eng. R. Cas. 150.

[48] Bull v. Mobile, etc., R. Co., 67 Ala. 206.

[49] Chicago, etc., R. Co. v. Doyle, 60 Miss. 977; 8 Am. & Eng. R. Cas. 171.

[50] Van Wickle v. Manhattan R. Co., 23 Blatchf. (U. S.) 422; 32 Fed. Rep. 278; Smith v. Memphis, etc., R. Co., 18 Fed. Rep. 304; Howland v. Milwaukee, etc., R. Co., 54 Wis. 226; 11 N. W. Rep. 529; 5 Am. & Eng. R. Cas. 578.

[51] Besel v. New York, etc., R. Co., 70 N. Y. 171; Casey v. Louisville, etc., R. Co., 87 Ky. 79; Harvey v. New York, etc., R. Co., 32 N. Y. S. R. 817; 57 Hun 589.

[52] Easton v. Houston, etc., R. Co., 32 Fed. Rep. 893; Weger v. Pennsylvania R. Co., 55 Pa. St. 460; Sherrin v. St. Joseph, etc., R. Co., 103 Mo. 378; 15 S. W. Rep. 442.

§ 470. **Limitations upon rule of nonliability for coemployee's neglect.**— The rule of nonliability for the injuries due to the carelessness of a coemployee of the injured person, applies only where the action is brought for an injury to an employee against the principal, by whom such employee was employed.[53] The negligence of a coemployee must have been the approximate cause of an injury, before the employer will be exempted from responsibility to an injured employee, on this ground,[54] and where the action is against a third person for an injury to an employee, if the negligence of such person concurred to produce the injury, it is immaterial, so far as his defense is concerned, that the negligence of a coemployee of the injured one concurred to produce the injury.[55]

And in States where the "conassociation or department doctrine" obtains, it is also essential that the injured employee and the negligent one were both employed in the same general employment or department of the company's service, and the rule of nonliability in such States does not apply, where the respective situations of the employees allow no opportunity for the exertion of a mutual influence upon each others' carefulness.[56] And it is very generally held that in order for the employer to avoid liability for an injury done to another employee's carelessness, the two employees must have been engaged in the same general employment and employed by the same common employer.[57]

[53] Nary v. New York, etc., R. Co., 29 N. Y. S. R. 630; 9 N. Y. Supp. 153; 55 Hun 612; 125 N. Y. 759; 27 N. E. Rep. 408.

[54] Chicago, etc., R. Co. v. Rush, 84 Ill. 570.

[55] Ft. Worth, etc., R. Co. v. Mackey, 83 Texas 410; 18 S. W. Rep. 949.

[56] Western, etc., R. Co. v. Drysdale, 51 Ga. 644; North Chicago Co. v. Johnson, 114 Ill. 57.

[57] Sadowski v. Michigan Car Co., 84 Mich. 100; 47 N. W. Rep. 598; Dow v. Kansas Pacific R. Co., 8 Kansas 642; 5 Am. Ry. Rep. 401;

§ 471. **Company's negligence concurring to produce injury.** — The rule as to the nonliability of a company to its employees for injuries resulting from the negligence of coemployees does not apply where the railroad company is itself guilty of negligence concurring to produce the injury.[58] If the negligence of the employer is the proximate cause of the injury,[59] or if such negligence, combined with that of a coemployee of the injured person, produces the injury, the employer is liable therefor, and the concurring negligence of the coemployee would not affect the question of the employer's liability.[60] If the injury would not have resulted, if the employer had performed his duty toward the injured person, the concurring negligence of a coemployee is immaterial.[61]

Mobile, etc., R. Co. v. Thomas, 42 Ala. 672; Alabama, etc., R. Co. v. Waller, 48 Ala. 459.

[58] Smoot v. Mobile, etc., R. Co., 67 Ala. 13; Pittsburg, etc., R. Co. v. Lewis, 33 Ohio St. 196; Houston, etc., R. Co. v. Gilmore, 62 Texas 391; Harrison v. Central R. Co., 31 N. J. L. 293; Hanley v. Grand Trunk R. Co., 62 N. H. 274; Wormington v. Atchison, etc., R. Co., 46 Mo. App. 159; Colorado, etc., R. Co. v. Ogden, 3 Colo. 499; Crew v. St. Louis, etc., R. Co., 20 Fed. Rep. 87.

[59] Grand Trunk R. Co. v. Cummings, 106 U. S. 700; Cincinnati, etc., R. Co. v. Lang, 118 Ind. 579; 21 N. E. Rep. 317; 38 Am. & Eng. R. Cas. 25; Whittaker v. Delaware, etc., R. Co., 49 Hun 400; 22 N. Y. S. R. 405.

[60] Grand Trunk R. Co. v. Cummings, 106 U. S. 700; 12 Am. & Eng. R. Cas. 204; Fisk v. Central Pacific R. Co., 72 Cal. 38; 13 Pac. Rep. 144; Pullman Palace Car Co. v. Laack, 143 Ill. 242; 32 N. E. Rep. 285; Hunn v. Michigan, etc., R. Co., 78 Mich. 513; 44 N. W. Rep. 502; 7 L. R. A. 500; 41 Am. & Eng. R. Cas. 452; Franklin v. Winona, etc., R. Co., 37 Minn. 409; 34 N. W. Rep. 898; 5 Am. St. Rep. 856; 31 Am. & Eng. R. Cas. 211; Bluedorn v. Missouri Pacific Ry. Co., 108 Mo. 439; 18 S. W. Rep. 1103; Stetler v. Chicago, etc., R. Co., 46 Wis. 497; 21 Am. Ry. Rep. 402; Cowan v. Chicago, etc., R. Co., 80 Wis. 284; 50 N. W. Rep. 180; Gulf, etc., R. Co. v. Johnson, 83 Texas 628; 19 S. W. Rep. 151.

[61] Coppins v. New York, etc., R. Co., 122 N. Y. 557; 25 N. E. Rep. 915; Knathla v. Oregon, etc., R. Co., 21 Oregon 136; 27 Pac. Rep. 91.

And whenever the injury is caused in whole or in part, because of the failure on the part of the employer to perform some one of the nondelegable duties imposed upon him by law, that the negligence of an employee combined with such cause, to produce the injury, is not a defense.[62] Hence, it is that a railroad company is liable for injuries from a failure to provide reasonably safe roadbed, appliances or cars;[63] a reasonably safe track;[64] a defective bridge or trestle;[65] reasonably safe machinery,[66] engines,[67] or cars,[68] or other materials or structures,[69] and for a failure to properly man and operate its trains,[70] although the negligence of a coemployee with the injured person, may, in part, contribute to produce the injury complained of.

[62] Warner v. Erie R. Co., 39 N. Y. 468; Dyer v. American Express Co., 82 Wis. 307; 52 N. W. Rep. 304; 53 Am. & Eng. R. Cas. 612.

[63] Ellis v. New York, etc., R. Co., 95 N. Y. 546; Trask v. California, etc., R. Co., 63 Cal. 96; 11 Am. & Eng. R. Cas. 192; McDermott v. Pacific R. Co., 30 Mo. 115; Davis v. Central R. Co., 55 Vt. 84; 45 Am. Rep. 590; Atchison, etc., R. Co. v. Wilson, 48 Fed. Rep. 57.

[64] Lewis v. St. Louis, etc., R. Co., 59 Mo. 495; Texas, etc., R. Co. v. Kirk, 62 Texas 227.

[65] Paulmeier v. Erie R. Co., 34 N. J. L. 151.

[66] Young v. New Jersey R. Co., 46 Fed. Rep. 160; Northern Pacific R. Co. v. Charless, 51 Fed. Rep. 562; 51 Am. & Eng. R. Cas. 198; St. Louis, etc., R. Co. v. Harper, 44 Ark. 524; Harper v. Indianapolis, etc., R. Co., 47 Mo. 567; Atchison, etc., R. Co. v. Holt, 29 Kansas 149; 11 Am. & Eng. R. Cas. 206; Pullman Palace Car Co. v. Harkins, 55 Fed. Rep. 932.

[67] Cone v. Delaware, etc., R. Co., 81 N. Y. 206; 37 Am. Rep. 491; 2 Am. & Eng. R. Cas. 57; Crutchfield v. Richmond, etc., R. Co., 76 N. Car. 320.

[68] Macy v. St. Paul, etc., R. Co., 35 Minn. 200; 28 N. W. Rep. 249; Henry v. Wabash R. Co., 109 Mo. 488; 19 S. W. Rep. 239.

[69] Dillon v. Union Pacific R. Co., 3 Dill (U. S.) 319; Brickner v. New York, etc., R. Co., 2 Lans. (N. Y.) 506.

[70] Booth v. Boston, etc., R. Co., 73 N. Y. 38; Pittsburg, etc., R. Co. v. Henderson, 37 Ohio St. 549; 5 Am. & Eng. R. Cas. 529.

Employer is liable for injury resulting from combined negligence

§ 472. **Vice-principal's negligence not assumed.**— When an employer places one person in his employ, under the direction or control of another person, also in his employ, such employer is liable for injuries to the person placed in the subordinate position, caused by the negligence of the superior employee, the same as he would be for injuries resulting from his own want of care.[71]

The negligence of the vice-principal in the service of a railroad company is regarded in the law as the negligence of the company.[72] And a marked change in the rule that obtained at common law, has taken place, in regard to employees clothed with partial authority only, such as a foreman or superior employees; and the principle upon which

of vice-principal and fellow workman. Chicago Tr. Co. v. Sawusch, 218 Ill. 130; 75 N. E. Rep. 797; 1 L. R. A. (N. S.) 670.

"Where the negligence of an employer and that of a fellow workman concur to produce an injury to an employee, the employer is liable for the injury sustained." Stone v. Union Pac. R. Co. (Utah, 1907), 89 Pac. Rep. 715, 723.

Missouri, K. & T. Ry. Co. v. Wise (Tex. Civ. App. 1908), 106 S. W. Rep. 465.

"The rule that, where an employee is injured by the concurrent negligence of an employer and fellow workmen, no action will lie against the employer, is not recognized by the courts of the United States." Chandler v. St. Louis & S. F. R. Co. (Mo.), 106 S. W. Rep. 553.

[71] Chicago, etc., R. Co. v. May, 108 Ill. 288; 15 Am. & Eng. R. Cas. 320; Mad River R. Co. v. Barber, 5 Ohio St. 541; Palmer v. Utah, etc., R. Co., 2 Idaho 290; 13 Pac. Rep. 425; Pittsburg, etc., R. Co. v. Lewis, 33 Ohio St. 196; Pittsburg, etc., R. Co. v. Ranney, 37 Ohio St. 665; 5 Am. & Eng. R. Cas. 533.

[72] Fagundes v. Central Pacific R. Co., 79 Cal. 97; 21 Pac. Rep. 437; 3 L. R. A. 824; McMasters v. Illinois, etc., R. Co., 65 Miss. 264; 4 So. Rep. 59; 7 Am. St. Rep. 653; 41 Am. & Eng. R. Cas. 486; Denver, etc., R. Co. v. Driscoll, 12 Colo. 520; 21 Pac. Rep. 708; 38 Am. & Eng. R. Cas 105; Miller v. Missouri Pacific Ry. Co., 109 Mo. 350; 19 S. W. Rep. 58; 53 Am. & Eng. R. Cas. 598; Russ v. Wabash R. Co., 112 Mo. 45; 20 S. W. Rep. 472; Wabash, etc., R. Co. v. Hawk, 121 Ill. 259; 12 N. E. Rep. 253; 31 Am. & Eng. R. Cas. 306; O'Brien v. American, etc., Co., 53 N. J. L. 291; 21 Atl. Rep. 294.

such change is based is that when the employer delegates any duty which he owes to his employees, he remains liable for its improper performance, the same as if he himself personally performed the given duty.[73]

When a superintendent, or other agent, is empowered to select, employ and discharge such employees as operate under him, he is bound to use the same care in protecting such employee from injury, as is imposed upon the employer; and for any failure in this respect, resulting injuriously to the employees under his control, the employer may be called upon to respond in damages,[74] as the law views the act of the employer's representative in the same light as if the employer had been himself personally present, directing the service.[75]

This rule of law is founded upon the wisest considerations of public policy,[76] for while just that the employee should assume the ordinary and incidental risks of his employment, he ought not to be held to assume a risk created by the negligent act of the employer's representative in making unsafe the work which he orders the employee to perform.[77]

§ 473. **Character of act determines employer's liability.**— The employer is liable for the carelessness of a vice-principal, regardless of the department of the service in which he is at work,[78] and the vice-principal is bound to use the same

[73] Flike v. Boston, etc., R. Co., 53 N. Y. 553; Anderson v. Bennett, 16 Oregon, 515; 19 Pac. Rep. 765; 8 Am. St. Rep. 311; 38 Am. & Eng. R. Cas. 87.

[74] Douglas v. Texas, etc., R. Co., 63 Texas 564; Chicago, etc., R. Co. v. Blank, 24 Ill. App. 438.

[75] Sweeney v. Gulf, etc., R. Co., 84 Texas 433; 19 S. W. Rep. 555.

[76] Lake Shore, etc., R. Co. v. Spangler, 44 Ohio St. 471; 8 N. E. Rep. 467; 28 Am. & Eng. R. Cas. 319.

[77] Taylor v. Evansville, etc., R. Co., 121 Ind. 124; 22 N. E. Rep. 876; 6 L. R. A. 584; 41 Alb. L. J. 173; 41 Am. & Eng. R. Cas. 437.

[78] Galveston, etc., R. Co. v. Smith, 76 Texas 611; 13 S. W. Rep. 562; 44 Am. & Eng. R. Cas. 598.

degree of care, in protecting his subordinates as is imposed upon the employer himself, by the law.[79]

The true test for determining whether or not an employer is liable to one employee for an injury received through the negligence of another, depends upon the character of the act performed, which causes the injury and not upon the rank or grade of the person performing the alleged negligent act. If the act amounts to a neglect of one of the duties the employer has impliedly contracted to perform, he is liable, no matter what the rank or grade of the person he has designated to perform it, because the person so delegated is the employer's agent, in the performance of the delegated duties and the employer, by delegating the duty to another, cannot avoid responsibility therefor.[80] The question to be determined therefore, in all cases, is, were the person performing the act complained of and the injured employee, coemployees, or not? If they were, there can be no recovery against the employer, for an injury caused by the neglect of a coemployee, in the absence of a statute abolishing the common-law rule.[81] If the employee guilty of the wrongful act was the employer's representative in the doing of the act, or it was one of the nondelegable duties of the employer, the latter remains liable, the same as if he personally did the act.[82] If the act performed is one of the duties of the employer toward his employees, it is the same as if it were his own misfeasance, irrespective of whether the act is performed by a superior or inferior officer or agent to whom the performance of the act has been committed.[83]

[79] Douglas v. Texas, etc., R. Co., 63 Texas 564.

[80] Galveston, etc., R. Co. v. Smith, *supra;* Colorado, etc., R. Co. v. Naylor, 17 Colo. 501; 30 Pac. Rep. 249.

[81] Taylor v. Evansville, etc., R. Co., 121 Ind. 124; 22 N. E. Rep. 876; 6 L. R. A. 584.

[82] Gilmore v. Northern Pacific R. Co., 18 Fed. Rep. 866; 9 Sawy. 558; 15 Am. & Eng. R. Cas. 304.

[83] Fuller v. Jewett, 80 N. Y. 46; 1 Am. & Eng. R. Cas. 109; Pike

But, on the other hand, the negligence of a superior officer or agent, would not, in all cases, render the employer responsible, for it is only where the law would recognize a duty on the part of the employer to perform the act for the protection of his employees, that he could be held liable for the misfeasance of a superior agent, and if the act complained of related to the work of a coemployee of the injured person, there would be no liability, regardless of the grade of the agent performing the act.[84]

v. Chicago, etc., R. Co., 41 Fed. Rep. 95; St. Louis, etc., R. Co. v. Triplett, 54 Ark. 289; 15 S. W. Rep. 831; 48 Am. & Eng. R. Cas. 283; Pullman Palace Car Co. v. Laack, 143 Ill. 242; 32 N. E. Rep. 285; Capper v. Louisville, etc., R. Co., 103 Ind. 305; 2 N. E. Rep. 749; 21 Am. & Eng. R. Cas. 525.

[84] Stockmeyer v. Reed, 55 Fed. Rep. 259; Fones v. Phillipps, 39 Ark. 17.

"Whether a person by whose negligence an employee is injured is a vice-principal or a fellow workman does not depend on a difference of grade, rank, or authority, but on the character of the act performed by the offending employee, as to whether it is the performance of a duty which the employer owed to the injured employee and intrusted to the offending employee to perform." Pagan v. Southern Ry. Co., 59 S. E. Rep. 32.

"If an employer has conferred on one member of a class of workmen carrying on a particular branch of his business authority to control the movements of the men under his charge, the employee, while in the exercise of such authority, stands in the place of the employer, and is not a fellow workman to those under his direction." Chicago Terminal R. Co. v. Reddick, 82 N. E. Rep. 598; 230 Ill. 105.

"In the absence of some statute defining fellow workmen, the test to be applied is whether the negligent act, which caused the injury, was a breach of a positive duty owing by the employer to his employee, in which case the person performing the act is a vice-principal." Morrison v. San Pedro, etc., R. Co. (Utah 1907), 88 Pac. Rep. 998.

"Employees charged with the duty of keeping a place to work and machinery in a safe condition, and of inspecting the same, are vice-principals of the employer, regardless of their rank." Missouri, K. & T. Ry. Co. v. Wise (Tex. Civ. App. 1908), 106 S. W. Rep. 465.

A vice-principal is one who is placed in a position of performing a positive duty of the employer, or who has general control of the entire

§ 474. **Promises or assurances of vice-principal.**— A railroad company is responsible for the promises and assurances of its vice-principal, with reference to repairing defects in machinery or appliances or the safety of the place of work

business or some department of it. Mollhoff v. Chicago, R. I. & P. R. Co. (Ok.), 82 Pac. Rep. 733.

The duty which the foreman of a bridge gang owes to see that there is a clear track, is a duty due from him as vice-principal, and for a breach of this duty, in case of an injury, the company will be liable. Texas & Pac. R. Co. v. Carlin, 189 U. S. 354; 47 L. Ed. 849.

"A railroad company cannot delegate to its section men the duty of furnishing a brakeman a reasonably safe place in which to work, including a reasonably safe track, and using ordinary care to keep the same in repair." Missouri, K. & T. Ry. Co. v. Wise, 106 S. W. Rep. 465.

"An employee designated by a vice-principal to perform a particular service which has been delegated to him by his employer in turn becomes a vice-principal." Cleveland & St. L. Ry. Co. v. Austin, 127 Ill. App. 281.

"A mere foreman or gang boss is a fellow workman of those working with or under him, and for his defaults by which a fellow employee is injured the employer is not responsible, unless the duty as to which the default is made is an absolute duty of the employer and the performance of which has been delegated to such foreman." Brown v. Baltimore & O. R. Co. (C. C.), 142 Fed. Rep. 911, reversed. Baltimore & O. R. Co. v. Brown (U. S., C. C. A., Pa. 1906), 146 Fed. Rep. 24.

"An employee, whose duty is to direct and control workmen under him, is a vice-principal as to the work intrusted to him." Smith v. American Car & Foundry Co. (Mo. App. 1907), 99 S. W. Rep. 790.

"The boss of a repair train is not a vice-principal." Peterson v. Philadelphia, B & W. R. Co. (Pa. 1907), 66 Atl. Rep. 660.

"A person is not a vice-principal, unless he has entire charge of the business, or a distinct branch thereof, having authority to superintend the work and exercising control of such business, or unless the employer has delegated to him a duty of his own, which is an absolute obligation, from which nothing but performance can relieve him." Vant v. Roelofs, 66 Atl. Rep. 749.

"An employee assumes the risk of the negligence of his superior fellow employees in the latter's direction of the men, of the machinery, and of the work to the same extent that he assumes the risk of the negligence of the fellow laborer by his side who is engaged in performing the work." American Bridge Co. v. Seeds. 144 Fed. Rep. 605.

or the appliance causing an injury to a subordinate employee.[85]

An assurance from one representing the employer that the machinery or appliance being used by an employee is all right and an order from him to the employee to use it, notwithstanding a complaint of such employee as to its sufficiency, amounts to a guaranty of the safety and the employer will then be liable for any injury resulting from its prudent use.[86]

An employee of a railroad has the right to rely upon the promise or assurance of the vice-principal that he will protect him while he is at work on the side track, notwithstanding the existence of a rule of the company requiring employees to protect themselves by putting out flags while engaged in such work.[87]

But in order that an assurance of safety or a promise from an employee shall be given the effect of a guaranty on the part of the employer, the employee making the promise or giving the assurance, must be representing the employer in authority and although he is a superior employee to the injured person and has given an assurance or made a promise, this will not bind the employer, unless in making such promise or giving such assurance he had superintendence or control over the men or the place, or power to replace or provide the machinery or appliances as to which the given promise or assurance was made.[88]

[85] Louisville, etc., R. Co. v. Kenley, 92 Tenn. 207; 21 S. W. Rep. 326; Lyttle v. Chicago, etc., R. Co., 84 Mich. 289; 47 N. W. Rep. 571.

[86] Rowland v. Missouri Pacific Ry. Co., 20 Mo. App. 463; McGowan v. St. Louis, etc., R. Co., 61 Mo. 532.

[87] Moore v. Wabash, etc., R. Co., 85 Mo. 588; 21 Am. & Eng. R. Cas. 509; Missouri Pacific Ry. Co. v. Williams, 75 Texas 4; 12 S. W. Rep. 835.

[88] McGowan v. St. Louis, etc., R. Co., 61 Mo. 528.

§ 475. **Notice to vice-principal notice to employer.**— Notice to a superintendent of a defect in machinery or appliances or a dangerous place where employees are placed at work, is notice to the railroad company, where he is engaged to superintend such machinery or place of work,[89] and any knowledge of such vice-principal, as to matters within his department of the business, is notice to the railroad company he represents.[90] And notice to a temporary vice-principal, when so acting, is the same as notice to one regularly occupying such a place and will be notice to the company, as to all matters wherein he is representing the company.[91]

Thus, it is held that knowledge on the part of a vice-principal that an incompetent fireman is handling an engine, while switching is being done, is knowledge of such fact, to his employer;[92] and the carelessness of a section foreman and his notice of an obstruction in the path of a switchman, are held to be imputable to the railroad company.[93]

But an injured employee who seeks to recover from a railroad company for an injury due to the negligence of a superior employee, has the burden of establishing that the relation of coemployees did not exist; and in order to establish negligence he must also show that the superior employee knew of the danger, or by the exercise of ordinary care might have known of it, and that the danger could not

[89] Chicago, etc., R. Co. v. Jackson, 55 Ill. 492; Lyttle v. Chicago, etc., R. Co., 84 Mich. 289; 47 N. W. Rep. 571; Davis v. Central Vermont R. Co., 55 Vt. 84; 45 Am. Rep. 590.

[90] Louisville, etc., R. Co. v. Kenley, 92 Tenn. 207; 21 S. W. Rep. 326.

[91] Baldwin v. St. Louis, etc., R. Co., 75 Iowa 297; 39 N. W. Rep. 507.

[92] Lyttle v. Chicago, etc., R. Co., 84 Mich. 289; 47 N. W. Rep. 571.

[93] Hall v. Missouri Pacific Ry. Co., 74 Mo. 289; 8 Am. & Eng. R. Cas. 106.

have been known to the plaintiff by the exercise of such care.[94]

§ 476. **Dual capacity doctrine.**— Railroad companies are not liable to one employee for injuries occasioned by another, where both are engaged in the same general undertaking;

[94] Thompson v. Chicago, etc., R. Co., 5 McCrary (U. S.) 542; 18 Fed. Rep. 239.

For liability of railroad company for act of vice-principal in failure to promulgate rules, see Fraker v. St. Paul, etc., R. Co., 32 Minn. 54; Anderson v. Bennett, 16 Oregon 515; 19 Pac. Rep. 765; 8 Am. St. Rep. 311; 38 Am. & Eng. R. Cas. 87.

For a failure to give proper command or order, or giving negligent order or command: Cowles v. Richmond, etc., R. Co., 84 N. C. 309; 37 Am. Rep. 620; 2 Am. & Eng. R. Cas. 90; Taylor v. Evansville, etc., R. Co., 121 Ind. 124; 22 N. E. Rep. 876; 6 L. R. A. 584; 41 Am. & Eng. R. Cas. 437; East St. Louis, etc., R. Co., v. Enright, 47 Ill. App. 494; Miller v. Union Pacific R. Co., 5 McCrary (U. S.) 300; 17 Fed. Rep. 67; Gilmore v. Northern Pacific R. Co., 9 Sawy. (U. S.) 558; 18 Fed. Rep. 866; 15 Am. & Eng. R. Cas. 304; Pittsburg, etc., R. Co. v. Henderson, 37 Ohio St. 549; 5 Am. & Eng. R. Cas. 529; Union Pacific R. Co. v. Fort, 17 Wall. (U. S.) 553.

For failure to provide reasonably safe working place, see Louisville, etc., R. Co. v. Graham, 124 Ind. 89; 24 N. E. Rep. 668; Kansas Pacific R. Co. v. Little, 19 Kansas 267; 17 Am. Ry. Rep. 455; Luebke v. Chicago, etc., R. Co., 59 Wis. 127; 17 N. W. Rep. 870; 48 Am. Rep. 483; 15 Am. & Eng. R. Cas. 183.

Failure to inspect and repair machinery or appliances: Hough v. Texas, etc., R. Co., 100 U. S. 213; 21 Am. Ry. Rep. 451; Schultz v. Chicago, etc., R. Co., 48 Wis. 375; 4 N. W. Rep. 399; Condon v. Missouri Pacific Ry. Co., 78 Mo. 567; Brann v. Chicago, etc., R. Co., 53 Iowa 595; 6 N. W. Rep. 5.

For negligence in causing collisions: Sheehan v. New York, etc., R. Co., 91 N. Y. 332; 12 Am. & Eng. R. Cas. 235; Daniel v. Chesapeake, etc., R. Co., 36 W. Va. 397; 15 S. E. Rep. 162; 16 L. R. A. 383; 53 Am. & Eng. R. Cas. 503.

Negligence in selection of incompetent employees: Rowland v. Missouri Pacific Ry. Co., 20 Mo. App. 463; Texas, etc., R. Co. v. Whitmore, 58 Texas 276; 11 Am. & Eng. R. Cas. 195.

In operating hand car: Hoben v. Burlington R. Co., 20 Iowa, 562; Sleete v. Great Northern R. Co., 53 Minn. 341; 55 N. W. Rep. 137; Russ v. Wabash R. Co., 112 Mo. 45; 20 S. W. Rep. 472.

nor does it make any difference that the injury in the particular case happens to one employee by the negligence of an employee of higher authority, to whom the injured employee is subject and from the consequences of whose negligence he cannot guard.[95] The rule is general in its application that an employee may be a vice-principal of his employer and also a colaborer of the person injured and whether he is the one or the other depends entirely upon the relation he assumes and sustains to the employer, in the doing of the act which causes the injury. If the negligent act arises out of and is the direct result of the authority conferred by the employer, on the superior employee over his colaborers, he is a vice-principal and the employer is liable for injuries resulting from his neglect.[96] But if his negligent act was not done in his representative capacity, but while he was acting as a colaborer with those subject to his authority, his act is that of a coemployee.[97]

[95] Thayer v. St. Louis, etc., R. Co., 22 Ind. 26; Columbus, etc., R. Co. v. Arnold, 31 Ind. 174; Lawler v. Androscoggin R. Co., 62 Me. 463; Blake v. Maine R. Co., 70 Me. 60; Holden v. Fitchburg R. Co., 129 Mass. 268; 37 Am. Rep. 343; 2 Am. & Eng. R. Cas. 94; Brown v. Winona, etc., R. Co., 27 Minn. 162; 6 N. W. Rep. 484; 38 Am. Rep. 285; Hard v. Vermont, etc., R. Co., 32 Vt. 473.

[96] Fogarty v. St. Louis Transfer Co., 180 Mo. 490; 79 S. W. Rep. 664; Hollweg v. Telephone Co., 195 Mo. 149, 157; 93 S. W. Rep. 262; Harper v. Indianapolis, etc., R. Co., 47 Mo. 567; Moore v. Wabash R. Co., 85 Mo. 588; Bane v. Irwin, 172 Mo. 306; 62 S. W. Rep. 522; Hofnagle v. New York, etc., R. Co., 55 N. Y. 608; Hobbs v. Atlantic, etc., R. Co., 107 N. Car. 1; 12 S. E. Rep. 124; Chicago, etc., R. Co. v. Touhy, 26 Ill. App. 99.

[97] Fogarty v. Transit Co., 180 Mo. 490; 79 S. W. Rep. 664; Kreuger v. Louisville, etc., R. Co., 111 Ind. 51; 11 N. E. Rep. 957; 31 Am. & Eng. R. Cas. 329; Cullen v. Norton, 126 N. Y. 1; 26 N. E. Rep. 905.

"Where a vice-principal does the work of an ordinary laborer, and is negligent therein, his employer is not liable for injuries to another employee from such negligence." Miller v. American Bridge Co., 65 Atl. Rep. 1109; 216 Pa. St. 559.

"In so far as a 'working foreman' is performing the work of a

For instance, the duty to close a switch which has been opened by a section foreman, to let a hand car in on the side track, is a duty belonging to the ordinary laborer and not one of the nondelegable duties of the employer to its employees, and the railroad company would not be liable for the death of one of its employees, caused by the negligence of the foreman in so leaving the switch open.[98] The negligence of a foreman of a pile driver, in failing to block a pile, which was shoved against the plaintiff, because it was not blocked, is also held to be the negligence of a coemployee, although the foreman had authority to employ and discharge the plaintiff and the plaintiff was under his superintendence and control in doing the work he was engaged in performing, when injured, and the employer is not liable for such an injury.[99] And so, the assurance of a foreman of bridge work, to an employee that a rope attached to a girder was fastened securely, as a result of which the employee used the rope, which was not so secured, and sustained an injury, was held, in Tennessee, not to be an act for the employer, personally, but a mere assurance of a coemployee, for which the employer was not liable.[1] This case would seem to be reaching somewhat across the border line, for since it is one of the nodelegable duties of the employer to furnish reasonably safe appliances, an assurance from his foreman of the safety of an appliance is, in fact, or ought to be, an assurance from the employer, whom the foreman is representing on the work, about which the representation is made. But the above rule

laborer, he is, under the laws of Illinois, the fellow workman of another laborer, so the employer is not liable for his negligence in such respect causing injury to the other laborer." Bokamp v. Chicago & A. Ry. Co. (Mo. App. 1907), 100 S. W. Rep. 689.

[98] Davies v. Southern Pacific R. Co., 98 Cal. 19; 32 Pac. Rep. 708.

[99] Ell v. Northern Pacific R. Co., 1 N. Dak. 336; 48 Am. & Eng. R. Cas. 318.

[1] Louisville, etc., R. Co. v. Lahr, 86 Tenn. 335; 6 S. W. Rep. 663.

is quite generally accepted and the courts look rather to the *act* and not the *rank* of the vice-principal, in determining whether two employees are colaborers or not.[2]

§ 477. **The department doctrine.**— The rule of the common law reports that an employer who has exercised due care in the employment and retention of his employees is not responsible for an injury sustained by one of them in the course of his employment, by the negligence of another, however distinct the grade of the service or different the labor performed, or however widely separated the localities of their respective employments may be, has been modified, by the course of judicial opinions, in many of the States in the United States, so as to meet what is sometimes thought the ends of justice, in a more enlightened manner.[3]

In such jurisdictions it is not the law that an employer is released from liability in all cases in which one employee is injured by the negligence of another, but the employer's immunity is limited to cases where the employees are engaged

[2] Bane v. Irwin, 172 Mo. 306; 62 S. W. Rep. 522. In this case Judge Gantt said: "We agree with counsel for defendant, 'it is the act and not the rank of the vice-principal which determines whether two employees are fellow servants.'" But see Dayharsh v. Hannibal, etc., R. Co., 103 Mo. 570; 15 S. W. Rep. 554, where a negligent act of a "boss" was not distinguished from a negligent order, when such act was done, in the general scope of the "boss's" duty as vice-principal. This case was distinguished, in Ring v. Missouri Pacific Ry. Co. (112 Mo. 220), and Fogarty v. Transfer Co. (180 Mo. 505; 79 S. W. Rep. 669), where it ought to have been overruled.

[3] Gilmore v. Northern Pacific R. Co., 9 Sawy. (U. S.) 558; 18 Fed. Rep. 866. For common-law rule, see Priestley v. Fowler, 3 M. & W. 1; King v. Ohio, etc., R. Co. 11 Biss. (U. S.) 362; 14 Fed. Rep. 277; 8 Am. & Eng. R. Cas. 119; Pittsburg, etc., R. Co. v. Powers, 74 Ill. 341; Louisville, etc., R. Co. v. Sheets (Ky.), 13 S. W. Rep. 248; 41 Am. & Eng. R. Cas. 470; Union Pacific R. Co. v. Billeter, 28 Neb. 422; 44 N. W. Rep. 483; 41 Am. & Eng. R. Cas. 431; Richmond, etc., R. Co. v. Noemend, 84 Va. 167; 4 S. E. Rep. 211; Madden v. Chesapeake, etc., R. Co., 28 W. Va. 610; 57 Am. Rep. 695.

in the same common service, or in the same department of duty; it does not extend to cases where the employees are engaged in departments of the service essentially foreign to each other.[4]

The reasons given by the courts in States where this rule obtains are said to be that an employee cannot justly be held to have contemplated, in the adjustment of his wages, those dangers which arise from the carelessness of coemployees without any reference whatever to the nature of their employment or duties.[5] Under such rule, employees of a railroad company controlling and directing the movements of one train, are, with reference to those in the same company upon another train, to be held the agents of the company and not coemployees, and where an employee on one train is injured through the negligence of an employee on another train, the maxim *respondeat superior* applies, and the company is liable.[6] This rule has been applied in Indiana,[7] Tennessee,[8] Kentucky,[9] Illinois,[10] Wisconsin,[11] Missouri [12] and some other States, but the later cases, in Missouri, have refused to follow this rule and have returned to the common-law

[4] King v. Ohio, etc., R. Co., *supra.*

[5] King v. Ohio, etc., R. Co., 11 Biss. (U. S.) 362; 14 Fed. Rep. 277; 8 Am. & Eng. R. Cas. 119.

[6] Kentucky, etc., R. Co. v. Ackley, 87 Ky. 278; 8 S. W. Rep. 691; 12 Am. St. Rep. 480.

[7] Gillenwater v. Madison, etc., R. Co., 5 Ind. 339; Fitzpatrick v. New Albany, etc., R. Co., 7 Ind. 436.

[8] East Tennessee, etc., R. Co. v. DeArmond, 86 Tenn. 73; 5. S. W. Rep. 600; 6 Am. St. Rep. 816, but this rule is applied only as to railroads; Coal Creek Mining Co. v. Davis, 90 Tenn. 711; 18 S. W. Rep. 387.

[9] McLoed v. Ginther, 80 Ky. 399; 8 Am. & Eng. R. Cas. 162.

[10] Toledo, etc., R. Co. v. O'Connor, 77 Ill. 391.

[11] Chamberlain v. Milwaukee, etc., R. Co., 11 Wis. 238.

[12] Sullivan v. Missouri Pacific Ry. Co., 97 Mo. 113; 10 S. W. Rep. 852; Tabler v. Hannibal, etc., R. Co., 93 Mo. 79; 5 S. W. Rep. 810.

rule, as the safer guide to follow, in the adjustment of the rights of employer and employee.[13]

§ 478. **Objections to the department doctrine.**— That the common-law rule of exemption from liability for injuries due to the negligence of coemployees made no distinction as to the departments of the service in which the employees were engaged, is well settled. It seems that in many States where the common law has been adopted by statute, this rule of the law has been refined away and another rule substituted in its place, which the courts thought more in harmony with the institutions or spirit of the age. As a matter of fact this salutary rule of the common law has been deviated from, largely to meet the demands of a growing public sentiment for its change and the rights of the employer have been sacrificed upon the altar of public sentiment. This common-law rule rests for its support on reasoning which commends itself to the judgment and it was dictated by the highest motives of public policy, as evidenced by the decisions upon the subject and it has been so universally sanctioned by the highest authorities that a departure from it ought not be allowed, unless warranted by a plain legislative act.[14]

The basis of the liability of the employer, whether popular or unpopular, is the same in all cases, and rests upon the breach of a legal duty owing to the employee. If the employer is not personally negligent, because some of his employees are negligent, but the employees in his service assume the risk of injuries from such negligence, there is no good reason for limiting the rule to employees in the

[13] Grattis v. Kansas City, etc., R. Co., 153 Mo. 380; 55 S. W. Rep. 108; 48 L. R. A. 399; 77 Am. St. Rep. 721.

[14] This is substantially the language of Judge Norton, in Proctor v. Hannibal, etc., R. Co., 64 Mo. 118.

same department only of the service. An employer, guilty of no personal negligence, should not be liable for an injury to one employee due to the negligence of another, even though they are engaged in different departments of the business. Regardless of the department wherein the negligent employee is at work, unless he acts for the employer in the doing of the act, or in the performance of some of the nondelegable duties due the employees, his negligence is not that of the employer and should not be so held.[15]

It should make no difference, therefore, whether a brakeman is injured by the carelessness of another brakeman, or by that of an engineer or conductor; or whether a fireman is injured by the negligence of the engineer, or by that of a machinist who is charged with fitting the engine for the road. The company's obligation should be the same in all cases, and it ought to be held liable for the negligence of all employees, or not liable for that of any of its employees, without regard to grade or department of the service. There is no certainty in the decisions unless this rule does obtain and otherwise it is basing a liability upon no reason, consistent with the common-law rule, which has stood the test of ages of criticism and has never been improved upon.[16]

[15] Foster v. Minnesota, etc., R. Co., 14 Minn. 360; Faulkner v. Erie R. Co., 49 Barb. (N. Y.) 324.

[16] Mobile, etc., R. Co. v. Thomas, 42 Ala. 672; Smoot v. Mobile, etc., R. Co., 67 Ala. 13; Corbett v. St. Louis, etc., R. Co., 26 Mo. App. 621; Lewis v. St. Louis, etc., R. Co., 59 Mo. 495; Porter v. Hannibal, etc., R. Co., 71 Mo. 78; Hall v. Missouri Pacific Ry. Co., 74 Mo. 298; Schultz v. Pacific R. Co., 36 Mo. 29; Blake v. Maine Central R. Co., 70 Me. 60; Brodeur v. Valley Falls R. Co., 16 R. I. 448; 17 Atl. Rep. 54; New York, etc., R. Co. v. Bell, 112 Pa. St. 400; 4 Atl. Rep. 50; 28 Am. & Eng. R. Cas. 338; Texas, etc., R. Co. v. Harrington, 62 Texas 597; 21 Am. & Eng. R. Cas. 571; Grattis v. Kansas City, etc., R. Co., 153 Mo. 380; 55 S. W. Rep. 108; 48 L. R. A. 399; 77 Am. St. Rep. 721; Northern Pacific R. Co. v. Peterson, 162 U. S. 346; Oakes v. Mase, 165 U. S. 363.

§ 479. **Employees in separate departments.**— In those States where the conassociation idea or department doctrine prevails, the following employees have been held to be in different departments of the business, i. e., two employees working for the same employer, but in different employments;[17] a car loader and a switch tender;[18] an engineer and car inspector;[19] an express messenger and an engineer;[20] a master mechanic and a watchman;[21] one ereeting mail-catchers and the fireman of an engine;[22] a person installing new machinery and an employee of the owner thereof;[23] a train dispatcher and an engineer running on his orders;[24] one repairing the place or appliance and an employee using such place or appliance;[25] a section foreman and train hands;[26] a car inspector and a brakeman;[27] an express clerk and the operator of the engine pulling his express car;[28] the foreman of one switching crew and employees in another crew;[29] a section foreman and an engineer;[30] a section boss and a

[17] Washburn v. Nashville, etc., R. Co., 3 Head. (Tenn.) 638; Relyea v. Kansas City, etc., R. Co., 112 Mo. 86; 20 S. W. Rep. 480; 53 Am. & Eng. R. Cas. 578.

[18] Chicago, etc., R. Co. v. Henry, 7 Ill. App. 322.

[19] Chicago, etc., R. Co. v. Hoyt, 122 Ill. 369; 12 N. E. Rep. 225; 31 Am. & Eng. R. Cas. 309.

[20] Chamberlain v. Milwaukee, etc., R. Co., 11 Wis. 238.

[21] St. Louis, etc., R. Co. v. Harper, 44 Ark. 524.

[22] Chicago, etc., R. Co. v. Gregory, 58 Ill. 272.

[23] Pullman Palace Car Co. v. Laack, 143 Ill. 242; 32 N. E. Rep. 285.

[24] Chicago, etc., R. Co. v. Young, 26 Ill. App. 115.

[25] Sadowski v. Michigan Car Co., 84 Mich. 100; 47 N. W. Rep. 598.

[26] Drymala v. Thompson, 26 Minn. 40; 1 N. W. Rep. 255.

[27] Daniels v. Union Pacific R. Co., 6 Utah 357; 23 Pac. Rep. 762.

[28] Baltimore, etc., R. Co. v. McKenzie, 81 Va. 71; 24 Am. & Eng. R. Cas. 395.

[29] Armstrong v. Oregon, etc., R. Co., 8 Utah 420; 32 Pac. Rep. 693.

[30] Calvo v. Charlotte, etc., R. Co., 23 So. Car. 526; 55 Am. Rep. 28; 28 Am. & Eng. R. Cas. 327; St. Louis, etc., R. Co. v. Weaver, 35 Kansas 412; 11 Pac. Rep. 408; 28 Am. & Eng. R. Cas. 341.

brakeman;[31] section men and car coupler;[32] train men on different trains;[33] train men of a wild train and employees on a gravel train;[34] engineers in charge of engines belonging to different railroads;[35] train men and car cleaners;[36] train men and quarry laborers;[37] train men and employees being transported to their work;[38] a mechanic and the operators of an engine;[39] the employees on a train and a shopman;[40] train men and a telegraph operator;[41] train men and track men;[42] a section foreman riding on a freight train and the employees of such train;[43] a laborer distributing steel rails and the engineer of an engine;[44] a teamster hauling ties and an engineer;[45] an engineer and a trackman, repairing the track;[46] an engineer and a fence builder;[47] a sub contractor, for the erection of bridges, and the opera-

[31] Hulehan v. Green Bay, etc., R. Co., 68 Wis. 520; 32 N. W. Rep. 529; 31 Am. & Eng. R. Cas. 322.

[32] Vautrain v. St. Louis, etc., R. Co., 8 Mo. App. 538; 78 Mo. 44.

[33] Louisville, etc., R. Co. v. Cavens (Ky.), 9 Bush. 559.

[34] Northern Pacific R. Co. v. O'Brien, 1 Wash. 599; 21 Pac. Rep. 32.

[35] Texas, etc., R. Co. v. Easton 2; Texas Civ. App. 378; 21 S. W. Rep. 575.

[36] Devine v. Boston, etc., R. Co., 159 Mass. 348; 34 N. E. Rep. 539.

[37] Dixon v. Chicago, etc., R. Co., 109 Mo. 413; 19 S. W. Rep. 412; 53 Am. & Eng. R. Cas. 589.

[38] Fitzpatrick v. New Albany, etc., R. Co., 7 Ind. 436.

[39] O'Donnell v. Allegheny Valley R. Co., 59 Pa. St. 239.

[40] Ryan v. Chicago, etc., R. Co., 60 Ill. 171; 12 Am. Ry. Rep. 327.

[41] East Tennessee, etc., R. Co. v. DeArmond, 86 Tenn. 73; 5 S. W. Rep. 600; 6 Am. St. Rep. 816.

[42] Parker v. Hannibal, etc., R. Co., 109 Mo. 362; 19 S. W. Rep. 1119, overruled in Grattis v. Kansas City, etc., R. Co., 153 Mo. 380; 55 S. W. Rep. 108; 48 L. R. A. 399; 77 Am. St. Rep. 721.

[43] Peoria, etc., R. Co. v. Rice, 144 Ill. 227; 33 N. E. Rep. 951.

[44] Garrahy v. Kansas City, etc., R. Co., 25 Fed. Rep. 258.

[45] Hobson v. New Mexico, etc., R. Co. (Ariz.), 11 Pac. Rep. 545; 28 Am. & Eng. R. Cas. 360.

[46] Chicago, etc., R. Co. v. Bliss, 6 Ill. App. 411.

[47] Louisville, etc., R. Co. v. Hawthorne, 46 Ill. App. 635.

tors of a train;[48] a track walker and engineer,[49] and a section hand and an engineer.[50] And for an injury to an employee in one of these several departments of the business, caused by an employee in the other department, in those States where the department idea prevails, the employer is not exempted under the rule of the common law, already discussed.

§ 480. **Employees in same department.**— Even in those States where the department doctrine prevails, the courts do not agree as to what employees are in the same or distinct departments of the service, but the cases are hopelessly irreconcilable on this, as upon other phases of the law of coemployees, as it was administered at common law.[51] It will not be attempted in the small space available for this section, to present all the inconsistent holdings on this rule,

[48] Donaldson v. Mississippi, etc., R. Co., 18 Iowa 280.

[49] Sullivan v. Missouri Pacific Ry. Co., 97 Mo. 113; 10 S. W. Rep. 852; Howard v. Delaware, etc., R. Co., 40 Fed. Rep. 195; 41 Am. & Eng. R. Cas. 473.

[50] McKenna v. Missouri Pacific Ry. Co., 54 Mo. App. 161.

A skilled workman employed in a separate room from a common laborer is not the fellow workman of such common laborer where they were not at the time of the accident in a position to exercise an influence over each other promotive of caution for their common safety. Schneider & Co. v. Carlin, 120 Ill. App. 538.

The negligence of a train crew, in failing to watch out for a brakeman on the track, who was struck by the train from the rear, is held to be the company's negligence, in Kentucky. Cincinnati, etc., R. Co. v. Hill's Admr., 28 Ky. L. R. 530; 89 S. W. Rep. 523.

Members of a different crew from that on which the deceased was employed, in charge of a different train, were not fellow workmen with him, in Kentucky. Cincinnati, etc., R. Co. v. Hill's Admr., 28 Ky. L. R. 530; 29 S. W. Rep. 523.

[51] For a list of a few of the inconsistent holdings in one State, where the department doctrine was followed for a short time, see Grattis v. Kansas City, etc., R. Co., 153 Mo. 380; 55 S. W. Rep. 108; 48 L. R. A. 399; 77 Am. St. Rep. 721,

announced by any one of the States where the doctrine prevails, but only a few of the cases will be represented.

A master machinist, though acting in a distinct department in making the selection of an engine, has been held to be a coemployee with the operator of the engine;[52] all of the different employees engaged in the work of constructing a railroad trestle, have been held to be coemployees;[53] a section hand under one boss has been held to be in the same department of the service with a section foreman of another crew of men, working for the same company;[54] a brakeman of one train crew, working a switch for his engine, has been held in the same department with the engineer of another engine;[55] one employed to unload cars, was held to be a coemployee with an engineer, who moved his engine and caused an injury to such employee,[56] and in direct opposition to the rule announced in some cases, a tunnel repairer, being transported to his work by a train, has been held to be a coemployee with the operatives of the engine pulling the train on which he was riding.[57] These inconsistent holdings but illustrate the confusion resulting from the application of the department doctrine, which is noted in a recent Missouri case, which restores the common-law rule in that State and overrules the inconsistent holdings announcing the department doctrine.[58]

[52] Cumberland, etc., R. Co. v. State, 44 Md. 283; 45 Md. 229; Nashville, etc., R. Co. v. Jones, 9 Heisk. (Tenn.) 27; 19 Am. Ry. Rep. 261.

[53] Lindvall v. Woods, 41 Minn. 212; 4 L. R. A. 793; 42 N. W. Rep. 1020; 39 Am. & Eng. R. Cas. 339.

[54] Clarke v. Pennsylvania R. Co., 132 Ind. 199; 31 N. E. Rep. 808.

[55] Randall v. Baltimore, etc., R. Co., 109 U. S. 478; 3 Sup. Ct. Rep. 222; 15 Am. & Eng. R. Cas. 243.

[56] Chicago, etc., R. Co. v. Keefe, 47 Ill. 108.

[57] Capper v. Louisville, etc., R. Co., 103 Ind. 305; 2 N. E. Rep. 749; 21 Am. & Eng. R. Cas. 525.

[58] Grattis v. Kansas City, etc., R. Co., 153 Mo. 380; 55 S. W. Rep. 108; 48 L. R. A. 399; 77 Am. St. Rep. 721.

§ 481. **Employees of different companies.**— As a general rule, the law applying to coemployees in the same employment does not apply to employees in the service of distinct employments, by separate and distinct companies.

Accordingly, the porter of one railroad company was held entitled to recover damages for an injury due to the negligence of employees in a station of another company;[59] the right of a fireman, injured by a collision at a railroad crossing was held not to be affected by the concurrent negligence of his own engineer, combining with that of the employees of the other railroad company;[60] an employee of one company, injured by a defective track of another company, does not assume the risk of such an injury;[61] where two companies occupy the same station, the employees of each company are not coemployees;[62] a railroad company was held liable for an injury to an employee by the train of another company running into a hand car, under the charge of its own section foreman,[63] and a track laborer killed by the negligence of employees on the engine of another company, using

The crews of two different trains on the same road are fellow workmen, in Illinois. Illinois Cent. R. Co. v. Ring, 119 Ill. App. 294.

[59] Warburton v. Great Western R. Co., 2 Ex. 30; 36 L. J. Ex. 9; 4 H. & C. 695; 15 W. R. 108; 15 L. T. 361; Philadelphia, etc., R. Co. v. State, 58 Md. 372; 10 Am. & Eng. R. Cas. 792.

[60] Gray v. Philadelphia, etc., R. Co., 24 Fed. Rep. 168; 23 Blatchf. (U. S.) 264; 22 Am. & Eng. R. Cas. 351; Chicago, etc., R. Co. v. O'Connor, 119 Ill. 586; 9 N. E. Rep. 263; 19 Ill. App. 591; Chesapeake, etc., R. Co. v. McMichael (Ky.), 15 S. W. Rep. 878.

[61] Philadelphia, etc., R. Co. v. State, 58 Md. 372; 10 Am. & Eng. R. Cas. 792; Vannata v. Central, etc., R. Co., 154 Pa. St. 262; 26 Atl. Rep. 384.

[62] Vose v. Lancashire, etc., R. Co., 2 H. & N. 728; 4 Jur. N. S. 364; 27 L. J. Ex. 249.

[63] Pittsburg, etc., R. Co. v. Kirk, 102 Ind. 399; 1 N. E. Rep. 849; 52 Am. Rep. 675.

the track, was held not to be a coemployee of the operators of such engine.[64]

And the same general rule applies as to employees of a lessor railroad company and the employees of a lessee company, using its track or yards, and such employees are not affected by the rule of fellow service, as it obtained at common law, since the same employer was necessary to constitute the two classes of employees coemployees.[65] Neither are the employees of two separate independent contractors, coemployees, within the rule stated;[66] or the employees of a railroad company and those of an independent contractor, working for such company,[67] or the employees of a railroad company, and those of a coal company, or other distinct employer,[68] for in all such cases the essential of a common employment is lacking.

[64] Noonan v. New York, etc., R. Co., 131 N. Y. 594; 62 Hun 618; 42 N. Y. S. R. 949.

[65] Phillipps v. Chicago, etc., R. Co., 64 Wis. 475; 25 N. W. Rep. 544; 23 Am. & Eng. R. Cas. 453; Zeigler v. Danbury, etc., R. Co., 52 Conn. 543; 23 Am. & Eng. R. Cas. 400; Catawissa, etc., R. Co. v. Armstrong, 49 Pa. St. 186; Sawyer v. Rutland R. Co., 27 Vt. 370; Pennsylvania R. Co. v. Price, 96 Pa. St. 256; 1 Am. & Eng. R. Cas. 234; Sullivan v. Tioga, etc., R. Co., 112 N. Y. 634; 20 N. E. Rep. 569; 8 Am. St. Rep. 793.

[66] Dixon v. Chicago, etc., R. Co., 109 Mo. 413; 19 S. W. Rep. 412; 53 Am. & Eng. R. Cas. 589.

[67] Turner v. Great Eastern R. Co., 33 L. T. 431.

[68] Central R. Co. v. Stoermer, 51 Fed. Rep. 518; 1 U. S. App. 276; 2 C. C. A. 360.

"An arrangement between two railroad companies whereby both uses the tracks owned by one of them, the train employees of both, when running on the tracks, being subject to the train and signal rules and orders of the company owning the tracks, does not make the employees of the owner and licensee fellow workmen, so as to bring them under the rule of law applicable to such relation." Jennings v. Philadelphia & W. Ry. Co. (D. C. 1907), 29 App. (D. C.) 219.

Employees of an independent contractor and those of the principal, are not fellow workmen. Lookout Mt., etc., Co. v. Lea (Ala.), 39 So. Rep. 1017.

§ 482. **Injuries due to incompetency of employees.**— A railroad company owes its employees the duty of employing, so far as it can, with reasonable care, only competent men, in the management of its road, and those that can be relied upon to execute the rules of the employment, and for a breach of this duty toward its employees, in case of an injury, due to the incompetency of a coemployee, the employer can be held liable in damages.[69]

This rule does not mean that every neglect, either in the method of doing the work or in the manner of its execution, shall be evidence of fault on the employer's part,[70] but the employer is only bound to use the same care in the se-

"The C. railroad, by which decedent was employed as engineer, used the tracks of defendant company for a certain distance entering Philadelphia, and decedent, on approaching the junction with a fast freight, found the tower signal turned against him. He waited six minutes, when a white light was displayed from the tower, signaling his train to proceed, which signal indicated that decedent had the right of way, and that the track to the south was unobstructed. When decedent's train arrived at a point somewhat south of the signal station, it struck the engine and tender of a local freight train belonging to defendant company, which was crossing from the south to the north-bound track, and the engineer of such freight testified that, in violation of the rules, he had been on the south-bound track after cars, without having a man out either ahead or behind his train to guard against accidents. *Held*, that neither the operatives of defendant's train nor the signal man in the tower, all of whom were employed and paid by defendant company, could be regarded as decedent's fellow workmen." Baker v. Philadelphia & R. Ry. Co. (U. S. C. C., Pa. 1907), 149 Fed. Rep. 882.

[69] Coppings v. New York, etc., R. Co., 122 N. Y. 557; 25 N. E. Rep. 915; 44 Am. & Eng. R. Cas. 618; Louisville, etc., R. Co. v. Petty, 67 Miss. 255; 7 So. Rep. 351; 41 Am. & Eng. R. Cas. 444; Totten v. Pennsylvania R. Co., 11 Fed. Rep. 564; St. Louis, etc., R. Co. v. Morgert, 45 Ark. 318; Stafford v. Chicago, etc., R. Co., 114 Ill. 244; 2 N. E. Rep. 185; Miller v. Southern R. Co. 20 Oregon, 285; 26 Pac. Rep. 70; Dwyer v. American Epress Co., 82 Wis. 307; 52 N. W. Rep. 304; 53 Am. & Eng. R. Cas. 612; Texas, etc., R. Co. v. Berry, 67 Texas 238; 5 S. W. Rep. 817; 31 Am. & Eng. R. Cas. 147.

[70] Burns v. Staten Island R. Co., 10 N. Y. S. R. 352; 45 Hun 592,

lection of its employees that it uses in the selection of its appliances, and when the company uses due care, in this respect, or when it is reasonably prudent, or uses the same care that reasonably prudent men in the same business use in selecting their employees,[71] it performs the full measure of its duty toward its employees in this regard.[72]

The company does not warrant the competency of its employees, but the extent of the undertaking is that it will exercise reasonable care in the selection of its employees and if the incompetency of an employee is discovered that he will be discharged.[73] If the negligent employee is not shown to have been incompetent, the company is not liable for his negligence, resulting in injury to a coemployee;[74] the selection of the incompetent employee must have been due to the employer's negligence,[75] and the incompetency of such employee must then have been the proximate cause of the injury complained of.[76]

[71] Wabash R. Co. v. McDaniels, 107 U. S. 454; 11 Am. & Eng. R. Cas. 158; Holden v. Fitchburg, etc., R. Co., 129 Mass. 268; 37 Am. Rep. 343; 2 Am. & Eng. R. Cas. 94; Trinity, etc., R. Co. v. Mitchell, 72 Texas 609; 10 S. W. Rep. 698; Memphis, etc., R. Co. v. Thomas, 51 Miss. 637; Mobile, etc., R. Co. v. Smith, 50 Ala. 245; Williams v. Missouri Pacific R. Co., 109 Mo. 475; 18 S. W. Rep. 1098; Langlois v. Maine Central R. Co., 84 Me. 161; 24 Atl. Rep. 804; Louisville, etc., R. Co. v. Kenley, 92 Tenn. 207; 21 S. W. Rep. 326; Craig v. Chicago, etc., R. Co., 54 Mo. App. 523; Harper v. Indianapolis, etc., R. Co., 47 Mo. 567.

[72] Evansville, etc., R. Co. v. Guyton, 115 Ind. 450; 17 N. E. Rep. 101; 33 Am. & Eng. R. Cas. 311; Schauk v. Northern C. R. Co., 25 Md. 462; Wonder v. Baltimore, etc., R. Co., 32 Md. 411.

[73] Columbus, etc., R. Co. v. Troesch, 68 Ill. 545; Holland v. Tennessee, etc., R. Co., 91 Ala. 444; 8 So. Rep. 524; Deppe v. Chicago, etc., R. Co., 36 Iowa 52; Moss v. Missouri Pacific Ry. Co., 49 Mo. 167.

[74] Toner v. Chicago, etc., R. Co., 69 Wis. 188; 31 N. W. Rep. 104; 28 Am. & Eng. R. Cas. 449.

[75] Union Pacific R. Co. v. Milliken, 8 Kansas 647; Proctor v. Hannibal, etc., R. Co., 64 Mo. 112; 9 Am. Ry. Rep. 440.

[76] Gibson v. Pacific R. Co., 46 Mo. 163.

§ 483. **Liability for retention of incompetent or intemperate employee.**— A railroad company must exercise the same degree of care in the discharge of incompetent or intemperate employees that it exercises in the first instance to prevent the

For an injury due to the neglect of an incompetent conductor, see Zeigler v. Danbury, etc., R. Co., 52 Conn. 543; 23 Am. & Eng. R. Cas. 400; Frazier v. Pennsylvania R. Co., 38 Pa. St. 104; Huntington, etc., R. Co. v. Decker, 82 Pa. St. 119; 15 Am. Ry. Rep. 425.

Company engaging or promoting a conductor without examining him, held negligent, in Evansville, etc., R. Co. v. Guyton, 110 Ind. 450; 17 N. E. Rep. 101; 33 Am. & Eng. R. Cas. 311.

For liability for injury to apprentice in machine shop, for injury by habitually negligent employee, see Missouri Pacific R. Co. v. Peregoy, 36 Kansas 424; 14 Pac. Rep. 7.

For injuries due to the placing of an incompetent fireman in charge of an engine, see Core v. Ohio River R. Co., 38 W. Va. 456; 18 S. E. Rep. 596.

But employee injured as result of act of an alleged incompetent employee, must always show, either negligence in the original employment of such employee, or that he was retained after notice of his incompetency. Cooper v. Milwaukee, etc., R. Co., 23 Wis. 668.

"Where an employer neglects to use ordinary care in the selection of his employees, he is answerable for his negligence." Tucker v. American Car & Foundry Co. (Pa. 1907), 67 Atl. Rep. 616.

"An employer is only required to exercise due care in selecting his employees, and is not liable for injuries caused to an employee by reason of the incompetency or inefficiency of a fellow workmen where he exercised such care." Jackson v. Southern Ry. (S. C. 1907), 58 S. E. Rep. 605; 77 S. C. 550.

"An employee, seeking to recover for injuries sustained in consequence of the incompetency of a fellow workman retained by the employer with knowledge of the facts, must not only prove prior incompetency of the fellow workman of which the employer could have had knowledge, as well as the retention by the employer of an incompetent employee, but also that the accident resulting in the injury complained of was occasioned by such incompetency." Cooney v. Commonwealth Ave. Ry. Co. (Mass. 1907), 81 N. E. Rep. 905.

"Where a defendant ordered plaintiff to repair an engine, it was defendant's duty to furnish plaintiff competent assistants, who would exercise ordinary care in performing the work." Horton v. Seaboard Air Line Ry. (N. C. 1907), 58 S. E. Rep. 993.

"If an employer employs competent employees for inspection, and gives them reasonable facilities for the work, he will not be liable for

employment of such employees.[77] Where the officers of a railroad company have had their attention directed to the incompetency or intemperance of an employee, it is their duty to make careful or frequent investigation as to the fact if he is retained in the service of the company,[78] and if an incompetent or intemperate employee is knowingly retained in the service and another employee sustains injury as a result thereof, the railroad company is liable for the injury so sustained.[79] The company must not retain in its service employees of such intemperance or incompetency as may likely result in injury to other employees and after notice of such fact, or of facts from which such notice could be had, a liability will result, in case an injury is due to such a cause.[80]

the negligent performance of such labor to a fellow workman, unless he knew of the defective manner in which the inspection was conducted." Sage v. Baltimore, etc., R. Co. (Pa. 1907), 67 Atl. Rep. 985; 219 Pa. 129.

The failure of a railroad company to have three brakemen, instead of two, on a train which broke in two, is not the proximate cause of an injury to a deceased brakeman from being run over by the backing of the train, which he had gone between. Keefe v. New York Cent., etc., R. Co., 95 N. Y. S. 828; 109 App. Div. 180.

[77] Pennsylvania R. Co. v. Wachter, 60 Md. 395; 15 Am. & Eng. R. Cas. 187; St. Louis, etc., R. Co. v. Mogart, 45 Ark. 318; Louisville, etc., R. Co. v. Petty, 67 Miss. 255; 7 So. Rep. 351; 41 Am. & Eng. R. Cas. 444.

[78] Michigan, etc., R. Co. v. Gilbert, 46 Mich. 176; 9 N. W. Rep. 243; 2 Am. & Eng. R. Cas. 230.

[79] St. Louis, etc., R. Co. v. Rice, 51 Ark. 467; 11 S. W. Rep. 699; 4 L. R. A. 173; Lake Shore, etc., R. Co. v. Stupak, 123 Ind. 210; 23 N. E. Rep. 246; 41 Am. & Eng. R. Cas. 382; Neilon v. Kansas City, etc., R. Co., 85 Mo. 599; 28 Am. & Eng. R. Cas. 386; Weger v. Pennsylvania R. Co., 55 Pa. St. 460.

[80] Hobbs v. Atlantic, etc., R. Co., 107 N. C. 1; 12 S. E. Rep. 124; Higgins v. Missouri Pacific R. Co., 104 Mo. 413; 16 S. W. Rep. 409; Coppons v. New York, etc., R. Co., 122 N. Y. 557; 25 N. E. Rep. 915; 44 Am. & Eng. R. Cas. 618; Crew v. St. Louis, etc., R. Co., 20 Fed. Rep. 87.

An intemperate person has been held incompetent as a freight conductor and a company is liable for an injury sustained by reason of his intemperance and consequent incompetency after notice of the fact, or of conditions that ought to have led to such knowledge.[81] And it is not essential that actual notice of such incompetency be brought home to the railroad company, if the existence of such fact has continued for a time to enable it, by due care, to have known of the fact of the employee's incompetency.[82] But an employee, competent when employed, is presumed to continue competent until the contrary appears, and the employer is not bound to discharge a former competent employee until notice of the incompetency is derived, or until it has continued for a length of time sufficient to enable him to have acquired such notice, by the exercise of reasonable care on the employer's part.[83] Notice to a vice-principal, however, is the same as notice to the employer,[84] and notice to the injured employee of the incompetency or intemperance of his coemployee will defeat his right of recovery, or constitute negligence on his part, in working with a known incompetent employee, to the same extent that it will constitute neg-

[81] Crew v. St. Louis, etc., R. Co. 20 Fed. Rep. 87.

[82] Whittaker v. Delaware, etc., R. Co., 126 N. Y. 544; 27 N. E. Rep. 1042.

[83] Lake Shore, etc., R. Co. v. Stupak, 123 Ind. 210; 23 N. E. Rep. 246; 41 Am. & Eng. R. Cas. 382; Bonner v. Whitcomb, 80 Texas 178; 15 S. W. Rep. 899; Zumwalt v. Chicago, etc., R. Co., 35 Mo. App. 661; Lee v. Michigan, etc., R. Co., 87 Mich. 574; 49 N. W. Rep. 909; 48 Am. & Eng. R. Cas. 356.

[84] McDermott v. Hannibal, etc., R. Co., 87 Mo. 285; 28 Am. & Eng. R. Cas. 528; *id.*, 73 Mo. 516; 2 Am. & Eng. R. Cas. 85; 39 Am. Rep. 526; Kidwell v. Houston, etc., R. Co., 3 Woods (U. S.) 313; Frazier v. Pennsylvania R. Co., 38 Pa. St. 104. But notice to a train dispatcher is held not to be notice to the railroad company, of the incompetency of a telegraph operator, in Pennsylvania, in the absence of power to discharge such operator. Reiser v. Pennsylvania R. Co., 152 Pa. St. 38; 25 Atl. Rep. 175.

ligence on the employer's part in retaining a known incompetent employee in his service and if an employee knowingly continues to work with an incompetent employee and the employer had made no promise or assurance in reference thereto, no right of action will accrue for an injury so sustained.[85]

§ 484. **Who generally deemed coemployees.**— According to the rules of the common law, all train men, engaged in the service of a railroad company and at work in the same general department of the business, or to attain the same common end, such as employees upon the same train, engaged in operating the train, are regarded as coemployees.[86] The rule of common service is not generally affected by the fact that some of the employees are actually engaged in the operation

[85] Missouri Furnace Co. v. Abend, 107 Ill. 44; Kansas Pacific R. Co. v. Peavey, 34 Kansas, 472; 8 Pac. Rep. 780; Dillon v. Union Pacific R. Co., 3 Dill. (U. S.) 319; United States Rolling Stock Co. v. Wilder, 116 Ill. 100; 5 N. E. Rep. 92; 25 Am. & Eng. R. Cas. 414; Wormington v. Atchison, etc., R. Co., 46 Mo. App. 159; Porter v. Western, etc., R. Co., 97 N. C. 66; 2 Am. St. Rep. 272; 2 S. E. Rep. 580. And the rule is the same where the negligence is that of a vice-principal. McDermott v. Hannibal, etc., R. Co., 87 Mo. 285; 28 Am. & Eng. R. Cas. 528. In New York, an employee injured as a result of the incompetency of a coemployee is denied a recovery, if he had the same or equal means of knowledge as the employer and continued in the service without complaint. Haskin v. New York, etc., R. Co., 65 Barb. 129; 56 N. Y. 608.

The employer's duty about discharging incompetent employees when their incompetency is known, or ought to be, is the same as his duty to employ competent employees, in the first instance. Gulf, C. & S. F. R. Co. v. Hays (Texas), 89 S. W. Rep. 29.

"Where an employer, after knowledge of incompetency of his employees retains them, he is answerable to a fellow workman for his negligence." Tucker v. American Car & Foundry Co. (Pa. 1907), 67 Atl. Rep. 616.

[86] Robinson v. Houston, etc., R. Co., 46 Texas 540; Pease v. Chicago, etc., R. Co., 61 Wis. 163; 20 N. W. Rep. 508; LePierre v. Chicago, etc., R. Co., 99 Mich. 212; Hoover v. Beach Creek R. Co., 154 Pa. St. 362.

of the train, while others are not so engaged, but are upon the train to render services of a different character,[87] or by the fact that some are given superintendence or power of control over the others, unless the injury to one of the subordinate employees is occasioned by the superior employee in the doing or failure to do some one of the nondelegable duties of the employer;[88] but in some of the States this rule does not obtain and the employer is held liable for an injury to a subordinate employee, when the injury results from the neglect of some one of the employees entrusted with power of supervision, regardless of the character of the act causing the injury,[89] and upon the nature of the wrongful acts for which the employer is responsible and also upon the proposition who will be regarded as employees and who as representatives of the employer, the authorities are in most irreconcilable conflict, in the different States.[90]

§ 485. **Nature of service the proper test.**— Under various modifications, the list of modern text writers, without exception, confine themselves to the indefinite statement that all are coemployees who "engage in the same common pursuit, under the same general control," or use similar

[87] Heine v. Chicago, etc., R. Co., 58 Wis. 525; 17 N. W. Rep. 420; Howland v. Milwaukee, etc., R. Co., 54 Wis. 226; Sullivan v. Toledo, etc., R. Co., 58 Ind. 26; Cassidy v. Maine, etc., R. Co., 76 Me. 488.

[88] Green v. Louisville, etc., R. Co., 94 Ky. 169; Patton v. Western, etc., R. Co., 96 N. Car. 455; Louisville, etc., R. Co. v. Lehr, 86 Tenn. 335.

[89] Lake Shore, etc., R. Co. v. Spangler, 44 Ohio St. 471; Chicago, etc., R. Co. v. Snyder, 117 Ill. 376.

[90] Grattis v. Kansas City, etc., R. Co., 153 Mo. 380; 55 S. W. Rep. 108; 77 Am. St. Rep. 721; 48 L. R. A. 399.

"All serving a common employer, working under the same control, deriving authority and compensation from the same source, and engaged in the same general business, though in different grades or departments, are fellow workmen." Southern Ry. Co. v. Smith (Va. 1907), 59 S. E. Rep. 372.

indefinite expressions to indicate just who will be and who will not be regarded as coemployees.[91] These definitions are so general that they are not found of practical service by the practitioner. Confusion arises in determining what is the "same common pursuit," etc., and the definitions do not define this unknown term. While it is said that it is not the rank of the employee or his authority over others, which determines whether or not he is an employee or vice-principal, but that the nature of the service is the proper test for solving this vexed question, it is not often intimated what service will determine when a given employee is a vice-principal or when he is a coemployee.[92]

The acts of service which make him a representative of the employer are those acts which the employer has agreed, or the law compells him to perform for the safety of his employees. Among these acts may be mentioned those of furnishing reasonably safe places, machinery and appliances; the exercise of reasonable care to keep the machinery or appliances or place of work, in repair;[93] the exercise of reasonable care

[91] Cooley on Torts, p. 541, and note; 2 Thompson on Neg., § 31, p. 1026; 3 Wood's Ry. Law, § 338; Beach, Con. Neg., § 115, p. 338; Howard v. Denver, etc., R. Co., 24 Am. & Eng. R. Cas. 448, and note.

[92] Krogg v. Atlanta, etc., R. Co., 77 Ga. 202; 4 Am. St. Rep. 79; Sullivan v. New York, etc., R. Co., 62 Conn. 209; 25 Atl. Rep. 711; Webb v. Denver, etc., R. Co., 7 Utah 363; 26 Pac. Rep. 981; Wellman v. Oregon, etc., R. Co., 21 Oregon 530; 28 Pac. Rep. 625; Chicago, etc., R. Co. v. May, 108 Ill. 288; 15 Am. & Eng. R. Cas. 320; Hofnagle v. New York, etc., R. Co., 55 N. Y. 608; Krueger v. Louisville, etc., R. Co., 111 Ind. 51; 11 N. E. Rep. 957; 31 Am. & Eng. R. Cas. 329; Justice v. Pennsylvania R. Co., 130 Ind. 321; 30 N. E. Rep. 303; 53 Am. & Eng. R. Cas. 604; Davis v. Southern Pacific R. Co., 98 Cal. 19; 32 Pac. Rep. 708.

[93] Geoghehan v. Atlas, etc., Co., 51 N. Y. S. R. 868; 22 N. Y. Supp. 749; Chicago, etc., R. Co. v. May, 108 Ill. 288; 15 Am. & Eng. R. Cas. 320; Nall v. Louisville, etc., R. Co., 129 Ind. 260; 28 N. E. Rep. 183; 48 Am. & Eng. R. Cas. 309; Kirk v. Atlanta, etc., R. Co. (N. C.), 25 Am. & Eng. R. Cas. 507, and monographic note, on criterion of fellow-

to employ and retain sufficient careful and competent employees to properly perform the work of the employer;[94]

workmen in 25 Am. & Eng. R. Cas. 513, to 522, and 44 Am. & Eng. R. Cas. 606, and 54 Am. & Eng. R. Cas. 364, and cases cited.

[94] Nix v. Texas, etc., R. Co., 82 Texas 473; 18 S. W. Rep. 571; Core v. Ohio River R. Co., 38 W. Va. 456; 18 S. E. Rep. 596; Anderson v. Bennett, 16 Oregon 515; 19 Pac. Rep. 765; 8 Am. St. Rep. 311; 38 Am. & Eng. R. Cas. 87; Pullman Car Co. v. Laack, 143 Ill. 242; 32 N. E. Rep. 285; Lewis v. St. Louis, etc., R. Co., 59 Mo. 495; Colorado Midland R. Co. v. Naylon, 17 Colo. 501; 30 Pac. Rep. 248; Elledge v. National City R, Co., 100 Cal. 282; 34 Pac. Rep. 720.

In the following cases, where the employer had delegated to an agent, the performance of some of the nondelegable duties imposed upon the employer by law, it was held that the injured employee could recover for breach of the duty so imposed. Indiana Car Co. v. Parker, 100 Ind. 181; Hannibal, etc., R. Co. v. Fox, 31 Kansas 586; 3 Pac. Rep. 320; 15 Am. & Eng. R. Cas. 325; Atchison, etc., R. Co. v. McKee, 37 Kansas 592; 15 Pac. Rep. 484; Fisher v. Oregon, etc., R. Co., 22 Oregon 533; 30 Pac. Rep. 425; 16 L. R. A. 519; 53 Am. & Eng. R. Cas. 539.

The duty of providing safe track and roadbed was held to be a nondelegable duty, in Mobile, etc., R. Co. v. Smith, 59 Ala. 245; Fisher v. Oregon, etc., R. Co., 22 Oregon 533; 30 Pac. Rep. 425; 16 L. R. A. 519; 53 Am. & Eng. R. Cas. 539.

The duty of furnishing reasonably safe machinery and appliances, was likewise held to be nondelegable, in Pennsylvania R. Co. v. Whitman, 111 Ind. 212; 12 N. E. Rep. 380; 31 Am. & Eng. R. Cas. 149; Brown v. Minneapolis, etc., R. Co., 31 Minn. 553; 18 N. W. Rep. 834; Atchison, etc., R. Co. v. McKee, 37 Kansas 592; 15 Pac. Rep. 484.

Agents, exercising power of discharging and hiring employees were herd to be vice-principals, in Chicago, etc., R. Co. v. May, 108 Ill. 288; 15 Am. & Eng. R. Cas. 320; Colorado Midland R. Co. v. O'Brien, 16 Colo. 219; 27 Pac. Rep. 701; 48 Am. & Eng. R. Cas. 235; Baldwin v. St. Louis, etc., R. Co., 75 Iowa 297; 39 N. W. Rep. 507; St. Louis, etc., R. Co. v. Lemon, 83 Texas 143; 18 S. W. Rep. 331; Erickson v. Milwaukee, etc., R. Co., 93 Mich. 414; 53 N. W. Rep. 393; Hamilton v. Iron Mountain R. Co., 4 Mo. App. 564; Webb v. Richmond, etc., R. Co., 97 N. C. 387; 2 S. E. Rep. 440; Palmer v. Michigan, etc., R. Co., 93 Mich. 363; 53 N. W. Rep. 397; Criswell v. Pittsburg, etc., R. Co., 30 W. Va. 798; 6 S. E. Rep. 31; 33 Am. & Eng. R. Cas. 232; Russ v. Wabash R. Co., 112 Mo. 45; 20 S. W. Rep. 472; Smith v. Sioux City R. Co., 15 Neb. 583; 19 N. W. Rep. 638; 17 Am. & Eng. R. Cas. 561.

Employees in full charge and control of other employees were held

the promulgation of reasonable and proper rules and regulations to carry on the business of the employer and, the exercise of reasonable care to warn or instruct a known youthful or inexperienced employee in the perils of the business, of which he is ignorant, but likely to sustain injury. It may be quite definitely stated that in the performance of any of these specific duties, according to the maxims *qui facit per alium facit per se* and *respondeat superior,* the employee is held to act as the agent of the employer and will be held to be a vice-principal, but as to all other duties in the common service, an employee is to be regarded as a coemployee and not the agent of the employer.

§ 486. **Division superintendent, roadmaster and other division officers.**— As the superintendents of divisions of a railroad are generally the ranking officers of such division and the other employees on such division are subject to their orders, such superintendents are generally held to be vice-principals and not coemployees with the men under their control.[95]

The same rule applies to roadmasters, who are generally in charge of the track and roadbed within their respective divisions, and as to such officers and agents, those working upon the roadbed or track are subject to the orders and con-

to be acting for the employer, in Gravelle v. Minneapolis, etc., R. Co., 3 McCrary (U. S.) 352; 10 Fed. Rep. 711; Northern Pacific R. Co. v. Peterson, 51 Fed. Rep. 182; Hunn v. Michigan, etc., R. Co., 78 Mich. 513; 44 N. W. Rep. 502; 7 L. R. A. 500; 41 Am. & Eng. R. Cas. 452; Wabash R. Co. v. Hawk, 121 Ill. 259; 12 N. E. Rep. 253; 31 Am. & Eng. R. Cas. 306; Kansas City, etc., R. Co. v. Burton, 97 Ala. 240; 12 So. Rep. 82; 53 Am. & Eng. R. Cas. 115; Moore v. Wabash R. Co., 85 Mo. 588; 21 Am. & Eng. R. Cas. 509; Miller v. Missouri Pacific Ry. Co., 109 Mo. 350; 19 S. W. Rep. 58; 53 Am. & Eng. R. Cas. 598.

[95] Louisville, etc., R. Co. v. Heck, 151 Ind. 292; 50 N. E. Rep. 988; 4 Thompson on Negligence, § 5120.

trol of the roadmasters; the subordinates are not generally held to be coemployees, but subordinates of such roadmasters.[96]

But while the roadmaster is generally held to be a vice-principal as toward the men subject to his orders in the repair of the track or roadbed, this rule is not of universal application. In a Texas case[97] the roadmaster is regarded merely as a superior employee, engaged in the same common service, which would leave the men working under him, coemployees, and not subordinates of such roadmaster and a similar holding was announced in a Minnesota case.[98] The roadmaster's act in misplacing a switch, whereby an engineer and fireman were injured, is held to be the act of a coemployee, in a Massachusetts case,[99] and in Texas, the roadmaster was so far regarded as a coemployee of the engineer and fireman of a train, as to relieve the railroad company from liability for an injury due to the negligence of such engineer and fireman.[1]

[96] Browning v. Wabash R. Co., 124 Mo. 55; 27 S. W. Rep. 644; Atchison, etc., R. Co. v. Moore, 31 Kansas 197.

[97] Galveston, etc. R. Co. v. Smith, 76 Texas 611; 13 S. W. Rep. 562.

[98] Brown v. Winona, etc., R. Co., 27 Minn. 162.

[99] Walker v. Boston, etc., R. Co., 128 Mass. 8.

[1] Gulf, etc., R. Co. v. Ryan, 69 Texas 665; 7 S. W. Rep. 83.

A division superintendent is not a coemployee of a car inspector, but is a vice-principal. Shuster v. Philadelphia, etc., Co. (Del.), 62 Atl. Rep. 689.

A superintendent of a division of a railroad was held to be a vice-principal as to employees subject to his orders, in Galveston, etc., R. Co. Co. v. Arispe, 81 Texas 517; 17 S. W. Rep. 47; 48 Am. & Eng. R. Cas. 350; Denver, etc., R. Co. v. Driscoll, 12 Colo. 520; 21 Pac. Rep. 708; 38 Am. & Eng. R. Cas. 105; Dobbin v. Richmond, etc., R. Co., 81 N. Car. 446; Cook v. Hannibal, etc., R. Co., 63 Mo. 397; Kansas Pacific R. Co. v. Little, 19 Kansas 267; 17 Am. Ry. Rep. 455; Colorado Midland R. Co. v. Naylon, 17 Colo. 501; 30 Pac. Rep. 249; Chicago, etc., R. Co. v. McLallen, 84 Ill. 109.

" A roadmaster of a railroad in discharging his duty of seeing that a portion of the track was in good and safe condition was not a fellow

§ 487. **Employees upon different railway trains.**— Under the common-law definition of the term coemployees, it would seem that there could be no difference in the views entertained by the various courts, upon the proposition that all employees upon the same railroad and in the same service would be held to be coemployees, so that the employer would not be responsible for an injury caused by one of such employees, to another, although the employee causing the injury and the injured person are at work upon different trains, as all are engaged in attaining the same common object, for the same employer. And perhaps a majority of the courts hold this view of the nonliability of the railroad company for an injury to one employee upon a train or engine, caused by another employee on a different engine or train of cars.[2] But some

workman with a locomotive fireman." Chicago, R. I. & P. Ry. Co. v. Birk (Tex. Civ. App. 1907), 99 S. W. Rep. 753.

"Plaintiffs' intestates, their foremen, and defendant's roadmaster were all engaged in removing débris from defendant's track, caused by a landslide into a cut. During the afternoon one of the section foremen had been warned that the adjoining mountain side was dangerous, and in the evening the roadmaster stated, in the hearing of those present, that he had examined the mountain side before dark and that it was all right. Thereafter several of the employees were killed by a rock which rolled down the side of the mountain during the night. *Held*, that all engaged in the work were fellow workmen." Maloney v. Florence, etc., R. Co. (Colo. 1907), 89 Pac. Rep. 649; Allen v. Same, *id.*

Although a roadmaster is placed in charge of all work in handling gravel on a railroad, this would not make him a vice-principal as to those handling the train that hauled the gravel, as it is generally understood that the operatives of the train would have control thereof and the roadmaster only supervise the loading of gravel and such matters. Vinson v. Los Angeles & Pac. R. Co., 147 Cal. 479; 82 Pac. Rep. 53.

[2] Schaub v. Hannibal, etc., R. Co., 106 Mo. 74; 16 S. W. Rep. 924; Relyea v. Kansas City, etc., R. Co., 112 Mo. 86; 20 S. W. Rep. 480; 18 L. R. A. 817; 53 Am. & Eng. R. Cas. 578; Maher v. Union Pacific R. Co., 106 Fed. Rep. 309; 45 C. C. A. 301; Beaumont v. Northern Pacific R. Co., 109 Fed. Rep. 532; 48 C. C. A. 529; Randall v. Baltimore, etc., R. Co., 109 U. S. 478; Norfolk, etc., R. Co. v. Donnelly,

of the courts that adhere to the modern refinements of the common-law doctrine of coservice, or enforce what is commonly known as the department or conassociation theory, do not follow this rule and in such States the railroad company is held responsible for an injury to one employee, although engaged to attain the same common object as another employee, causing his injury, if the two employees, at the time of the accident, were engaged upon separate trains or engines.[3]

§ 488. **Train despatcher and other employees.**— As a general rule a train despatcher, who gives orders for the movement of trains, is not regarded as a coemployee with the employees in the other department of the service whose duties are to obey the orders given and operate the trains in accordance with the despatcher's orders.[4] Prescribing the

88 Va. 853; 14 S. E. Rep. 692; Swisher v. Illinois, etc., R. Co., 182 Ill. 533; 55 N. E. Rep. 555; Chicago, etc., R. Co. v. Thompson, 99 Ill. App. 277; Pleasants v. Raleigh, etc., R. Co., 121 N. Car. 492; 28 S. E. Rep. 267; 61 Am. St. Rep. 674; McMaster v. Illinois, etc., R. Co., 65 Miss. 264; 4 So. Rep. 59; 7 Am. St. Rep. 653; Peaslee v. Fitchburg, etc., R. Co., 152 Mass. 155; 25 N. E. Rep. 71; Jarman v. Chicago, etc., R. Co., 98 Mich. 135; 57 N. W. Rep. 32; MacCarthy v. Whitcomb, 110 Wis. 113; 85 N. W. Rep. 707.

[3] Northern Pacific R. Co. v. Mase, 63 Fed. Rep. 113; 11 C. C. A. 63; Chicago, etc., R. Co. v. House, 172 Ill. 601; 50 N. E. Rep. 151; San Antonio, etc., R. Co. v. Harding, 11 Texas Civ. App. 497; 33 S. W. Rep. 373; 3 Am. & Eng. R. Cas. (N. S.) 389; Goodman v. Deleware, etc., Co., 167 Pa. St. 332; 31 Atl. Rep. 670; Freeman v. Illinois, etc., R. Co., 107 Tenn. 340; 64 S. W. Rep. 1.

[4] Smith v. Wabash R. Co., 92 Mo. 359; Missouri, etc., R. Co. v. Elliott, 102 Fed. Rep. 96; 42 C. C. A. 188; Clyde v. Richmond, etc., R. Co., 69 Fed. Rep. 673; Chicago, etc., R. Co. v. Ross, 112 U. S. 377; 28 L. Ed. 787; Sheehan v. New York, etc., R. Co., 91 N. Y. 332; Hankins v. New York, etc., R. Co., 142 N. Y. 416; 37 N. E. Rep. 466; 59 N. Y. S. R. 802; 25 L. R. A. 396; Hannibal, etc., R. Co. v. Kinealy, 39 Kansas 1; Hunn v. Michigan, etc., R. Co., 78 Mich. 513; 44 N. W. Rep. 502; 7 L. R. A. 500; 41 Am. & Eng. R. Cas. 452; Little Rock, etc., R. Co. v. Barry, 58 Ark. 198; 23 S. W. Rep. 1097; 25 L.

movements of trains in the various classes of the service; the indication to the operatives of the trains at which stations they shall stop and the length of the stops and the schedule time upon which the various trains shall run, is so far within the nondelegable duty of the employer to adopt a reasonably safe method or system to his business, when so complicated as the running of different trains, manned by many different employees, upon the same railroad, as to make these functions peculiarly those of a nondelegable character, for a neglect of which the employer ought to be held answerable.[5]

But as all employees, at common law, engaged in the same common undertaking, in the service of the same employer, without regard to the department or station occupied, were regarded as coemployees, according to the common-law rule, it would seem that a train despatcher, who gives orders for the movement of trains and the employees who move the trains in pursuance to such orders, are so far engaged to attain the same object, as to make them fellow employees, within the rule that the employer is not responsible for an injury, resulting from the neglect of the train despatcher and this rule is followed in many States,[6] where the princi-

R. A. 396; Chicago, etc., R. Co. v. McLain, 94 Ill. 109; McKune v. California, etc., R. Co., 66 Cal. 302; Louisville, etc., R. Co. v. Heck, 151 Ind. 292; 50 N. E. Rep. 988; 11 Am. & Eng. R. Cas. (N. S.) 382.

[5] 4 Thompson on Negligence, § 5020, and cases cited.

[6] Price v. Detroit, etc., R. Co., 145 U. S. 651; Evans v. Atlantic, etc., R. Co., 62 Mo. 49; Blessing v. St. Louis, etc., R. Co., 77 Mo. 410; Millsap v. Louisville, etc., R. Co., 69 Miss. 423; 13 So. Rep. 696; Houston, etc., R. Co. v. Stewart, 92 Texas 540; 50 S. W. Rep. 333; Norfolk, etc., R. Co. v. Hoover, 79 Md. 253; 29 Atl. Rep. 994; 25 L. R. A. 710.

"A train despatcher, whose duty it is to issue telegraphic orders for movements of trains in the name of the superintendent, and to see that they are transmitted, is not a fellow workman of a fireman on one of the locomotives." Ricker v. Central R. Co. (N. J. 1906), 64 Atl. Rep. 1068.

ples of the common law have not been set aside by modern refinements and theories.

§ 489. **Local telegraph operator and trainmen.**— The federal courts, which follow the common-law, quite generally hold that a local telegraph operator, who receives and delivers the orders of the train despatcher, with reference to

"A car dispatcher, having not only control of the motormen and conductors of an interurban electric railway, but also control of the cars and their operation, is not a fellow workman of the motormen and conductors, but is a vice-principal." Edge v. Southwest Missouri Electric Ry. Co. (Mo. 1907), 104 S. W. Rep. 90.

"The plaintiff, a fireman, was injured in an accident and the question arose whether if the cause of the accident was the negligence of a train despatcher in giving orders which made the accident possible, the plaintiff was precluded from recovering. The court holds that the duties of the train despatcher come within that class which the employer is required to perform, and for which he cannot avoid responsibility by delegation to an employee; that, therefore, the train despatcher is not a fellow workman of the plaintiff, within the rule. The court points out that the decisions of the federal courts and a large number of the States are in accordance with this decision, while in Maryland and Mississippi decisions are the other way." Ricker v. Central Railroad Co. (N. J.), 64 Atl. Rep. 1068.

"Defendant railroad company was engaged in constructing a railroad on which trains west of C. were operated under bulletin orders issued by defendant's trainmaster. An order was issued that all east-bound work trains should have right of way over west-bound trains between 12 o'clock noon and 12 o'clock midnight and vice versa between 12 o'clock midnight and 12 o'clock noon. On the day of the accident plaintiff, as engineer, was running an extra east-bound train about 60 miles west of C., and at 1 o'clock p. m. his train, having the right of way under such orders, was run into by a west-bound train in charge of the trainmaster as foreman in charge of a crew of laborers. The latter train was run at a high rate of speed on a crooked track through a rough and mountainous country, and no flagman was put out or any steps taken to protect plaintiff's east-bound train. *Held*, that the negligence of the trainmaster in permitting his train to be run in violation of the bulletin was negligence in his capacity as vice-principal, and not as plaintiff's fellow workman, for which the railroad company was responsible." Morrison v. San Pedro & S. L. R. Co. (Utah 1907), 88 Pac. Rep. 998.

the stops to be made by a given train and the schedule time upon which the train shall be run, to the persons in charge of the train and engine, is a coemployee of the train men in charge of the train and other employees on the train, so that the railroad company is not responsible for an injury to an engineer or other employees on the train, due to the collision of the train with another train or engine on the same track, caused by the negligence of the local telegraph operator in the failure to repeat the orders, or in giving the wrong order with reference to the movement of the train.[7] This rule is

A railroad company will not be relieved of the charge of negligence for an injury in a head-on collision, by the mere promulgation by the dispatcher, of proper orders, if he learned of the failure to comply with such orders in time to have issued new orders and thus have avoided the collision. Santa Fe Pac. R. Co. v. Holmes, 202 U. S. 438; 50 L. Ed. 1094.

But no charge of negligence can be sustained on the fact that a train dispatcher acted upon the information he received by telegram, from local operators. Northern Pac. Ry. Co. v. Dixon (Minn.), 139 Fed. Rep. 737.

A train dispatcher was held to be a vice-principal, in Lewis v. Seifert, 116 Pa. St. 628; 11 Atl. Rep. 514; McKune v. California, etc., R. Co., 66 Cal. 302; 17 Am. & Eng. R. Cas. 589; Hunn v. Michigan, etc., R. Co., 78 Mich. 513; 44 N. W. Rep. 502; 7 L. R. A. 500; 41 Am. & Eng. R. Cas. 452; McChesney v. Panama R. Co., 49 N. Y. S. R. 148; 21 N. Y. Supp. 207; Lasky v. Canadian Pacific R. Co., 83 Me. 461; 22 Atl. Rep. 367; Smith v. Wabash R. Co., 92 Mo. 359; 4 S. W. Rep. 129; 31 Am. & Eng. R. Cas. 331; Darrigan v. New York, etc., R. Co., 52 Conn. 285; 52 Am. Rep. 590; 23 Am. & Eng. R. Cas. 438; Phillipps v. Chicago, etc., R. Co., 64 Wis. 475; 25 N. W. Rep. 544; 23 Am. & Eng. R. Cas. 453.

But a train dispatcher was held to be a coemployee with trainmen, in Blessing v. St. Louis, etc., R. Co., 77 Mo. 410; 7 Mo. App. 594; 15 Am. & Eng. R. Cas. 298; Hankins v. New York, etc., R. Co., 55 Hun 51; 28 N. Y. S. R. 59; 8 N. Y. Supp. 272; Robertson v. Terre Haute, etc., R. Co., 78 Ind. 77; 41 Am. Rep. 552; 8 Am. & Eng. R. Cas. 175; Slater v. Jewett, 85 N. Y. 61; 39 Am. Rep. 627; 5 Am. & Eng. R. Cas. 515.

[7] Illinois Central R. Co. v. Bentz, 99 Fed. Rep. 657; 40 C. C. A. 56; Oregon, etc., R. Co. v. Frost, 74 Fed. Rep. 965; 21 C. C. A. 186; 44 U. S. App. 606; Baltimore, etc., R. Co. v. Camp, 65 Fed. Rep. 952;

also followed in a great many of the States in the United States.[8]

But in some other jurisdictions, a telegraph operator is held to occupy the same position as a train despatcher and is regarded as so far in a distinct department of the service and exercising such power of supervision or control over the train men, as to render the railroad company liable for an injury to any of the train men, caused by a collision, resulting from the neglect of the telegraph operator.[9]

§ 490. **Switchmen, track repairers and trainmen.**— In jurisdictions where the common-law rule of common service has been modified by the department doctrine or the conasso-

13 C. C. A. 233; McKaig v. Northern Pacific R. Co., 42 Fed. Rep. 288; Price v. Detroit, etc., R. Co., 145 U. S. 651.

A local operator is a fellow workman with train crew and company not liable for his failure to report a train to dispatcher, in the federal courts. Northern Pac. R. Co. v. Dixon, 139 Fed. Rep. 737.

[8] Reiser v. Pennsylvania R. Co., 152 Pa. St. 38; Blessing v. St. Louis, etc., R. Co., 77 Mo. 410; Evans v. Atlantic, etc., R. Co., 62 Mo. 49; Monaghan v. New York, etc., R. Co., 9 N. Y. S. R. 672; 45 Hun 113.

The negligence of a local agent and telegraph operator, in reporting a dispatch, properly delivered to him, is the negligence of a fellow workman of a fireman, who is killed by a collision, as a result of such negligence and no recovery for such death can be had, in the federal court. Northern Pac. R. Co. v. Dixon, 194 U. S. 338; 48 L. Ed. 1006.

[9] Flannegan v. Chesapeake, etc., R. Co., 40 W. Va. 436; 21 S. E. Rep. 1028; East Tennessee, etc., R. Co. v. DeArmond, 86 Tenn. 73; 5 S. W. Rep. 600; 6 Am. St. Rep. 816.

A telegraph operator was held to be a coemployee with men operating a train, in Dana v. New York, etc., R. Co., 23 Hun (N. Y.) 473; Monaghan v. New York, etc., R. Co., 45 Hun 113; 9 N. Y. S. R. 672; McKaig v. Northern Pacific R. Co., 42 Fed. Rep. 288; Cincinnati, etc., R. Co. v. Clark, 57 Fed. Rep. 125; Reiser v. Pennsylvania R. Co., 152 Pa. St. 38; 25 Atl. Rep. 175.

But a telegraph operator was held not to be a fellow workman with train crew, in Illinois, etc., R. Co. v. Hunter, 70 Miss. 471; 12 So. Rep. 482; Sheehan v. New York, etc., R. Co., 91 N. Y. 332; 12 Am. & Eng. R. Cas. 235; Hall v. Galveston, etc., R. Co., 39 Fed. Rep. 18.

ciation idea, those engaged in other departments of the business, such as repairing the tracks,[10] tending the switches [11] and such like work,[12] would not be held to be coemployees with the train men, engaged in the management and operation of the trains, because not so situated as to enable the trainmen to observe their work and avoid the consequences of their negligence.

In States where the common-law rule of coemployees obtains, however, as the track men,[13] switch tenders,[14] bridge builders or repairers [15] and baggage men,[16] are all engaged

[10] Chicago, etc., R. Co. v. Swan, 176 Ill. 424; 52 N. E. Rep. 916; 12 Am. & Eng. R. Cas. (N. S.) 674; Missouri, etc., R. Co. v. Hines (Texas), 40 S. W. Rep. 152.

[11] Missouri, etc., R. Co. v. Hines, *supra;* Davis v. Central Vermont, etc., R. Co., 55 Vt. 84; 45 Am. Rep. 590; Chicago, etc., R. Co. v. Swan, 176 Ill. 424; 52 N. E. Rep. 916; 12 Am. & Eng. R. Cas. (N. S.) 674.

[12] Bridge builders and trainmen are held not to be fellow employees, in Missouri, etc., R. Co. v. Hines (Texas), 40 S. W. Rep. 152. See, also, Chicago, etc., R. Co. v. Pontius, 157 U. S. 209; 39 L. Ed. 675.

[13] St. Louis, etc., R. Co. v. Henson, 61 Ark. 302; 32 S. W. Rep. 1079.

[14] Roberts v. Chicago, etc., R. Co., 33 Minn. 218.

[15] St. Louis, etc., R. Co. v. Welsh, 72 Texas 298; 10 S. W. Rep. 529; 2 L. R. A. 839.

[16] San Antonio, etc., R. Co. v. Taylor (Texas), 35 S. W. Rep. 855.

A switchman and brakeman are held to be fellow workmen, in Washington. Stevick v. Northern Pac. R. Co., 39 Wash. 501; 81 Pac. Rep. 999.

A track repairer and trainmen were held to be coemployees, in the following cases: Heine v. Chicago, etc., R. Co., 58 Wis. 525; Howland v. Milwaukee, etc., R. Co., 54 Wis. 226; Slavens v. Northern Pacific R. Co., 97 Fed. Rep. 255; 38 C. C. A. 151; Atchison, etc., R. Co. v. Martin, 7 N. M. 158; 34 Pac. Rep. 536. But see, *contra*, Miller v. Missouri, etc., R. Co., 109 Mo. 350; 19 S. W. Rep. 58; Chicago, etc., R. Co. v. Lundstrom, 16 Neb. 354; 49 Am. Rep. 718; Haney v. Pittsburg, etc., R. Co., 38 W. Va. 570; 18 S. E. Rep. 748.

And a car repairer and trainmen are held to be coemployees, in Ohio, in Johnson v. Cleveland, etc., R. Co., 11 Ohio C. C. 553.

A yard master, in charge of a yard, and a brakeman and conductor, are fellow workmen of a car inspector, whose duty it is to examine

in the same common object of the employer's service, there is held to be no liability on the employer's part, for an injury to a train man because of the neglect of any of these other employees, because, by the contract of employment, the neglect of such employees as are competent, is assumed, as one of the ordinary risks of the business.

§ 491. **Conductors and other employees.**— The Supreme Court of the United States has held that a conductor of a railway train is not, because of his control of the train, to be regarded as a vice-principal, but being engaged in the same common object as the other employees of the company on the same train, he is, under the common-law rule, a co-employee of the other train men, and that for an injury due to his negligent act, the railroad company is not responsible to another of the employees on the same train.[17] This rule is followed in a majority of the States, where the common-law rule has not been modified by statutory enactments, or by refinements introduced by the courts themselves, and the

cars and see if they are safe for use. Shuster v. Philadelphia, etc., R. Co. (Del.), 62 Atl. Rep. 689.

A railroad yard foreman is held not to be a fellow workman of a switchman, in Kentucky. Howard v. Chesapeake & O. R. Co., 28 Ky. L. R. 891; 90 S. W. Rep. 950.

A switchman was held to be a coemployee with men upon trains, in Farwell v. Boston, etc., R. Co., 4 Metc. (Mass.) 49; Miller v. Southern Pacific R. Co., 20 Oregon 285; 26 Pac. Rep. 70; 48 Am. & Eng. R. Cas. 294; Roberts v. Chicago, etc., R. Co., 33 Minn. 218; 22 N. W. Rep. 389; Pool v. Southern Pacific R. Co., 7 Utah 303; 26 Pac. Rep. 654.

[17] Randall v. Baltimore, etc., R. Co., 109 U. S. 478; 27 L. Ed. 1003; Northern Pacific R. Co. v. Herbert, 116 U. S. 642; 29 L. Ed. 755; Baltimore, etc., R. Co. v. Baugh, 149 U. S. 368; 37 L. Ed. 772; Northern Pacific R. Co. v. Hamby, 154 U. S. 349; 38 L. Ed. 1009; Central R. Co. v. Keegan, 160 U. S. 259; 40 L. Ed. 418; Northern Pacific R. Co. v. Peterson, 162 U. S. 346; 40 L. Ed. 994; Northern Pacific R. Co. v. Porter, 167 U. S. 48; 42 L. Ed. 72; New England R. Co. v. Conroy, 175 U. S. 323; 44 L. Ed. 181.

conductor and engineer;[18] the conductor and fireman;[19] the conductor and brakeman,[20] and the conductor and other employees working under his orders, on the same train,[21] have all been held to be so far engaged in the same common service as to make of them coemployees, within the rule of the common law.

But this rule is not of general application in the United States, for in some jurisdictions, instead of adhering to the common-law rule, that all employees engaged in the same common service, are coemployees, regardless of the grade of the service, a distinction is made between those in different departments and those empowered with authority of the others, and under these distinctions a train conductor is held to be a vice-principal, who, in the control of the train, represents the employer and for his negligence, another employee of the same train, sustaining injury, is held entitled to recover from the railroad company.[22] He is held, in Georgia,[23] not to be a coemployee of an engineer, fireman or brakeman,

[18] New England, etc., R. Co. v. Conroy, 175 U. S. 323; 44 L. Ed. 181; Hoover v. Beech Creek R. Co., 154 Pa. St. 362; 26 Atl. Rep. 315; Grattis v. Kansas City, etc., R. Co., 153 Mo. 380; 55 S. W. Rep. 108; 48 L. R. A. 399; 77 Am. St. Rep. 721.

[19] Grattis v. Kansas City, etc., R. Co., 153 Mo. 380; 55 S. W. Rep. 108; 48 L. R. A. 399; 77 Am. St. Rep. 721.

[20] Louisville, etc., R. Co. v. Southwick, 16 Ind. App. 486; 44 N. E. Rep. 263; Wooden v. Western, etc., R. Co., 147 N. Y. 508; 70 N. Y. S. R. 83; 42 N. E. Rep. 199; Ott v. Lake Shore, etc., R. Co., 18 Ohio C. C. 395; Sherman v. Rochester, etc., R. Co., 17 N. Y. 153; Hayes v. Western, etc., R. Co., 3 Cush. (Mass.) 270; Dow v. Kansas Pacific R. Co., 8 Kansas 642.

[21] Martin v. Atchison, etc., R. Co., 166 U. S. 399; 41 L. Ed. 1051.

[22] Purcell v. Southern R. Co., 119 N. Car. 728; 26 S. E. Rep. 161; Culpepper v. Northeastern R. Co., 90 Texas 627; 40 S. W. Rep. 386; Richmond, etc., R. Co. v. Williams, 86 Va. 165; 9 S. E. Rep. 990; Walker v. Gillett, 59 Kansas 214; 52 Pac. Rep. 442; 10 Am. & Eng. R. Cas. (N. S.) 140.

[23] Spencer v. Brooks, 97 Ga. 681; 25 S. E. Rep. 480; 5 Am. & Eng. R. Cas. (N. S.) 202.

working under his orders, and this holding is followed in a great many States.[24]

[24] Haltom v. Southern R. Co., 127 N. C. 255; 37 S. E. Rep. 262; Louisville, etc., R. Co. v. Mitchell, 87 Ky. 327; Daniel v. Chesapeake, etc., R. Co., 36 W. Va. 397.

A conductor was held to be a coemployee with a brakeman on his train, in Smith v. Potter, 46 Mich. 258; 9 N. W. Rep. 273; 2 Am. & Eng. R. Cas. 140; Lawless v. Connecticut, etc., R. Co., 136 Mass. 1; 18 Am. & Eng. R. Cas. 96; Hoover v. Beech Creek R. Co., 154 Pa. St. 362; 26 Atl. Rep. 315; Pease v. Chicago, etc., R. Co., 61 Wis. 163; 20 N. W. Rep. 908; 17 Am. & Eng. R. Cas. 527.

But he was held not to be a fellow workman with a brakeman on his train, in Newport News, etc., R. Co. v. Dentzel, 91 Ky. 42; 14 S. W. Rep. 958; Lake Shore, etc., R. Co. v. Spangler, 44 Ohio St. 471; 8 N. E. Rep. 467; 28 Am. & Eng. R. Cas. 319; Openshaw v. Utah, etc., R. Co., 6 Utah 132; Ayers v. Richmond, etc., R. Co., 84 Va. 679; 5 S. E. Rep. 582; 33 Am. & Eng. R. Cas. 269; Northern Pacific R. Co. v. Kavanaugh, 51 Fed. Rep. 517; Georgia Pacific R. Co. v. Propst, 83 Ala. 518; 3 So. Rep. 764; Central R. Co. v. DeBray, 71 Ga. 406; Louisville, etc., R. Co. v. Kenley, 92 Tenn. 207; 21 S. W. Rep. 326.

He was likewise held to be a coemployee of a brakeman on another train, in Baltimore, etc., R. Co. v. Andrews, 50 Fed. Rep. 728; 53 Am. & Eng. R. Cas. 523; Becker v. Baltimore, etc., R. Co., 57 Fed. Rep. 188; Pittsburg, etc., R. Co. v. Devinney, 17 Ohio St. 197; McMaster v. Illinois, etc., R. Co., 65 Miss. 264; 4 So. Rep. 59; 7 Am. St. Rep. 653; 41 Am. & Eng. R. Cas. 486.

But, on the contrary, he was held to be a vice-principal of a brakeman on another train, in Daniel v. Chesapeake, etc., R. Co., 36 W. Va. 397; 15 S. E. Rep. 162; 16 L. R. A. 383; 53 Am. & Eng. R. Cas. 503; Au v. New York, etc., R. Co., 29 Fed. Rep. 72.

Conductor was held to be a coemployee of baggage master on another train, in Kerlin v. Chicago, etc., R. Co., 50 Fed. Rep. 185; 53 Am. & Eng. R. Cas. 530.

But he was held to be a vice-principal of a baggage man or expressman on another train, in Central Trust Co. v. Wabash, etc., R. Co., 34 Fed. Rep. 616.

Conductor was also held to be a coemployee with a car coupler, in Wilson v. Madison, etc., R. Co., 18 Ind. 226.

But he was held not to be a coemployee with a person employed in coupling cars, in Mason v. Richmond, etc., R. Co., 111 N. C. 482; 16 S. E. Rep. 698; 53 Am. & Eng. R. Cas. 183.

He was also held to be a coemployee with car inspector, in Whitmore v. Boston, etc., R. Co., 150 Mass. 477; 23 N. E. Rep. 220.

§ 492. **Engineer and other employees on same train.**— The engineer in charge of the engine operating a train of cars, is quite generally deemed the coemployee of the other agents

But a vice-principal as to construction hands and track repairers, under his control, in Chicago, etc., R. Co. v. Lundstrum, 16 Neb. 254; 20 N. W. Rep. 198; 49 Am. Rep. 718; 21 Am. & Eng. R. Cas. 528; Miller v. Missouri Pacific Ry. Co., 109 Mo. 350; 19 S. W. Rep. 58; 53 Am. & Eng. R. Cas. 598.

The conductor was held to be a vice-principal with the engineer on same train, in Van Amburg v. Vicksburg, etc., R. Co., 37 La. Ann. 650; 55 Am. Rep. 517; Mase v. Northern Pacific R. Co., 57 Fed. Rep. 283; Little Miami R. Co. v. Stevens, 20 Ohio St. 415; Chicago, etc., R. Co. v. Ross, 112 U. S. 377; 17 Am. & Eng. R. Cas. 501.

But he was held to be a coemployee with engineer on same train, in Harris v. Norfolk, etc., R. Co., 88 Va. 560; 14 S. E. Rep. 535; Grattis v. Kansas City, etc., R. Co., 153 Mo. 380; 55 S. W. Rep. 108; 77 Am. St. Rep. 721; 48 L. R. A. 399; Oaks v. Mase, 165 U. S. 363.

He was held to be a vice-principal of an engineer on another train, in Madden v. Chesapeake, etc., R. Co., 28 W. Va. 610; 57 Am. Rep. 695.

But was held to be a coemployee with an engineer on another train, in Oaks v. Mase, 165 U. S. 363.

He was held to be a coemployee of fireman on same train, in Slater v. Jewett, 85 N. Y. 61; 39 Am. Rep. 627; 5 Am. & Eng. R. Cas. 515.

But not of fireman, on another train, in Ragsdale v. Northern Pacific R. Co., 42 Fed. Rep. 383.

He was held to be the vice-principal of a train porter, in Haney v. Pittsburg, etc., R. Co., 38 W. Va. 570; 18 S. E. Rep. 748; Missouri Pacific Ry. Co. v. Texas, etc., R. Co., 38 Fed. Rep. 816.

The conductor was also held to be a coemployee with a section foreman, in Elliott v. Chicago, etc., R. Co., 5 Dakota 523; 41 N. W. Rep. 758; 3 L. R. A. 363; 38 Am. & Eng. R. Cas. 62.

Where a conductor handles a crippled car in a way to cause injury to a car inspector and the conductor was informed by telegram how to handle the car properly, his negligence in so handling it is that of a fellow workman of the car inspector, in Delaware. Shuster v. Philadelphia, etc., R. Co., 62 Atl. Rep. 689.

"An employee, engaged in construction work on a railway roadbed, does not assume the risk of the negligence of the conductor in charge of the construction train in failing to properly adjust the switches on moving the train from a side track to the main line." St. Louis, etc., Ry. Co. v. Boyles (Ark. 1906), 95 S. W. Rep. 783.

and employees of the same train, in the service of the same company.[25]

Because the engineer and the conductor on the same train, are jointly co-operating to attain the same result, a conductor, injured through the negligence of the engineer was held to have no right of action, in a recent case;[26] a like conclusion was reached as to the status of the engineer and fireman, on the same train;[27] laborers on a construction train are also held to be coemployees of the engineer, running the engine that pulls the train;[28] the engine hostler, or engine wiper and his engineer are coemployees;[29] a switchman, acting in conjunction with an engineer in placing cars, is a coemployee;[30] a section hand on the same train that an engine is pulling, is a fellow employee of the engineer;[31] an engineer and flagman at a crossing are held coemployees, in a New York case;[32] a torpedo man, or one whose duty it is to display danger signals, is held to be a coemployee of the engineer, in Tennessee;[33] an engineer and another employee riding on the same train, as a passenger, are held to be coemployees, in Indiana,[34] and the engineers on two different

[25] Watts v. Hart, 7 Wash. 178; 34 Pac. Rep. 423; Brewster v. Chicago, etc., R. Co., 114 Iowa 144; 86 N. W. Rep. 221; Wormington v. Atchison, etc., R. Co., 46 Mo. App. 159; Dysart v. Kansas City, etc., R. Co., 145 Mo. 83; 46 S. W. Rep. 751; Pittsburg, etc., R. Co. v. Lewis, 33 Ohio St. 196; Fowler v. Chicago, etc., R. Co., 61 Wis. 159.

[26] Link v. Louisville, etc., R. Co., 107 Ky. 370; 54 S. W. Rep. 184.

[27] Chicago, etc., R. Co. v. Brandau, 65 Ill. App. 150.

[28] Miller v. Ohio, etc., R. Co., 24 Ill. App. 326.

[29] Louisville, etc., R. Co. v. Richardson, 100 Ala. 232; 14 So. Rep. 209.

[30] Rutledge v. Missouri Pacific Ry. Co., 123 Mo. 121; 24 S. W. Rep. 1053.

[31] Houston, etc., R. Co. v. Rider, 62 Texas 267.

[32] MacDonald v. New York, etc., R. Co., 63 Hun 587; 45 N. Y. S. R. 711.

[33] East Tennessee, etc., R. Co. v. Rush, 15 Lea (Tenn.) 145.

[34] Evansville, etc., R. Co. v. Henderson, 134 Ind. 636; 33 N. E. Rep. 1021.

engines, drawing the same train, are coemployees, under the holding in a Kentucky case.[35]

But the question of whether the engineer of one train will be deemed a coemployee, or superior agent of other employees engaged in other departments of the service, is usually determined by the peculiar ideas of the courts of the State where the question is raised and whether or not the conassociation doctrine or the departmental theory obtains. If the other employee can be held to be acting for the railroad company, in the performance of its nondelegable duties, he is of course a vice-principal of an engineer, and not a coemployee.[36] In Illinois,[37] a member of a fencing crew is held not to be a fellow employee of an engineer, because they are in different departments of the service; in a Texas case,[38] the cook on a construction train was held not to be a coemployee of the engineer, as they are in separate departments of the business, and, in a South Carolina case,[39] a section fore-

[35] Cincinnati, etc., R. Co. v. Roberts, 110 Ky. 856; 62 S. W. Rep. 901.

[36] Chicago, etc., R. Co. v. Flynn, 154 Ill. 448; 40 N. E. Rep. 332; St. Louis, etc., R. Co. v. Kelton, 28 Texas Civ. App. 137; 66 S. W. Rep. 887.

[37] Louisville, etc., R. Co. v. Hawthorne, 147 Ill. 226; 35 N. E. Rep. 534.

[38] Brown v. Sullivan, 71 Texas 470; 10 S. W. Rep. 288.

[39] Calvo v. Charlotte, etc., R. Co., 23 S. C. 526; 55 Am. Rep. 28.

An engineer was held to be a coemployee of a brakeman on the same train, in Missouri Pacific Ry. Co. v. Texas, etc., Ry. Co., 31 Fed. Rep. 527; Illinois, etc., R. Co. v. Keene, 72 Ill. 512; Louisville, etc., R. Co. v. Petty, 67 Miss. 255; 7 So. Rep. 351; 41 Am. & Eng. R. Cas. 444; Moran v. New York, etc., R. Co., 67 Barb. (N. Y.) 96; Pittsburg, etc., R. Co. v. Ranney, 37 Ohio St. 665; 5 Am. & Eng. R. Cas. 533; Miller v. Chicago, etc., R. Co., 90 Mich. 230; 51 N. W. Rep. 370; Hobbs v. Atlantic, etc., R. Co., 107 N. C. 1; 12 S. E. Rep. 124; 44 Am. & Eng. R. Cas. 592; Louisville, etc., R. Co. v. Kenley, 92 Tenn. 207; 21 S. W. Rep. 326; Wormington v. Atchison, etc., R. Co., 46 Mo. App. 159.

And he was held also to be a coemployee of a brakeman on another train, in Randall v. Baltimore, etc., R. Co., 109 U. S. 478; 15 Am. &

man, whose duty it is to keep in repair a section of the railroad track, is held not to be a coemployee of the engineer, running an engine over the road, as the latter has a right to anticipate a reasonably safe track and roadbed and the former

Eng. R. Cas. 243; Baltimore, etc., R. Co. v. Andrews, 50 Fed. Rep. 728; 53 Am. & Eng. R. Cas. 523; East Tennessee, etc., R. Co. v. Rush, 15 Lea (Tenn.) 145.

But the engineer was held to be a vice-principal of a brakeman, in Louisville, etc., R. Co. v. Brooks, 83 Ky. 129; East Tennessee, etc., R. Co. v. Collins, 85 Tenn. 227; 1 S. W. Rep. 883; Illinois, etc., R. Co. v. Pirtle, 47 Ill. App. 498; Brown v. Southern Pacific R. Co., 7 Utah 288; 26 Pac. Rep. 579.

An engineer and car coupler were held to be coemployees, in Boatright v. Northeastern R. Co., 25 So. Car. 128; Thompson v. Lake Shore, etc., R. Co., 84 Mich. 281; 47 N. W. Rep. 584.

But an engineer and car inspector were held not to be coemployees, in Chicago, etc., R. Co. v. Hoyt, 122 Ill. 369; 12 N. E. Rep. 225; 31 Am. & Eng. R. Cas. 309.

He was held to be a coemployee of construction hands, riding on a gravel train, in Miller v. Ohio, etc., R. Co., 24 Ill. App. 326; Higgins v. Missouri Pacific Ry. Co., 104 Mo. 413; 16 S. W. Rep. 409; Henry v. Staten Island R. Co., 81 N. Y. 373; 2 Am. & Eng. R. Cas. 60; Russell v. Hudson River R. Co., 17 N. Y. 134.

But he was held not to be a coemployee of an express messenger, in Chamberlain v. Milwaukee, etc., R. Co., 11 Wis. 238.

An engineer and fireman were held to be fellow workmen, in Baltimore, etc., R. Co. v. Baugh, 149 U. S. 368; 54 Am. & Eng. R. Cas. 328; Howard v. Denver, etc., R. Co., 26 Fed. Rep. 837; 24 Am. & Eng. R. Cas. 448; Hobbs v. Atlantic, etc., R. Co., 107 N. C. 1; 12 S. E. Rep. 124; Bull v. Mobile, etc., R. Co., 67 Ala. 206; Illinois, etc., R. Co. v. Hosler, 45 Ill. App. 205.

But he was held to be the vice-principal of the fireman, in Cooper v. Central R. Co., 44 Iowa 134; Sabine, etc., R. Co. v. Ewing, 1 Texas Civ. App. 531; 21 S. W. Rep. 700.

An engineer was held not to be a coemployee of a section foreman, in Peoria, etc., R. Co. v. Rice, 144 Ill. 227; 33 N. E. Rep. 951.

But, on the contrary, was held a coworkman with roadmaster, in Holland v. Southern Pacific R. Co., 100 Cal. 240; 34 Pac. Rep. 666.

He was held to be a fellow workman with section men, in Easton v. Houston, etc., R. Co., 32 Fed. Rep. 893; Clifford v. Old Colony R. Co., 141 Mass. 564; 6 N. E. Rep. 751; Connolly v. Minneapolis, etc., R. Co., 38 Minn. 80; 35 N. W. Rep. 582; Rohback v. Pacific R. Co., 43 Mo. 187.

in the exercise of his duty, acts for the employer, in the performance of one of the nondelegable duties that is imposed upon him, by law.'

§ 493. **Yard men, switchmen and other employees.**— As a

Was held to be a coemployee with a switchman, in Chicago, etc., R. Co. v. Touhy, 26 Ill. App. 99; Toms v. Buffalo Creek R. Co., 70 Hun (N. Y.) 84; Smith v. Memphis, etc., R. Co., 18 Fed. Rep. 304.

But he was held not to be a coemployee of yard switchman, in Louisville, etc., R. Co. v. Sheets (Ky.), 13 S. W. Rep. 248; 41 Am. & Eng. R. Cas. 470.

Different engineers, of same employer, are coemployees. Van Avery v. Union Pacific R. Co., 35 Fed. Rep. 40; Ohio, etc., R. Co. v. Robb, 36 Ill. App. 627; Norfolk, etc., R. Co. v. Donnelly, 88 Va. 853; 14 S. E. Rep. 692; 53 Am. & Eng. R. Cas. 571; Chicago, etc., R. Co. v. Doyle, 60 Miss. 977; 8 Am. & Eng. R. Cas. 171.

But not of engineers of another employer. Texas, etc., R. Co. v. Easton, 2 Texas Civ. App. 378; 21 S. W. Rep. 575.

Engineer was held to be coemployee of laborers unloading cars, in Lake Shore, etc., R. Co. v. Stupak, 123 Ind. 210; 23 N. E. Rep. 246; 41 Am. & Eng. R. Cas. 382; Kumler v. Junction R. Co., 33 Ohio St. 150.

But engineer and laborers unloading cars were held not to be coemployees, in Peoria, etc., R. Co. v. Johns, 43 Ill. App. 83; Union Pacific, etc., R. Co. v. Billiter, 28 Neb. 422; 44 N. W. Rep. 483; 41 Am. & Eng. R. Cas. 431.

"When a fireman is injured by a collision between his engine and another through the negligence of the switch tender in failing to change the semaphore signal, or by want of due care on the part of the engineer in failing to observe the danger signal, it must, in each instance, be deemed the result of the negligence of a fellow workman." Tillson v. Maine Cent. R. Co. (Me. 1907), 67 Atl. Rep. 407.

"Where plaintiff, a brakeman on a freight train, was injured by the alleged negligence of the engineer in backing his engine against a defective car, plaintiff and the engineer were *prima facie* fellow workmen." Southern Ry. Co. v. Elliott (Ind. 1907), 82 N. E. Rep. 1051, transferred from Appellate Court, 81 N. E. Rep. 1180.

"Where the engineer and conductor of a train on which decedent was fireman received orders to pass a certain other train on a specified siding, and those in charge of decedent's train saw a locomotive thereon, and taking it for granted that it was the locomotive of the other train, ran by and collided with the other train just beyond the siding, no

general rule, switchmen [40] or yard men,[41] working in the same yard, are regarded as coemployees. The different members of two separate switching squads are held to be coemployees, in Illinois; [42] a night watcher is a fellow employee of a foreman of a switching crew, in a yard; [43] an engine hostler and his helper, in care of the engine, are coemployees; [44] a yard clerk and the members of a switching crew are also coemployees,[45] as are such yard clerk and the engineer

recovery could be had for the death of decedent." Hayes v. New York, etc., R. Co., 105 N. Y. S. 592.

"Where an engineer and fireman saw an employee on the track riding on a railroad velocipede, and observed that he was ignorant of the approach of the engine, it was their duty to warn him, and to slow down the engine, and stop, if necessary to save his life, even though he may have been guilty of contributory negligence in running his velocipede as he did." Lynch v. Chicago & A. Ry. Co. (Mo. 1907), 106 S. W. Rep. 68.

The engineer of a steam shovel, who has control of the men, with power to hire and discharge them, is a fellow workman with a pitman, whose duty it is to help to move a six-foot track in front of the shovel, where the engineer controls the movement of the crane himself and the injury to the pitman results from being hit by the bucket attached thereto. Jemming v. Great Northern Ry. Co., 96 Minn. 302; 104 N. W. Rep. 1079; 1 L. R. A. (N. S.) 696.

An engineer who negligently runs his engine against another employee and injures him, is personally liable for such injury, although he does not own the engine and is running it for the company. Illinois Cent. R. Co. v. Coley, 28 Ky. L. R. 336; 89 S. W. Rep. 234; 1 L. R. A. (N. S.) 370.

An engineer, whose negligence causes injury to a mail clerk, is jointly liable, with the railroad company, for such injury. Illinois Cent. R. Co. v. Houchins, 28 Ky. L. R. 499; 89 S. W. Rep. 530; 1 L. R. A. (N. S.) 375.

[40] Gulf, etc., R. Co. v. Warner, 89 Texas 475; 35 S. W. Rep. 364.

[41] Illinois, etc., R. Co. v. Stewart (Ky.), 53 S. W. Rep. 596.

[42] Chicago, etc., R. Co. v. Driscoll, 176 Ill. 330; 52 N. E. Rep. 921; 12 Am. & Eng. R. Cas. (N. S.) 644.

[43] Chicago, etc., R. Co. v. Geary, 110 Ill. 383.

[44] Smith v. St. Louis, etc., R. Co., 151 Mo. 391; 52 S. W. Rep. 378; 14 Am. & Eng. R. Cas. (N. S.) 609.

[45] East St. Louis, etc., R. Co. v. O'Hara, 59 Ill. App. 649,

of a freight train, entering the yard;[46] the yard conductor or foreman and a fireman, or engineer, operating an engine, in the yard are coemployees,[47] as is such yard foreman and the foreman of a switching gang, working under his orders;[48] a laborer, sweeping snow, in a railroad yard, is a coemployee of an engineer or fireman, operating an engine in the yard;[49] a yard man, assisting an engine repairer, is a coemployee of such repairer, so that he assumes the risk of an injury due to his neglect,[50] and in many cases a switch tender and the agents in charge of an engine or car, are employees engaged to attain the same result, within the common-law doctrine of coservice, so that the railroad company is relieved from liability due to the negligence of either of such class of employees to the other.[51]

But in some States the foreman of a crew of switchmen, with power to control such laborers under him, is held to be a vice-principal and not a coemployee;[52] a roundhouse foreman, delegated with the duty of keeping engines in repair, is not a coemployee with a brakeman on the train, by which an engine is used to draw the train, which is lacking in repair, due to the neglect of such roundhouse foreman;[53] an employee of an inside roundhouse foreman and an employee of an outside switching crew, are not coemployees, where the

[46] New York, etc., R. Co. v. Hyde, 56 Fed. Rep. 188; 5 C. C. A. 461.

[47] Cincinnati, etc., R. Co. v. Gray, 101 Fed. Rep. 623; 41 C. C. A. 535; 50 L. R. A. 47; Parker v. New York, etc., R. Co., 18 R. I. 773; 30 Atl. Rep. 849.

[48] Thomas v. Cincinnati, etc., R. Co., 97 Fed. Rep. 245.

[49] Corcoran v. New York, etc., R. Co., 46 App. Div. 201; 61 N. Y. Supp. 672.

[50] Chicago, etc., R. Co. v. Cseuring, 4 Ill. App. 533.

[51] St. Louis, etc., R. Co. v. Needham, 63 Fed. Rep. 107; 11 C. C. A. 56; 25 L. R. A. 833.

[52] Terre Haute, etc., R. Co. v. Rittenhouse, 28 Ind. App. 633; 62 N. E. Rep. 295.

[53] Ohio, etc., R. Co. v. Stein, 140 Ind. 61; 39 N. E. Rep. 246.

department doctrine obtains;[54] the like rule obtains in such jurisdictions, as to switchmen, operating different switches and riding on different engines;[55] a switching crew foreman, in such States as have adopted the same rule, is held to be a vice-principal of the men working under his orders;[56] the same rule obtains, in such jurisdictions, as to the status of roundhouse employees and switching crews;[57] a carpenter at work in a railroad yard is not a coemployee of an engineer, running an engine in the same yard, in such States, as adhere to the conassociation theory;[58] a yard superintendent is held to be the vice-principal of a yard foreman, who takes orders from such superintendent,[59] and this is also held to be the status of a car inspector and the yard foreman, who negligently gives an order to back a train into a car that the inspector is inspecting, as a result of which injury is sustained.[60]

§ 494. **Status of car inspectors and repairers.**— As a gen-

[54] Texas, etc., R. Co. v. Scruggs (Texas), 58 S. W. Rep. 186.

[55] Galveston, etc., R. Co. v. Masterson, 91 Texas 385; 51 S. W. Rep. 1091.

[56] Missouri Pacific R. Co. v. Lyons, 54 Neb. 633; 75 N. W. Rep. 31.

[57] Houston, etc., R. Co. v. Talley (Texas), 39 S. W. Rep. 206.

[58] Egmann v. St. Louis, etc., R. Co., 65 Ill. App. 345.

[59] Texas, etc., R. Co. v. Tattman (Texas), 31 S. W. Rep. 333.

[60] Driscoll v. Chicago, etc., R. Co., 97 Ill. App. 668; 176 Ill. 330; 52 N. E. Rep. 921; 12 Am. & Eng. R. Cas. (N. S.) 644.

"Where a railroad company was doing certain switching with an engine and caboose in the railroad yards of another railroad company, and deceased was employed by the latter company to work in the yards and was injured by the caboose being kicked down a track, the deceased and the persons handling the caboose were not fellow workmen." Pittsburgh, C. C. & St. L. Ry. Co. v. Bovard, 121 Ill. App. 49.

"A locomotive engineer is a coemployee of the fireman and of an employee in charge of a switch and semaphore signals, and the employer is not liable in a common-law action for injuries received by the engineer in consequence of the negligence of the fireman or employee." Judgment (1906), 97 N. Y. S. 1143; 112 App. Div. 904, reversed; Pearsall v. New York Cent. etc., R. Co., 82 N. E. Rep. 752; 189 N. Y. 474.

eral rule, a car repairer, who repairs cars in a railroad yard, is held to be a coemployee with those employees engaged in the operation of engines or cars in the yard, and for an injury to such repairer, by the shunting or backing of cars against the car he is engaged in repairing, there is no liability, as the injury is due to the negligence of a fellow employee.[61] In an Arkansas case,[62] a car repairer is held to be a coemployee with the car inspector who, as foreman of the work the repairer is engaged in doing, directs his work and controls his actions.

In Massachusetts [63] and many other States,[64] a car inspector is held to be a coemployee, also, of the agents of the railroad company, engaged in the use of the cars or engines he inspects, so that the railroad company is exempted from liability for injuries due to a neglect of the duty of inspection by such inspector. But as the duty of inspection, like that of furnishing reasonably safe appliances, is one of the nondelegable duties of the employer, this holding is seemingly opposed to the principle of the law; has been condemned by text writers [65] and is not generally followed, but in perhaps a majority of the States the rule obtains that a car inspector is a vice-principal and not a coemployee with those using the cars or engines which he inspects.[66] A car builder and a

[61] St. Louis, etc., R. Co. v. Triplett, 54 Ark. 289; 15 S. W. Rep. 831; Renfro v. Chicago, etc., R. Co., 86 Mo. 302; Corcoran v. Delaware, etc., R. Co., 126 N. Y. 673; 38 N. Y. S. R. 251; Kirk v. Atlanta, etc., R. Co., 94 N. C. 625; 55 Am. Rep. 621; Smith v. Chicago, etc., R. Co., 91 Wis. 503; 65 N. W. Rep. 183; Peterson v. Chicago, etc., R. Co., 67 Mich. 102; 34 N. W. Rep. 260.

[62] Fordyce v. Brinley, 58 Ark. 206; 24 S. W. Rep. 250.

[63] Whitmore v. Boston, etc., R. Co., 150 Mass. 477; 23 N. E. Rep. 220.

[64] Potter v. New York, etc., R. Co., 136 N. Y. 77; 48 N. Y. S. R. 843; 32 N. E. Rep. 603; St. Louis, etc., R. Co. v. Rice, 51 Ark. 467; 11 S. W. Rep. 699; 4 L. R. A. 173; Little Miami R. Co. v. Fitzpatrick, 42 Ohio St. 318; Wonder v. Baltimore, etc., R. Co., 32 Md. 418.

[65] 4 Thompson on Negligence, §§ 5089, 5090, and citations.

[66] Long v. Pacific Ry. Co., 65 Mo. 225; Condon v. Missouri Pacific

car repairer are held to be employees in different departments, in Illinois;[67] a brakeman and a car inspector are held to be vice-principal and subordinate, not coemployees, in Kansas,[68] and a station agent is not held to be a coemployee with a car inspector, in Nebraska.[69]

§ 495. **Section foremen and section men.**— The courts of the different States in the United States have reached divergent conclusions as to the legal status of the section foreman

Ry. Co., 78 Mo. 567; Cincinnati, etc., R. Co. v. McMullen, 117 Ind. 439; Columbus, etc., R. Co. v. Frick, 51 Ohio St. 146; 37 N. E. Rep. 128; Chicago, etc., R. Co. v. Hoyt, 122 Ill. 369; 12 N. E. Rep. 225; Louisville, etc., R. Co. v. Bates, 146 Ind. 564; 45 N. E. Rep. 108; Illinois, etc., R. Co. v. Hilliard, 99 Ky. 684; 37 S. W. Rep. 75; International, etc., R. Co. v. Kernan, 78 Texas 294; Kastle v. Wabash R. Co., 114 Mich. 43; 72 N. W. Rep. 28.

[67] St. Louis, etc., R. Co. v. Holman, 155 Ill. 21; 39 N. E. Rep. 573.

[68] Missouri, etc., R. Co. v. Dwyer, 36 Kansas 58.

[69] Chicago, etc., R. Co. v. Kellogg, 54 Neb. 127; 74 N. W. Rep. 454.

In the following cases, a car inspector or repairer, in failing to inspect or repair cars, was held to be a vice-principal. Johnson v. Chesapeake, etc., R. Co., 36 W. Va. 73; 14 S. E. Rep. 432; Condon v. Missouri Pacific Ry. Co., 78 Mo. 567; Little Rock, etc., R. Co. v. Mosley, 51 Fed. Rep. 1009; Cincinnati, etc., R. Co. v. McMullen, 117 Ind. 439; 20 N. E. Rep. 287; 38 Am. & Eng. R. Cas. 165; Chicago, etc., R. Co. v. Jackson, 55 Ill. 492; Daniels v. Union Pacific R. Co., 6 Utah 357; 23 Pac. Rep. 762.

While he was held to be a coemployee in the following cases: Alabama, etc., R. Co. v. Carroll, 97 Ala. 126; 11 So. Rep. 803; 53 Am. & Eng. R. Cas. 556; St. Louis, etc., R. Co. v. Gaines, 46 Ark. 555; Gibson v. Northern, etc., R. Co., 22 Hun (N. Y.) 289; Little Miami R. Co. v. Fitzpatrick, 42 Ohio St. 318; 17 Am. & Eng. R. Cas. 578; Dewey v. Detroit, etc., R. Co., 97 Mich. 329; 56 N. W. Rep. 756, reversing on rehearing 52 N. W. Rep. 942; 16 L. R. A. 342; 53 Am. & Eng. R. Cas. 550.

A car inspector was held to be a coemployee of a car coupler, in Tierney v. Minneapolis, etc., R. Co., 33 Minn. 311; 23 N. W. Rep. 229; 53 Am. Rep. 35; 21 Am. & Eng. R. Cas. 545.

A car repairer, in so far as he represents the railroad company, in the repairing of cars, was held to be a vice-principal, in Northern Pacific R. Co. v. Herbert, 116 U. S. 642; 24 Am. & Eng. R. Cas. 407,

and the men subject to his orders, whose duty is to keep the track in repair. The weight of authority is no doubt in consonance with the common-law rule that mere grade of the service will not affect the question of who are to be regarded as coemployees and the section foreman in a majority of the States, is held to be a coemployee with the men working on his section.[70] In other States, however, even where statutes have not made such a rule essential,[71] the courts hold that the section foreman is empowered with supervision or control to such an extent as to make the men under his orders his subordinates and not his coemployees, and that the employer is responsible for his negligence as for the carelessness of a vice-principal.[72] In most instances the section foreman works with the men subject to his orders and if his negligent act, as distinguished from a negligent order, should occasion an injury, then, in jurisdictions where the dual capacity doctrine obtains, the employer would not be liable for an injury resulting from his wrongful act.[73] The men working right along with the foreman, there is nothing in the relation to change the legal status of the foreman as a coem-

[70] Kenney v. Central R. Co., 61 Ga. 590; Thacher v. Chicago, etc., R. Co., 159 Ind. 82; 64 N. E. Rep. 605; Shepard v. Boston, etc., R. Co., 158 Mass. 174; Gavigan v. Lake Shore, etc., R. Co., 110 Mich. 71; 67 N. W. Rep. 1097; 5 Am. & Eng. R. Cas. (N. S.) 523; Goodwell v. Montana, etc., R. Co., 18 Mont. 293; 45 Pac. Rep. 210; 4 Am. & Eng. R. Cas. (N. S.) 419; Spanake v. Philadelphia, etc., R. Co., 148 Pa. St. 184; 23 Atl. Rep. 1006; Northern Pacific R. Co. v. Peterson, 162 U. S. 346; 40 L. Ed. 994; Lochbaum v. Oregon, etc., R. Co., 104 Fed. Rep. 852; 44 C. C. A. 220.

[71] St. Louis, etc., R. Co. v. Rickman, 65 Ark. 138; 45 S. W. Rep. 56.

[72] Russ v. Wabash R. Co., 112 Mo. 45; Haworth v. Kansas City, etc., R. Co., 94 Mo. App. 215; 68 S. W. Rep. 111; Justice v. Pennsylvania R. Co., 130 Ind. 321; Allison v. Southern R. Co., 129 N. Car. 336; 40 S. E. Rep. 91; Chattanooga, etc., R. Co. v. Lawson, 101 Tenn. 406; 47 S. W. Rep. 489; 12 Am. & Eng. R. Cas. (N. S.) 669; Atchison, etc., R. Co. v. Vincent, 56 Kansas 344; 43 Pac. Rep. 251.

[73] Nashville, etc., R. Co. v. Ganns, 101 Tenn. 380; 47 S. W. Rep. 493.

ployee, even in States where the "conassociation" idea obtains;[74] but as to men in other departments of the service, such as employees in a steel mill, in States where the department doctrine finds countenance, the common-law rule of fellow service would not obtain between such men and the section men, engaged in work on the track.[75] Nor would the employer be relieved from responsibility for the acts of the section men in so far as they could be said to be engaged in the performance of the nondelegable duties of the employer, such as to furnish a reasonably safe track or roadbed for his other employees, or for third persons.[76]

[74] Chicago, etc., R. Co. v. Goltz, 71 Ill. App. 414.

[75] Joliet Steel Co. v. Shields, 146 Ill. 603; 34 N. E. Rep. 1108.

[76] Banks v. Wabash R. Co., 40 Mo. App. 458; Babcock v. Old Colony R. Co., 150 Mass. 467; 23 N. E. Rep. 325.

"In the courts of the United States, a section foreman, in the operation of his hand car, stands to the section hands, not as vice-principal, but as a fellow workman." Chandler v. St. Louis, etc., R. Co. (Mo. App. 1907), 106 S. W. Rep. 553.

"Where a section foreman allowed his men to place hand cars on the track in order to go to camp, without warning the men that a train might overtake them, or taking any precautions to ascertain if a train was approaching, or to give warning in case one should approach, when he knew that a passenger train was past due, and that the sharp curves in the track and the topographical obstructions made the risk of being run down very great, his acts constituted negligence." Mack v. Chicago, etc., Ry. Co. (Mo. App. 1907), 101 S. W. Rep. 142.

A section foreman, as to the duties delegated him by the railroad company, of providing a reasonably safe track or roadbed, was held to be a vice-principal, in Babcock v. Old Colony R. Co., 150 Mass. 467; 23 N. E. Rep. 325; Hall v. Missouri Pacific Ry. Co., 74 Mo. 298; 8 Am. & Eng. R. Cas. 106; Justice v. Pennsylvania R. Co., 130 Ind. 321; 30 N. E. Rep. 303; 53 Am. & Eng. R. Cas. 604; Rowland v. Missouri Pacific Ry. Co., 20 Mo. App. 463; Couch v. Charlotte, etc., R. Co., 22 So. Car. 557; 28 Am. & Eng. R. Cas. 331.

He was held to be a vice-principal as to hands subject to his control, in Russ v. Wabash R. Co., 112 Mo. 451; 20 S. W. Rep. 472; Sweeney v. Gulf, etc., R. Co., 84 Texas 433; 19 S. W. Rep. 555; Patton v. Western, etc., R. Co., 96 N. Car. 455; 1 S. E. Rep. 863; 31 Am. & Eng. R. Cas. 298; McDermott v. Hannibal, etc., R. Co., 87 Mo. 285; 28 Am. & Eng.

§ 496. **Flagman and trainmen.**— A flagman employed to obey the orders of the conductors and engineers, while the conductors or engineers are engaged in the operation of a train, in the giving and transmission of signals, is held to be a coemployee of the other train men while so engaged.[77]

But a flagman, employed at a place where the track was obstructed, to give warning to approaching trains, of the danger to be incurred by the obstruction, the place being a cross-

R. Cas. 528; Banks v. Wabash R. Co., 40 Mo. App. 458; Hutson v. Missouri Pacific Ry. Co., 50 Mo. App. 300.

But was held to be a coworkman as to hands working with him, in Clifford v. Old Colony R. Co., 141 Mass. 564; 6 N. E. Rep. 751; Shepard v. Boston, etc., R. Co., 158 Mass. 174; 33 N. E. Rep. 508; Olson v. St. Paul, etc., R. Co., 38 Minn. 117; 35 N. W. Rep. 866; 33 Am. & Eng. R. Cas. 386; Spancake v. Pennsylvania, etc., R. Co., 148 Pa. St. 184; 23 Atl. Rep. 1006; Coyne v. Union Pacific R. Co., 133 U. S. 370; Lagrone v. Mobile, etc., R. Co., 67 Miss. 592; 7 So. Rep. 432.

A section foreman was held to be a coemployee with another section foreman, in Sherrin v. St. Joseph, etc., R. Co., 103 Mo. 378; 15 S. W. Rep. 442.

But he was held not to be the coworkman of train crew, in Lewis v. St. Louis, etc., R. Co., 59 Mo. 495; 8 Am. Ry. Rep. 450; Hulehan v. Green Bay, etc., R. Co., 68 Wis. 520; 32 N. W. Rep. 529; 31 Am. & Eng. R. Cas. 322; Mobile, etc., R. Co. v. Smith, 59 Ala. 245; Hall v. Missouri Pacific Ry. Co., 74 Mo. 298; 8 Am. & Eng. R. Cas. 106; St. Louis, etc., R. Co. v. Weaver, 35 Kansas 412; 11 Pac. Rep. 408; 28 Am. & Eng. R. Cas. 341; Calvo v. Charlotte, etc., R. Co., 23 So. Car. 526; 55 Am. Rep. 28; 28 Am. & Eng. R. Cas. 327.

It is held to be gross negligence for a section boss to take his men on a hand car at a place and time when he knows a freight train is due. Louisville & N. R. Co. v. Helm, 89 S. W. Rep. 709; 28 Ky. L. R. 603.

Foreman's negligence in not sooner ordering the removal of a hand car, to prevent collision with approaching train, cannot be said to be cause of coemployee stumbling and falling against car, causing injury. Andrews v. Chicago, etc., Ry. Co. (Iowa), 105 N. W. Rep. 404.

[77] "A flagman who had been instructed to obey the orders of conductors and engineers while the conductors are in charge of trains, while obeying the orders of such conductors is a coemployee of the engineers." Lyon v. Charleston, etc., Ry. Co., 58 S. E. Rep. 12; 77 S. C. 328.

ing of a railroad and a highway, at grade, was held to be discharging the personal nondelegable duty of the employer, in giving such warning of the danger and hence, not to be a coemployee of the fireman on the engine, injured by a neglect of duty on the part of such flagman.[78]

§ 497. **Pullman conductor and porter.**— Even in those States where the conassociation idea, or department doctrine finds recognition, as the porter of a Pullman sleeping car and the conductor of the car, are thrown in each other's society and have the opportunity to watch each other's actions and observe the conduct of each, there could be no reason why these employees should not be held to be coemployees, although the conductor ranks the porter in the service, as both are employees in the same common employment, engaged to attain the same result.

Hence, it is that in Illinois, where the department doctrine is held to obtain, the conductor and porter of a sleeping car are held to be coemployees, in so far as their respective duties require that they shall during certain hours of the night, keep watch over the car where they are both employed, one serving during one portion of the night and the other during the remainder thereof.[79]

§ 498. **Track-repairers and train-men.**— The courts of the different States have arrived at directly opposite views as to

[78] "Under the laws of Pennsylvania, a flagman employed at a place where the track was obstructed to give warning to approaching trains, the place being a crossing of the railroad by a highway at grade, was not a coemployee of a fireman on the engine." Ferguson v. Central R. Co. (N. J. 1907), 67 Atl. Rep. 602.

[79] Pullman Car Co. v. Woodfolk, 121 Ill. App. 321.

A porter on a railroad was held to be a coemployee with a carpenter on a scaffold, injured by the negligent shifting of an engine by such porter, in Morgen v. Vale of Neath R. Co., 5 B. & S. 736; 35 L. J. Q. B. 23; 13 L. T. 564.

the legal status of section men, or track repairers and train men, as they have as to employees occupying other relations in railroad service, and in some States section men are held to be coemployees with train men,[80] while in others, they are held to occupy no such relation, but the employer is rendered liable for an injury to an employee in one department, by the negligent act of one in the other branch of the service.[81]

Upon principle, it would seem, as to an injury to a trainman, due to a failure on the part of section men to maintain a reasonably safe track or roadbed, the employer ought to be chargeable, in law, for the effects of such neglect, as this comes within the nondelegable duties of the employer;[82] but in the case of an injury to a section man, because of the neglect of a train man, there is apparently no good reason why the section man ought not to be held to assume the risk, as an incident of his employment,[83] unless it is a risk that would come within the class of duties of the employer, above referred to, in States where the "conassociation" or department doctrine does not obtain.[84]

[80] Parker v. Hannibal, etc., R. Co., 109 Mo. 362; 19 S. W. Rep. 1119; 18 L. R. A. 802; 50 Am. & Eng. R. Cas. 521; Harrison v. Detroit, etc., R. Co., 79 Mich. 409; 44 N. W. Rep. 1034; Filbert v. Delaware, etc., Co., 121 N. Y. 207; 23 N. E. Rep. 1104; Northern Pacific R. Co. v. Charless, 162 U. S. 359; 40 L. Ed. 999.

[81] Chicago, etc., R. Co. v. Eaton, 194 Ill. 441; 62 N. E. Rep. 784; Swaddle v. Missouri Pacific Ry. Co., 118 Mo. 268; 24 S. W. Rep. 140; Union Pacific R. Co. v. Greary, 52 Kansas 308; 34 Pac. Rep. 887.

[82] Kansas City, etc., R. Co. v. Webb, 97 Ala. 157; 11 So. Rep. 888; Anderson v. Michigan, etc., R. Co., 107 Mich. 591; 65 N. W. Rep. 585; Wellman v. Oregon, etc., R. Co., 21 Oregon 530; 28 Pac. Rep. 625; Wright v. Southern R. Co., 123 N. Car. 280; 31 S. E. Rep. 652; 12 Am. & Eng. R. Cas. (N. S.) 717.

[83] A track walker, riding a railroad velocipede, is held to assume the risk of being struck by a train, in Utah, in Stephani v. Southern, etc., R. Co., 19 Utah 196; 57 Pac. Rep. 34; 14 Am. & Eng. R. Cas. (N. S.) 575. But see, Schelerth v. Missouri Pacific Ry. Co., 115 Mo. 87; 21 S. W. Rep. 1110.

[84] Peoria, etc., R. Co. v. Rice, 144 Ill. 227; 33 N. E. Rep. 951. But

§ 499. **Station agent and other railway employees.**— A station agent has been held to be a coemployee with an engineer,[85] a brakeman,[86] and a section foreman,[87] so that in case of an injury to any of these, due to the negligence of the station agent, in the absence of a statute changing the common-law rule of nonliability, the railroad company would not be responsible for such injury.

But as in almost all other relations where the rule of coemployees is applied in the different States, there are widely divergent views as to the legal status of the various employees in different departments of the service, so there is a contrariety of judicial opinion as to the exact status of a station agent. In Kansas a station agent was held not to be a coemployee with a brakeman;[88] the conductor of a freight train, in a Tennessee case,[89] was held not to be a coemployee with a station agent, so as to deny him a cause of action, for an injury due to such agent's negligence; a station agent, in Illinois,[90] was held not to be in the same service with a section hand, injured by a collision due to such agent's neglect, so as to deny a recovery, because of the fellow service of the two employees, and under the Texas statute a station agent was held not to be a fellow employee with a train crew, employed near the station in coupling cars.[91]

see, Card v. Eddy, 129 Mo. 510; 28 S. W. Rep. 979, for contrary rule, in Missouri.

[85] Brown v. Minneapolis, etc., R. Co., 31 Minn. 553.

[86] Galveston, etc., R. Co. v. Farmer, 73 Texas 85; 11 S. W. Rep. 156; Toner v. Chicago, etc., R. Co., 69 Wis. 188; 31 N. W. Rep. 104.

[87] Miller v. Michigan, etc., R. Co., 123 Mich. 374; 82 N. W. Rep. 58.

[88] Atchison, etc., R. Co. v. Seeley, 54 Kansas 21; 37 Pac. Rep. 104.

[89] Louisville, etc., R. Co. v. Jackson, 106 Tenn. 438; 61 S. W. Rep. 771.

[90] St. Louis, etc., R. Co. v. Biggs, 53 Ill. App. 550.

[91] Gulf, etc., R. Co. v. Calvert, 11 Texas Civ. App. 297; 32 S. W. Rep. 246. But, in the absence of such a statute, see Galveston, etc., R. Co. v. Farmer, 73 Texas 85; 11 S. W. Rep. 156.

§ 500. **Status of various other employees in different departments.**— It is quite generally held that brakemen and other employees on the same train are coemployees;[92] a brakeman and fireman are generally regarded as coemployees, when employed upon the same train;[93] a car loader and brakeman or car coupler are also coemployees;[94] a brakeman and the engineer of the train on which he is braking are also in the same general service;[95] a bridge tender and a section man are held to be similarly engaged, so that the employer is not responsible for an injury due to the former's negligence;[96] a train master is held to be the coemployee and not the superior of a brakeman;[97] a sand man, or

Station agent was held to be a coemployee with brakeman, in the following cases: Gaffney v. New York, etc., R. Co., 15 R. I. 456; 7 Atl. Rep. 284; 31 Am. & Eng. R. Cas. 265; Toner v. Chicago, etc., R. Co., 69 Wis. 188; 31 N. W. Rep. 104; 33 N. W. Rep. 433; 28 Am. & Eng. R. Cas. 449; Galveston, etc., R. Co. v. Farmer, 73 Texas 85; 11 S. W. Rep. 156; 38 Am. & Eng. R. Cas. 75.

He was also held to be coworkman with engineer, in Dealey v. Philadelphia, etc., R. Co. (Pa.), 4 Atl. Rep. 170; Brown v. Minneapolis, etc., R. Co., 31 Minn. 553; 18 N. W. Rep. 834.

And likewise a coemployee with fireman, in Reiser v. Pennsylvania R. Co., 152 Pa. St. 38; 25 Atl. Rep. 175.

And a coemployee with train crew, even though inspecting loaded cars, in Byrnes v. New York, etc., R. Co., 113 N. Y. 251; 21 N. E. Rep. 50; 4 L. R. A. 151.

And a station hand, who helps make up trains, under the station master, is also held to be a coemployee with brakemen of the train, in Hodgkins v. Eastern R. Co., 119 Mass. 419; 9 Am. Ry. Rep. 271.

[92] Whalen v. Michigan, etc., R. Co., 114 Mich. 512; 72 N. W. Rep. 323; Ward v. Chesapeake, etc., R. Co., 39 W. Va. 46; 19 S. E. Rep. 389; Casey v. Louisville, etc., R. Co., 84 Ky. 79.

[93] Loranger v. Lake Shore, etc., R. Co., 104 Mich. 80; 62 N. W. Rep. 137; Southern R. Co. v. Clifford, 110 Ky. 727; 62 S. W. Rep. 514.

[94] Bailey v. Delaware, etc., R. Co., 27 App. Div. (N. Y.) 305; 50 N. Y. Supp. 87.

[95] Kersey v. Kansas City, etc., R. Co., 79 Mo. 362; Ekles v. Norfolk, etc., R. Co., 96 Va. 69; 25 S. E. Rep. 545.

[96] Illinois, etc., R. Co. v. Bishop, 76 Miss. 758; 25 So. Rep. 867.

[97] Martin v. Chicago, etc., R. Co., 65 Fed. Rep. 384.

one whose duty it is to provide sand in the sand box of the engine, is a coemployee of the train men operating the engine; [98] a track walker and track repairer and conductor are all coemployees,[99] as are the train men operating a train and other employees being hauled to work, on the same train,[1] so that for an injury due to the negligence of any such, there is no liability on the railroad company's part, in most of the States where the questions have been presented.

But the above rules of law would not be applicable in States where the " conassociation " theory, or department doctrine obtains, for as to such States there must be an identity of employment and service, to constitute two or more employees coemployees, within the common-law rule of nonliability for the negligence of the employees. Hence, it is, that in Illinois, a car loader and switchman are held not to be coemployees; [2] an express man employed by an express company and a railway employee are not coemployees as they have different employers; [3] an express messenger and a baggage man are not coemployees; [4] a porter upon a sleeper and railway employees are not engaged in the same service; [5] a quarry man and railway employees are engaged in distinct employments; [6] a telegraph operator is not the coemployee of a squad of men engaged in work on the section,[7] nor is

[98] Louisville, etc., R. Co. v. Petty, 67 Miss. 255; 7 So. Rep. 351; 41 Am. & Eng. R. Cas. 444.

[99] Fagundes v. Central Pacific R. Co., 79 Cal. 97; 21 Pac. Rep. 437.

[1] Manville v. Cleveland, etc., R. Co., 11 Ohio St. 417.

[2] Winona, etc., Co. v. Hohlquist, 51 Ill. App. 507.

[3] Cobb v. St. Louis, etc., R. Co., 149 Mo. 609; 50 S. W. Rep. 894; 13 Am. & Eng. R. Cas. (N. S.) 632.

[4] Union Pacific R. Co. v. Kelly, 4 Colo. App. 325; 35 Pac. Rep. 923.

[5] Jones v. St. Louis, etc., R. Co., 125 Mo. 666; 28 S. W. Rep. 883; 26 L. R. A. 718.

[6] Church v. Chicago, etc., R. Co., 119 Mo. 203; 23 S. W. Rep. 1056; Dixon v. Chicago, etc., R. Co., 109 Mo. 413; 19 S. W. Rep. 412.

[7] Savage v. Nassau, etc., R. Co., 168 N. Y. 680; 61 N. E. Rep. 1134.

the watchman at a bridge the coemployee of an engineer, operating a locomotive, so as to deprive him of a cause of action, for an injury due to his neglect.[8]

[8] Pike v. Chicago, etc., R. Co., 41 Fed. Rep. 95; 4 Thompson on Negligence, § 5147.

"Where a railroad company delegated its duty of loading a car to a lumber company making a shipment, it is liable for any injury to its own employee caused by negligence of the employees of the lumber company in loading the car." Britt v. Carolina Northern R. Co. (N. C. 1907), 56 S. E. Rep. 910.

"One employed in unloading rails from a train was a fellow workman of the engineer." De Santes v. New York, N. H. & H. R. Co. (N. Y. Supp. 1907), 103 N. Y. S. 849.

"An employee directing a gang engaged in loading iron rails on a flat car and controlling the manner of performing the work is a vice-principal and not a fellow workman, though he has no power to employ or discharge the men." Chicago, etc., Ry. Co. v. Rathneau, 80 N. E. Rep. 119; 225 Ill. 278.

"Where a railroad company and a news company enter into a contract by which an agent of the news company, employed to sell papers and fruit on trains, is permitted to ride thereon, he is employed on the train, and is not a passenger, within act April 4, 1868, § 1 (P. L. 58), and when killed by the negligence of an employee of the railroad company, no recovery can be had for his death." Smallwood v. Baltimore & O. R. Co., 64 Atl. Rep. 732; 215 Pa. 540.

"The employee of a railroad company employed in working about a coal dock, and under the direction of a foreman, was not a fellow workman of a locomotive engineer who worked under the direction of a yard master, and who had nothing to do with the work on the coal dock except to push cars on the dock and pull them out with his locomotive." Lanning v. Chicago Great Western Ry. Co. (Mo. 1906), 94 S. W. Rep. 491.

"Where a workman excavating the roadbed of a railway was injured by the explosion of dynamite caused by the negligence of a coemployee who was helping plaintiff in lighting the fuse, he cannot recover from the railway company employing him." Vito v. West Chester, etc., Electric Ry. Co. (Pa. 1907), 66 Atl. Rep. 659.

"A locomotive wiper while holding a piece of machinery in order to assist a mechanic engaged in repairing a locomotive was a fellow workman with the mechanic." Schneider v. Missouri Pac. Ry. Co. (Mo. App. 1906), 94 S. W. Rep. 730.

"A person employed to clean the cinders out of engines in a cinder

pit is a fellow workman of an assistant hostler employed to move engines from one part of the yards to another." Atchison, etc., Ry. Co. v. Dickens (Ind. T. 1907), 103 S. W. Rep. 750.

"Neither a roundhouse inspector charged with the duty of inspecting the pilot of an engine, nor a section foreman and his men, required to keep the track in safe condition, are fellow workmen of a brakeman." Missouri, etc., Ry. Co. v. Wise (Tex. Civ. App. 1908), 106 S. W. Rep. 465.

"Where a semaphore was seasonably set red so that it must have sent the danger signal down the line, which the engineer in the exercise of proper vigilance could not have failed to distinguish, and the collision resulted either from his failure of duty in this behalf or from the failure of the semaphore tender to change the signal from green to red until too late for the engineer to stop the train, the resulting injury to a fireman on an engine was caused by the negligence of a fellow workman." Tillson v. Maine Cent. R. Co. (Me. 1907), 67 Atl. Rep. 407.

"Where the inspection of cars and the discovery of defects therein were confided by a railway company to car inspectors, a rule of the company that flying switches should not be made without testing the brakes of the cars did not make employees engaged in switching agents for the inspection of the cars and the discovery of defects, and it was not liable to an employee for the negligence of a fellow employee violating the rule." Fogarty v. Southern Pac. Co. (Cal. 1907), 91 Pac. Rep. 650.

"A railroad employee does not assume the risk arising from the failure of another employee to use ordinary care in uncoupling cars." Missouri, etc., Ry. Co. v. Barnes (Tex. Civ. App. 1906), 95 S. W. Rep. 714.

A physician who agrees to wait upon railroad employees and passengers, when sick or injured, is not a fellow employee with a train crew, by whose negligence he is killed, while on the track going to the station to take a train, in order to pay a visit to one of his own patients. Tingle v. Long Island R. Co., 96 N. Y. S. 865; 109 App. Div. 793.

A student brakeman, learning the business, is held to be a fellow workman of the regular train crew, in California, though he receives no remuneration for his services. Weisser v. Southern Pac. R. Co., 83 Pac. Rep. 439.

A master mechanic was held to represent the company, in Taylor v. Evansville, etc., R. Co., 121 Ind. 124; 22 N. E. Rep. 876; 6 L. R. A. 584; 41 Am. & Eng. R. Cas. 437; Cooper v. Pittsburg, etc., R. Co., 24 W. Va. 37; Hough v. Texas, etc., R. Co., 100 U. S. 213; 21 Am.

Ry. Rep. 451; Tabler v. Hannibal, etc., R. Co., 93 Mo. 79; 5 S. W. Rep. 810; 31 Am. & Eng. R. Cas. 185.

An assistant road master was held to be vice-principal, in Harrison v. Detroit, etc., R. Co., 79 Mich. 409; 44 N. W. Rep. 1034; 41 Am. & Eng. R. Cas. 398.

A boss of railroad shops is a vice-principal of a helper in the shops. Union Pacific R. Co. v. Fort, 17 Wall. (U. S.) 553; Proctor v. Missouri, etc., R. Co., 42 Mo. App. 124.

A brakeman is held to be a coemployee with his conductor, in Wonder v. Baltimore, etc., R. Co., 32 Md. 411; Henry v. Staten Island R. Co., 81 N. Y. 373; 2 Am. & Eng. R. Cas. 60; Brown v. Central Pacific R. Co., 72 Cal. 523; 14 Pac. Rep. 138.

He is held to be a coemployee with a fireman of another train on the same railroad, in Relyea v. Kansas City, etc., R. Co., 112 Mo. 86; 20 S. W. Rep. 480; 53 Am. & Eng. R. Cas. 578.

And also of switchmen, or other brakemen operating switch, in Slattery v. Toledo, etc., R. Co., 23 Ind. 81; Connelly v. Minneapolis, etc., R. Co., 38 Minn. 80; 35 N. W. Rep. 582; Chicago, etc., R. Co. v. Rush, 84 Ill. 570.

Bridge builder was held to be representing company, in Davis v. Concord, etc., R. Co., 55 Vt. 84; 11 Am. & Eng. R. Cas. 173.

A railroad manager is a vice-principal of the men under his orders. Galveston, etc., R. Co. v. Arispe, 81 Texas 517; 17 S. W. Rep. 47; 48 Am. & Eng. R. Cas. 350; Phillipps v. Chicago, etc., R. Co., 64 Wis. 475; 25 N. W. Rep. 544; 23 Am. & Eng. R. Cas. 453.

Fireman was held to be coemployee of brakeman, in Kersey v. Kansas City, etc., R. Co., 79 Mo. 362; 17 Am. & Eng. R. Cas. 638; Greenwald v. Marquette, etc., R. Co., 49 Mich. 197; 13 N. W. Rep. 513; 8 Am. & Eng. R. Cas. 133.

CHAPTER XIX.

STATUTES ABOLISHING THE COMMON LAW.

§ 501. Objects and reasons for legislation affecting employers and employees.
502. Objections to such legislation.
503. History of legislation regarding.
504. Constitutionality of such statutes.
505. Extraterritorial effect of such statutes.
506. Contracts in contravention of statutes.
507. Actions for death, due to coemployee's negligence.
508. Injuries received while obeying employer's rules.
509. Injuries due to negligence of superintendent.
510. Person controlling car, train, or locomotive.
511. Negligence of employee controlling any signal, point, or switch.
512. Liability for defects in "ways, works, machinery, or plant."
513. Statute of Alabama.
514. The statute of Arkansas.
515. The civil code of California.
516. Colorado laws.
517. Statute of Connecticut
518. Florida statute.
519. The Georgia code.
520. The safety appliance act of Illinois.
521. The Indiana statute.
522. The statute of Iowa.
523. The general statutes of Kansas.
524. Kentucky statutes.
525. The code of Louisiana.
526. The revised laws of Massachusetts.
527. Laws of Minnesota.
528. Laws of Mississippi.
529. The statute of Missouri.
530. The Montana code and constitution.
531. The statute in Nebraska.
532. The legislation in Nevada.
533. The laws of New Mexico.
534. The New York statute.

§ 535. The North Carolina laws.
536. The North Dakota code.
537. The annotated statutes of Ohio.
538. Constitution of Oklahoma.
539. Legislation of Oregon.
540. Legislation of Pennsylvania.
541. The Constitution of South Carolina.
542. South Dakota legislation.
543. The laws of Texas.
544. The Federal Employer's Liability Act.
545. The United States Safety Appliance Act.
546. The law of Vermont.
547. The Virginia Constitution.
548. The statute of Washington.
549. The statute of Wisconsin.
550. The Constitution of Wyoming.

§ 501. **Objects and reasons for legislation, affecting employers and employees.**— Regardless of the wisdom of the common-law rule exempting the employer from liability for injuries to his employees from the negligence of other workmen with the injured person, that there has been a growing demand for the change or abolition of this rule, is abundantly evidenced by the statutory enactments in the United States and other countries, with reference to the more hazardous occupations, such as railroading. Much of this legislation is found to be unwise or ill-considered, by the courts and text writers, and too often, instead of being prompted by the interests of the employees, or the large industrial class in whose name such legislation is proclaimed to be enacted, it is prompted by those who expect to prey upon this class by the enforcement of otherwise illegal claims for personal injury actions, out of which a large proportion of the recovery goes to the representative of the injured employee and but a small portion to the party entitled thereto. But whether the growing public sentiment favorable to the repeal of the common-law rule obtaining in actions for injuries to employees, is due in any degree to the demands of politicians,

or to the restlessness of the individual citizen and the growing desire for greater individual rights and the further limitation upon the rights of the corporations, fostered as such demand is, by the modern growth of the idea that change alone can bring relief for industrial and civil evils, the increasing demand for the extension of the rights of the employee and the recognition of a liability on the employer's part, where none heretofore existed, has culminated in much legislation subjecting the employer to a liability for injuries to his employees, growing out of the carelessness of other workmen.

The general object of such legislation is to change the common-law rule of nonliability of employers of labor, particularly in the occupation of railroading, for personal injuries received by employees in the service, occasioned by the negligence of a coemployee. Frequently legislatures go even so far as to relax the salutary rule of the common law which makes contributory negligence a defense to claims for such injuries, and enables a recovery by an employee, for an injury caused by the negligence of a coemployee, even though the injured one contributed by his own negligence, to his own injury.[1] To effectuate such legislation, it is also generally provided that any contract, rule or regulation, seeking to relieve the employer from the liability created, shall be void.

It is unquestionably true, that in modern times personal injuries have become a tremendous burden to the large class of employees engaged in such hazardous occupations as railroading. As a partial relief for this burden, it is urged that whatever reason existed for the common-law rule, when it was first announced, can no longer exist, under modern meth-

[1] See Report of Mr. Sterling, for the majority of Com. on Jud., H. R. U. S., No. 1386, accompanying H. R. 20,310, on Liability of Employers, April 4, 1908.

ods of commerce by railroad. That while coemployees then had some influence over each other, tending to their personal safety, that this is not true, under present industrial methods. It is also urged that such legislation is conducive to greater care in the operation of railroads, because, by the common-law rule, the employee is not held to such strict rules of caution, for the safety of his coemployees, since the employer is not liable for his want of care.[2]

§ 502. **Objections to such legislation.**— Among the objections urged to such legislation, it is stated, in reply to the suggestion that greater care ought to be taken by the employer in the employment of competent and careful employees, that the common-law rule renders the employer liable for the employment or retention in his service of any but competent and skilled workmen, in case of an injury by an incompetent or habitually careless employee.[3] The basis of every personal injury action is a breach of duty on the part of the one charged with causing the injury and unless such breach of duty, or negligence is shown, whether by decision of the court, or by legislative act, it is wrong to compel charitable contributions under the guise of legal formulas, from one not morally responsible for the injury sustained. The contract of employment does not, as such, imply a contract of insurance and it is wrong to make of the employer, an insurer of his employees, but they should be left to carry insurance or not, as they deem it wise or unwise for their interests so to do.

In morals each person is responsible for his own acts or

[2] Rep. Com. Jud. H. R. U. S., No. 1386, on H. R. 20,310, page 3.

[3] Wabash R. Co. v. McDaniels, 107 U. S. 454; 11 Am. & Eng. R. Cas. 158; Holden v. Fitchburg, etc., R. Co., 129 Mass. 268; 37 Am. Rep. 343; 2 Am. & Eng. R. Cas. 94; Stafford v. Chicago, etc., R. Co., 114 Ill. 244; 2 N. E. Rep. 185; Dillon v. Union Pacific R. Co., 3 Dill. (U. S.) 319; Harper v. Indianapolis, etc., R. Co., 44 Mo. 488.

omissions but not for those of another person. It is only by the fiction or implication of the law, for the protection of society, that the rule *respondeat superior* exists. Within the contract of employment and between employer and employee, as in all other relations of life, every one assumes all the ordinary hazards, not due to the negligence of another, and is answerable for what he himself does or fails to do. It is generally found to be a dangerous experiment to modify or abolish such salutary rules of the common law, founded upon the interests of humanity and the rights of litigants, as settled by the best legal minds of the ages, during a period the most progressive that the world has ever witnessed.

The wisdom of such statutes is also questioned, because it is contended that they proceed upon contradictory principles, in imposing an increased responsibility upon the employer, presumably in order to make him more careful in the selection of his employees, and at the same time they minimize the necessity for care on the part of the employees, by allowing a recovery for their negligence. Such laws indeed seem counter to natural justice, in thus placing a reward upon the wrongful act of one person and penalizing another, not otherwise responsible therefor, for the effect of such carelessness.[4]

It is also urged against such legislation and the equality and fairness of such laws, that they discriminate against the companies engaged as common carriers, since they are made responsible to one employee for an injury suffered by the act of a coemployee, thus placing all employers who are common carriers, in a disfavored class, and all of their employees in a favored class to themselves.[5]

But with legislatures, equality and justness does not always furnish the proper guides, but far too often popular

[4] See H. R. No. 1386, on Liability of Emp., Min. Rep. Com. Jud., on H. R. 20,310, p. 95, April 4, 1908.

[5] Howard v. Illinois Central R. Co., 207 U. S. 463.

enactments, whether just or unjust, furnish the motive that crystallizes into written laws, which the courts and lawyers, in their strict adherence to these ideals, are called upon to set aside or construe, so as best to subserve the interests and rights of the citizen. Industrial evils are too often due to an excess of legislation, than the contrary and a cessation of the wholesale flood of statutory enactments against unpopular classes will do much to relieve the social evils.[6]

§ 503. **History of legislation regarding.**— The common-law rule that an employer was not responsible for injuries to his employees, caused by the negligence of competent co-employees, was first announced in England in 1837, since which time this rule has been generally followed both in England and the United States, except where abrogated or modified by statute.

The common-law rules, governing the liability of employers for injuries to their employees, still prevail in many of the United States, but in many of the States and also in many of the European countries, new rules of liability have been adopted, which generally extend the responsibility of the employer, as it was recognized at common law.

England, in 1880,[7] passed an act which abolished the common-law rule governing the employer's liability to his employees, engaged in the operation of railroad trains.

Germany, for many years, has been enacting statutes of different character, making inroads upon the common-law rule.

Austria, in 1869, passed a law making all railroad com-

[6] See Paper Before Mo. Bar Ass'n, Sept., 1907, at St. Joseph, Mo., entitled, The Judiciary and Public Sentiment.

[7] Emp. Liab. Act 1880, § 1; Cox. v. Great Western R. Co., L. R. 9 Q. B. 106; 6 Am. & Eng. R. Cas. 485; 43 & 44 Vict. 42.

panies responsible for injuries to their employees, not due to the contributory negligence of the injured employee.

The Code Napoleon, which is still in force in Belgium and Holland, made the employer liable for all injuries received by the workmen in his service.

In the United States, Georgia, in 1856, abolished the common-law rule, as to railroad employees; Iowa abrogated the rule as to train operatives, in 1862; Kansas enacted a statute abolishing the rule as to railroad companies, in 1874; Alabama eliminated the rule in so far as it applied to railroad companies, in 1885; Minnesota passed a similar act, in 1887; Missouri, North Carolina, North Dakota, and Massachusetts, have practically abolished the common-law rule, in so far as it applied to railroad employees, actually operating trains; Wisconsin has passed a similar law, and Florida, Ohio, Mississippi and Texas have greatly modified the common-law rule, to the material advantage of the employees of railroad companies, while Colorado, in 1901, abolished the common-law rule entirely.

Nor has this legislation been confined entirely to the different States, in the United States, but in 1906, the Congress of the United States passed a similar act, abolishing the common-law rule as to railroad companies and practically establishing, as to this favored class of employees, the rule of comparative negligence, permitting recovery by employees of railroad companies, even though the injured employee was himself guilty of negligence, contributing to cause his injury. This act was held to be violative of the Constitution by the Supreme Court,[8] and immediately after

[8] Howard v. Illinois Central R. Co., 28 Sup. Ct. Rep. 141; 207 U. S. 463.

For history of the legislation in the United States and foreign countries, upon employer's liability, see Report to Congress, by Jud. Com., on H. R. 20,310, Rep. No. 1,386, filed April 4, 1908, in Cong.

the rendition of this decision, another act was passed of similar import, in the year 1908.

§ 504. **Constitutionality of such statutes.**— In the first few States, in the United States, where statutes were enacted that abrogated the common-law rule, exempting the employer from liability for injuries to his employees, caused by the negligence of competent coemployees, the constitutionality of such acts was drawn in question and the courts of both the State and Federal Government passed upon the constitutionality of these statutes.

The Iowa Code, of 1873, was assailed, because it was in conflict with the 14th Amendment to the United States Constitution, guaranteeing the equal protection and benefit of the law, but both the Supreme Court of Iowa [9] and the Supreme Court of the United States [10] upheld the statute.

The statute of Kansas, of 1874, was claimed to deprive railroad companies of their property, without due process of law, and to deny to them the equal protection of the laws, but both the Supreme Court of Kansas [11] and the Supreme Court of the United States [12] likewise upheld this statute.

U. S., at Washington, D. C. In this report, it is stated that the first legislation in England on this subject, was in 1888, instead of in 1880, which was the date of the Employer's Liability Act, as to operation of Railroads, in England. (43 & 44 Vict. 42.)

[9] Pierce v. Central R. Co., 73 Iowa 140; 34 N. W. Rep. 783; Bucklew v. Central R. Co., 64 Iowa 603; Rayburn v. Central R. Co., 74 Iowa 637; 35 N. W. Rep. 606; 38 N. W. Rep. 520; Deppe v. Chicago, etc., R. Co., 36 Iowa 52; McAunich v. Mississippi, etc., R. Co., 20 Iowa 338.

[10] Chicago, etc., R. Co. v. McLaughlin, 119 U. S. 566; 7 Sup. Ct. Rep. 1366.

[11] Missouri Pacific Ry. Co. v. Mackey, 33 Kansas 298; 6 Pac. Rep. 291; 22 Am. & Eng. R. Cas. 306; Missouri Pacific Ry. Co. v. Haley, 25 Kansas 35; 5 Am. & Eng. R. Cas. 594; Atchison, etc., R. Co. v. Koehler, 37 Kansas 463; 15 Pac. Rep. 567; 31 Am. & Eng. R. Cas. 312.

[12] Missouri Pacific Ry. Co. v. Mackey, 127 U. S. 205; 8 Sup. Ct. Rep.

The Missouri Act of 1897 was assailed upon similar constitutional grounds, but was likewise upheld by the Supreme Court of that State,[13] as well as by the United States Supreme Court.[14] And the statutes of Georgia [15] and Wisconsin,[16] as well as other State laws on this subject, have been upheld as constitutional laws.

The Act of Congress of 1906 was held to be unconstitutional by the Supreme Court, because it embraced subjects within the authority of Congress to regulate and also included subjects not within the constitutional power of that body to regulate and the two were so interblended as not to be capable of separation.[17]

The act was also assailed because it discriminated against those engaged in interstate commerce, as common carriers, in that it made them responsible to employees for injuries due to the negligence of coemployees, thus placing all employers, who were common carriers, in a disfavored class and all their employees in a favored class, but upon these contentions, the court observed: "It must not be implied that we question the correctness of previous decisions, noted in the margin,[18] wherein State statutes were held not to

1161; 33 Am. & Eng. R. Cas. 390; Minneapolis, etc., R. Co. v. Herrick, 127 U. S. 210.

[13] Powell v. Sherwood, 162 Mo. 605; 63 S. W. Rep. 485; Callahan v. St. Louis, etc., Ry. Co., 170 Mo. 473; 71 S. W. Rep. 208; 94 Am. St. Rep. 746; 60 L. R. A. 249.

[14] St. Louis, etc., Ry. Co. v. Callahan, 194 U. S. 628; 24 Sup. Ct. Rep. 857; 48 L. Ed. 1157.

[15] Georgia, etc., R. Co. v. Ivey, 73 Ga. 499; 28 Am. & Eng. R. Cas. 392.

[16] Ditberner v. Chicago, etc., R. Co., 47 Wis. 138; 2 N. W. Rep. 69.

[17] Howard v. Illinois Central R. Co., 28 Sup. Ct. Rep. 141; 207 U. S. 463.

[18] The cases cited in the margin of the opinion, were, Missouri Pacific Ry. Co. v. Mackey, 127 U. S. 205; Minneapolis, etc., Ry. Co. v. Herrick, 127 U. S. 210, and Chicago, etc., R. Co. v. Pontius, 157 U. S. 209.

be repugnant to the 14th Amendment, although they classified steam railroads in one class for the purpose of applying a rule of master and servant." [19]

[19] Howard v. Illinois Central R. Co., 28 Sup. Ct. Rep. 141; 207 U. S. 463.

In some jurisdictions, these statutes abolishing the common-law rule as to fellow service, have been attacked as unconstitutional because they are class legislation, but where they only abrogate the rule as to those employees actually engaged in the operation of a railroad, they have been upheld, on this ground. O'Brien v. Chicago, etc., R. Co., 116 Fed. Rep. 502; Indianapolis, etc., R. Co. v. Houlihan, 157 Ind. 494; 60 N. E. Rep. 943.

But where such statutes attempt to impose a liability upon railroads specially, as to injuries received by all classes of employes, by the negligence of fellow workmen, regardless of the grade of the service or whether such injury is received in the operation of the railroad or otherwise, they have been held unconstitutional, in Schroeder v. Chicago, etc., R. Co., 41 Iowa 344; 47 Iowa 375; Chicago, etc., R. Co. v. Pontius, 52 Kansas 264; 34 Pac. Rep. 739; Johnson v. St. Paul, etc., R. Co., 43 Minn. 222; 45 N. W. Rep. 156; 8 L. R. A. 419.

But in North Carolina, and Wisconsin, it was held that the statutes are not unconstitutional, although not applicable only to employees engaged in the work of operating a railroad. Hancock v. Norfolk, etc., R. Co., 124 N. Car. 222; 32 S. E. Rep. 679; Ditberner v. Chicago, etc., R. Co., 47 Wis. 138.

These decisions seem counter to the best settled principles, for, as observed by the Supreme Court of Massachusetts, in an early case, "It is manifestly contrary to the first principles of civil liberty and natural justice and of the spirit of our constitution and laws that any one citizen should enjoy privileges and advantages which are denied to all others, under like circumstances, or that anyone should be subjected to losses, damages, suits, or actions from which all others, under like circumstances are exempted." Holden v. James, 11 Mass. 404.

Upon other questions than that of abolition of the common-law fellow service rule, this fundamental rule has been announced by the United States Supreme Court, as to railroad companies, for it was held, in Gulf, etc., R. Co. v. Ellis (165 U. S. 150) that a statute which arbitrarily classified railroad companies, exclusively, was void, because in conflict with the 14th Amendment to the Constitution of the United States.

In Akerson v. Chicago, etc., R. Co., the Iowa statute of 1862 was

considered by the Iowa Supreme Court, with reference to its application to all employees in the service of railroad work, and in the course of its opinion, the court said:

"The peculiarity of the railroad business which distinguishes it from any other is the movement of vehicles or machinery of great weight on the track by steam or other power, and the dangers incident to such movements are those the statute was intended to guard against. If, then, the injury is received by an employee whose work exposes him to the hazards of moving trains, cars, engines, or machinery on the track, and is caused by the negligence of a coemployee in the actual movement thereof, or in any manner directly connected therewith, the statute applies, and recovery may be had. Beyond this the statute affords no protection. The purpose of the lawmakers was evidently not to make men, because employed by railroad companies, favorites of the law, but to afford protection owing to the peculiar hazards of their situation." Ackerson v. Chicago, etc., R. Co., 75 N. W. Rep. 676. See, also, Stroble v. Chicago, etc., R. Co., 70 Iowa 555; 31 N. W. Rep. 63; Luce v. Minneapolis, etc., R. Co., 67 Iowa 75; 24 N. W. Rep. 600; Reddington v. Chicago, etc., R. Co., 78 N. W. Rep. 800; Foley v. Chicago, etc., R. Co., 64 Iowa 644; 21 N. W. Rep. 124.

A similar construction of the Minnesota statute was adopted by the Supreme Court of that State: Lavelle v. St. Paul, etc., R. Co., 40 Minn. 249; 41 N. W. Rep. 974; Johnson v. St. Paul, etc., R. Co., 43 Minn. 222; 45 N. W. Rep. 156; 8 L. R. A. 419; Jemming v. Great Northern R. Co., 104 N. W. Rep. 1079. In the Lavelle case, *supra*, in discussing this feature of the statute and the reason for the rule adopted, the court said:

"Therefore, after mature consideration, our conclusion is that, if any limitation is to be placed by the courts upon the application of this statute (and on constitutional grounds there must be) the only one which will furnish any definite or logical rule is to hold that it only applies to those employees *who are exposed to the peculiar hazards incident to the use and operation of railroads*, and whose injuries are the result of such dangers. We do not mean to say that there may be reasons suggested by some differences in the nature of the employment which would warrant the legislature in placing some other hazards within the provisions of such a law; but if the courts should attempt to impose upon the general language of this statute any other limitation than the one suggested, they would be all at sea, without either rudder or compass. Applying the test suggested, it is plain that plaintiff's case is not within the provisions of the act."

The best judicial thought upon this question seems to be that such statutes must not make the liability depend upon the fact of the *character of the employer*, but upon the *nature of the employment, or*

the statute making a special class of employers liable, cannot be upheld. Bedford Quarries Co. v. Baugh, 80 N. E. Rep. 529; Ballard v. Mississippi Oil Co., 81 Miss. 507; 34 So. Rep. 533; 95 Am. St. Rep. 476; 62 L. R. A. 407; Tullis v. Lake Erie, etc., R. Co., 175 U. S. 348; Connolly v. Union Sewer, etc., Co., 184 U. S. 540; South Indiana R. Co. v. Harrell (Ind.), 68 N. E. Rep. 262; Indianapolis, etc., R. Co. v. Forman, 69 N. E. Rep. 669; Pittsburg, etc., Ry. Co. v. Lightheiser, 78 N. E. Rep. 1033; Indianapolis, etc., Ry. Co. v. Houlihan, 157 Ind. 494; 60 N. E. Rep. 543; 54 L. R. A. 787.

The Indiana statute making railroad companies liable for injuries to employees due to the negligence of other employees, was held not to deprive the railroad company of the equal benefit of the law or to impair the obligations of any contract, in Pittsburg, etc., R. Co. v. Lightheiser, 78 N. E. Rep. 1033.

The Pennsylvania Act of 1868 was held not to deny to employees of railroad companies the equal protection or benefit of the law or deny them due process of law, in Martin v. Pittsburg, etc., R. Co., 203 U. S. 284; 51 L. Ed. 184; 27 Sup. Ct. Rep. 100.

The Mississippi Constitution of 1890, § 193, is held not to be violative of the 14th Amendment to the Federal Constitution, in Bradford Con. Co. v. Heflin, 88 Miss. 314; 42 So. Rep. 174.

The act of the 27th General Assembly of Iowa, making all contracts of insurance or for indemnity previously entered into void, in case of a resulting personal injury, does not deny the railroad company the equal protection of the laws, or impair contracts. McGuire v. Chicago, etc., R. Co., 108 N. W. Rep. 902.

The Colorado Laws of 1901, p. 161, regarding liability of employers for acts of coemployees, does not deny the employer his property without due process of law. Vindicator Consolidated, etc., Co. v. Firstbrook, 86 Pac. Rep. 313.

The equal protection of the laws was held not to be denied the railroad company, under Minnesota laws (1894, § 2701), by construing the proviso excepting cases of injuries to employees on new railroads in process of construction, from the provisions of the general laws, in Minnesota, etc., Co. v. Kline, 199 U. S. 593; 26 Sup. Ct. Rep. 159.

The Texas statute was held to be constitutional, in International, etc., R. Co. v. Still, 88 S. W. Rep. 257.

And the Minnesota statute was held to be constitutional, in Kibbe v. Stevenson Iron Mining Co., 136 Fed. Rep. 147; 69 C. C. A. 145.

And the Missouri statute was upheld, on same grounds, in St. Louis Merchant's Bridge Terminal Ry. Co. v. Callahan, 194 U. S. 628; 48 L. Ed. 1157; 24 Sup. Ct. Rep. 857; 170 Mo. 476; 71 S. W. Rep. 208; 60 L. R. A. 249; 94 Am. St. Rep. 746.

§ 505. **Extraterritorial effect of such statutes.**— In accordance with the rule discussed in a previous section,[20] that the courts of a State where an action is brought will defer to the rule of law obtaining in the State where the cause of action arose, in the adjudication of the rights of the parties, and if the plaintiff has a cause of action under the statutes of the State where the cause arose, he will be permitted a recovery in the State where the suit is filed, but otherwise not, regardless of the law of the forum, it is generally held that where the statutes of a State give a right of action for injuries due to the negligence of coemployees, a cause accruing in such a State will be enforced in another State, where the right of recovery would not be opposed to the settled policy of the State where the cause of action is tried.

Accordingly, it is held that the Alabama law, regarding fellow service, will be applied in a Tennessee court, in an action involving negligence, based on an Alabama statute, notwithstanding the law in Tennessee is different.[21]

But this rule is not of universal application, in actions tried in other than the State where the cause of action arose, in the absence of a statute in such State, giving a right of action. It is held that an action will not lie in Wisconsin, prior to the fellow-service law of that State by an employee

The Ohio statute was held to be constitutional, in Baltimore, etc., R. Co. v. Hottman, 25 Ohio Cir. Ct. R. 140.

The equal protection of the laws is held, in Bradford Construction Co. v. Heflin (Miss.), 12 L. R. A. (N. S.) 1040, not to be denied to railroad companies by a constitutional provision repealing the fellow-service doctrine in favor of employees of commercial railroads, but not as to logging, lumber, and other like roads.

[20] See Section 463, Conflict of Laws, in Chapter, Coemployees at Common Law.

[21] Nashville, etc., R. Co. v. Foster, 10 Lea (Tenn.) 351; 11 Am. & Eng. R. Cas. 180. See, also, Atchison, etc., R. Co. v. Moore, 29 Kansas 632; 11 Am. & Eng. R. Cas. 243; Alexander v. Pennsylvania R. Co., 48 Ohio St. 623; 30 N. E. Rep. 69.

against an employer, for injuries received through the negligence of a coemployee, in the State of Iowa, although the statute of that State gave a right of action therefor, as the *lex fori,* and not the *lex loci,* was applied.[22] In a case tried in a federal court, in Minnesota, for an injury to a track repairer, hurt by the negligence of his superintendent, in Iowa, according to the law of the State where the cause of action was tried, the plaintiff and the employee causing the injury, were held to be coemployees, but according to the federal decisions, they were not, and it was held that the court would not follow the State decisions, as the question did not involve a construction of a State statute.[23]

Of course a statute of one State, making employers liable for injuries to their employees by the negligence of coemployees, will not apply to an injury received outside of such State, in the absence of an express provision that it should so apply.[24]

[22] Anderson v. Milwaukee, etc., R. Co., 37 Wis. 321.

[23] Northern Pacific R. Co. v. Peterson, 51 Fed. Rep. 182; 4 U. S. App. 574; 2 C. C. A. 157. In Hough v. Texas, etc., Ry. Co. (100 U. S. 213-226; 25 L. Ed. 612-618), replying to the contention that two Texas decisions recognized a right of recovery for an injury due to the negligence of a coemployee, Justice Harlan, said: "Be this as it may, the question before us, *in the absence of positive statute,* depends upon principles of general law, and in their determination, we are not required to follow the decisions of the State courts."

[24] Alabama, etc., R. Co. v. Carroll, 97 Ala. 126; 11 So. Rep. 803; Kahl v. Memphis, etc., R. Co., 95 Ala. 337; 10 So. Rep. 661; Davis v. New York, etc., R. Co., 143 Mass. 301; 9 N. E. Rep. 815.

The parents of a railroad brakeman, of legal age, killed in Kansas, authorized by the statute of that State to sue for his death, while in defendant's employment, were held competent to sue in Missouri, for the death of their son, in Charlton v. St. Louis, etc., R. Co., 200 Mo. 413; 98 S. W. Rep. 529. See, also, Lee v. Missouri Pacific Ry. Co., 195 Mo. 400, 416; 92 S. W. Rep. 614.

But an administrator is not permitted to recover, in Missouri, on a cause of action originating, for the death of an employee, in Kansas, although he would have been competent to sue, in the latter State,

§ 506. **Contracts in contravention of statutes.**— Of course to permit railroad companies to provide for the waiver of statutes enacted for the benefit of employees, upon grounds of the police power of the State, because of its concern in the lives and limbs of its citizens, would practically put it in the power of employers to nullify the statute, at will, and for this reason, where the statute contains a provision to the effect that contracts in violation of the act shall be held void, the courts generally give this effect to all such contracts.[25]

It was accordingly held, in a Kansas case,[26] that a railroad company could not contract in advance, with its employees, for a waiver or release of the statutory liability imposed upon every railroad company in the State, for injuries to its employees, from the negligence of coemployees,[27] and a contract in contravention of the statute was held to be void and to constitute no defense to an action brought by an employee for damages resulting from an injury inflicted by a coemployee.

And construing a similar contract, under the Iowa statute, the federal court, in a recent case,[28] also held that a con-

as such recovery is contrary to the Missouri statute, on the right of recovery for death by negligence. Vawter v. Missouri Pacific Ry. Co. 84 Mo. 679; 54 Am. Rep. 105. See, also, Oates v. Union Pacific Ry. Co., 104 Mo. 514; 24 Am. St. Rep. 348; 16 S. W. Rep. 487; McGinnis v. Missouri Car, etc., Co., 174 Mo. 225; 73 S. W. Rep. 586; 97 Am. St. Rep. 553.

The Indiana statute, giving a right of action for injuries received by an employee outside the State of Indiana, was held unconstitutional, in Baltimore, etc., R. Co. v. Read, 158 Ind. 25; 62 N. E. Rep. 488; Baltimore, etc., R. Co. v. Jones, 158 Ind. 87; 62 N. E. Rep. 994. See, also, McGinnis v. Missouri Car, etc., R. Co., 174 Mo. 225; 73 S. W. Rep. 586; 97 Am. St. Rep. 553.

[25] Kansas Pacific R. Co. v. Peavey, 34 Kansas 472.

[26] Kansas Pacific R. Co. v. Peavey, 29 Kansas 169; 44 Am. Rep. 630; 11 Am. & Eng. R. Cas. 260.

[27] Laws Kansas, 1874, ch. 93.

[28] O'Brien v. Chicago, etc., R. Co., 116 Fed. Rep. 502.

tract made in violation of the statute would constitute no defense to the action for injury or death of an employee injured by the negligence of a coemployee, on a railroad, the court, on this phase of the case, observing: "While such contracts would be effective to protect the railroad company from liability at common law, under such statutory provisions, declaratory of the public policy of the State, they were invalid and constituted no defense against it for the death of the messenger, occurring in the State of Iowa, by reason of the wrecking of the express car in which he was employed, through the negligence and want of ordinary care of the defendant or its servants (employees)."

In the absence of a provision of the statute, however, that contracts waiving the statute shall be invalid, such contracts will be upheld by the courts, as a general rule. In a case which came before the United States Supreme Court,[29]

[29] In this case, in speaking of the contract of the employee, the court said:

"He was not constrained to enter into the contract whereby the railroad company was exonerated from liability to him, but entered into the same freely and voluntarily, and obtained the benefit of it by securing his appointment as such messenger; and such a contract did not contravene public policy." Voigt v. Baltimore, etc., Ry. Co., 176 U. S. 498.

This is not the same rule that is applied in all the States, on this same subject, for it is sometimes held, that irrespective of a statute on the subject, a contract will not be enforced, which attempts to relieve one of the parties thereto from damages sustained by reason of its own negligence. Carroll v. Missouri Pacific Ry. Co., 88 Mo. 239; 57 Am. Rep. 382; Boyd v. Coal Co., 50 N. E. Rep. 368; Catlett v. Young, 143 Ill. 74; 32 N. E. Rep. 447; Sunnyside Coal Co. v. Perry Center, 100 Ill. App. 546; Green v. Western, etc., Co., 30 Wash. 87; 70 Pac. Rep. 310; Western, etc., Co. v. Beaver, 192 Ill. 333; 61 N. E. Rep. 335; Spring Valley Co. v. Patting (Ill.), 71 N. E. Rep. 371.

But a contract between a railroad company and its employees, who voluntarily become members of its relief department, that in case of an injury, the receipt of relief shall constitute a waiver of the right to sue for damages, is held not to be affected by the Missouri fellow-service law and contracts made in violation thereof. Hamilton v. St. Louis, etc., Ry. Co., 118 Fed. Rep. 92.

where an express company had agreed to save harmless a railroad company, for injuries to its employees, a contract between an express messenger and the express company, whereby such employee waived expressly all claims for damages, whether resulting from negligence or otherwise, on the part of the railroad company, was upheld and the plaintiff was held to have no cause of action for an injury due to the negligence of the railroad company.

§ 507. **Actions for death due to coemployee's negligence.**— Since there was no right of action for injury or death of an employee due to the negligence of a coemployee, at common law, it is very generally held, under statutes giving a right of action for death, even though the act is broad enough to cover the death of "any person," that no action can be maintained for the death of an employee, caused by the negligence of a coemployee, unless the statute giving the right of action expressly creates a right of action for an in-

A contract of a railroad company, whereby it was exempted from damages for an injury resulting from the negligence of a vice-principal, was held to be opposed to public policy, in Lake Shore, etc., R. Co. v. Spangler (Ohio), 8 N. E. Rep. 467; Little Rock, etc., R. Co. v. Eubanks, 48 Ark. 460; 3 S. W. Rep. 808; Johnson's Admx. v. Richmond, etc., R. Co., 86 Va. 975; 11 S. E. Rep. 829; Richmond, etc., R. Co. v. Jones, 92 Ala. 218; 9 So. Rep. 276; Purdy v. Rome, etc., R. Co., 125 N. Y. Rep. 255.

That a liability imposed by statute, could not be relieved by contract, was expressly ruled, in Kansas Pacific Ry. Co. v. Peavey, 29 Kansas 169; 44 Am. Rep. 630; Tarbell v. Rutland R. Co. (Vt.), 51 Atl. Rep. 6.

An implied waiver of a statute requiring frogs on railroads to be blocked, cannot be based upon a mere continuance in the service, with knowledge of the violation of the statute. Narramore v. Cleveland, etc., R. Co., 96 Fed. Rep. 298; Coal Co. v. Polland, 62 N. E. Rep. 492.

But in the absence of a statute declaring such contracts void, they have been upheld, in Western, etc., R. Co. v. Bishop, 50 Ga. 465; Mitchell v. Pennsylvania R. Co. (Pa.), 1 Am. Law Reg. 717.

jury resulting in the death of an employee, from such a cause.[30]

As an illustration of this rule, it was formerly held, in Missouri,[31] in accordance with the well-known common-law rule, that the death statute, giving a right of action for death due to the negligence of the employer, did not cover a case where the death of the employee occurred through the negligence of a competent employee, and although by statute, in that State in 1897, this rule of the common law, as to a right of action for negligence resulting in the injury of an employee on a railroad, engaged in the operation of the road, was changed and a cause of action was given for such an injury, as this act did not provide for the survival of such a cause of action, but only provided for actions by injured employees, it was held that as to such a cause of action, occurring prior to the enactment of the law of 1905, giving a right of action for the death of an employee, from such a cause, that no right of action survived.[32] And this is in accord with the general rule of law on this subject.[33]

[30] 4 Thompson on Neg., § 5317, and cases cited; Proctor v. Hannibal, etc., R. Co., 64 Mo. 112, overruling Schultz v. Pacific R. Co., 36 Mo. 13.

[31] Proctor v. Hannibal, etc., R. Co., 64 Mo. 112.

[32] Strottman v. St. Louis, etc., R. Co. (Mo.), 109 S. W. Rep. 798. In this case, the court, *in banc*, were divided. The majority opinion, by Judge Burgess, presents the authorities in accordance with the rule in the text, supplemented by an able opinion by Judge Woodson. Judge Lamm dissents, and rather invokes the rules set forth in the Schultz case (36 Mo. 13), which, since the Proctor decision, that is manifestly in accord with the weight of authority in other jurisdictions — has ceased to be the law in Missouri.

[33] Atchison, etc., R. Co. v. Farrow, 6 Colo. 498; Carle v. Bangor, etc., R. Co., 43 Me. 269; Laughlin v. State, 105 N. Y. 159; Proctor v. Hannibal, etc., R. Co., 64 Mo. 112; Galveston, etc., R. Co. v. Davis, 4 Texas Civ. App. 468; 45 S. W. Rep. 956; 12 Am. & Eng. R. Cas. (N. S.), 832, and cases cited. But, see, *contra*, Quackenbush v. Wisconsin, etc., R. Co., 62 Wis. 411; cited 4 Thompson on Neg., § 5317.

§ 508. Injuries received while obeying employer's rules.— Acts done in obedience to the rules or instructions or orders of the employer, resulting in injury to his employees, where the instructions or orders are given by one representing the employer, in some of the States, are made the basis of an action for damages by statute.[34] Such a statute exists in

In Strottman v. St. Louis, etc., R. Co. (109 S. W. Rep. 776), Judge Burgess, in the majority opinion of the court, said: "We are unable to agree that this section has the effect of transmitting a right of action created by § 1, of the act of 1897, as it has been ruled by this court that that section does not include a claim for damages for injuries occasioned by the negligence of a fellow-servant." Proctor v. Hannibal, etc., R. Co., 64 Mo. 112; Miller v. Missouri Pacific Ry. Co., 109 Mo. 350; 19 S. W. Rep. 58; 32 Am. St. Rep. 673; Sherrin v. St. Joseph, etc., R. Co., 103 Mo. 378; 15 S. W. Rep. 442; 23 Am. St. Rep. 881.

And in the concurring opinion, in same case, Judge Woodson, observed "As neither the act of 1897, nor § 2865, transfers such a cause of action to the widow and children, I feel constrained to hold that the cause of action, created by the act of 1897, in favor of a fellow servant, did not survive his death, nor was it transmitted to his widow and children, after his death." Strottman v. St. Louis, etc., R. Co., 109 S. W. Rep. 781.

Of course this rule does not obtain as to causes of action created in favor of third persons, against the employer, for injuries received through the negligence of employees, for as to such rights of action, the cause is held to survive, in favor of the widow and children, in the following cases, in Missouri: Keeney v. Hannibal & St. Joseph Ry. Co., 105 Mo. 270; 15 S. W. Rep. 983; 16 S. W. Rep. 837; Crumpley v. Hannibal & St. Joseph Ry. Co., 98 Mo. 34; 11 S. W. Rep. 244; King v. Railroad, 98 Mo. 235; 11 S. W. Rep. 563; McQuade v. Suburban Ry. Co., 200 Mo. 157; 98 S. W. Rep. 552; Higgins v. St. Louis & Sub. Ry Co., 197 Mo. 301; 95 S. W. Rep. 863; Jackson v. Railroad, 157 Mo. 623; 58 S. W. Rep. 32; 80 Am. St. Rep. 650; Riska v. Union Depot Ry. Co., 180 Mo. 168; 79 S. W. Rep. 445.

[34] Alabama Code, 1897, §§ 1749, 1750, 1751; Deering's Code & Statute of California, 1885, as amended by ch. 97, Acts 1907; General Statute Connecticut, 1902, § 4702; Annotated St. Indiana, 1894, Revision of 1901, § 7803; Code & Statutes of Montana, 1895, §§ 2242, 2260 and Acts 1905, ch. 1; Constitution, art. 15, § 16; Oklahoma Constitution, 1907, art. 9 § 36; Acts Oregon, 1903, p. 20; Pennsylvania Acts, 1907, Act No. 329, §§ 1, 2; Code Virginia, 1904, §§ 1294k, 1294d subsection 36.

Indiana, and in that State, where a foreman was present giving orders in connection with the moving of certain car trucks and an employee was injured by the fall of the trucks, which his coemployees, under the direction of the foreman, permitted to strike him, it was held that he was entitled to recover, under the statute.[35]

In one case, in the federal court, construing the statute of Indiana, it was held that it was not essential to a recovery that the employee, at the time of the injury, must have been obeying any special order or instruction, but it was sufficient to bring an engineer within the protection of the statute, if he was running his engine, under the telegraphic orders customary on his division, when he sustained the injury by collision with another train.[36] But the Appellate Court of Indiana did not give this construction to the statute, but held that it was necessary, to bring the case of an employee within the statute, that such employee, at the time of his injury, must not only have been conforming to the orders or direction of an agent of the employer, to whose orders he was bound to conform, but that he must also have been obeying a special, as distinguished from a mere general order, at the time of the injury.[37]

It is likewise held that the employer is not responsible under such a statute for the negligent performance of a proper order by a representative of the employer,[38] nor for the disobedience of a reasonable rule, by a coemployee of the injured person, which has directly effected the injury.[39]

[35] Louisville, etc., R. Co. v. Wagner, 153 Ind. 420; 53 N. E. Rep. 927; 14 Am. & Eng. R. Cas. (N. S.) 706.

[36] Cincinnati, etc. R. v. Thiebaud, 114 Fed. Rep. 918; 52 C. C. A. 538.

[37] Grand Rapids, etc., R. Co. v. Petite, 27 Ind. App. 120; 60 N. E. Rep. 1000. See, also, Mobile, etc., R. Co. v. George, 94 Ala. 199; 10 So. Rep. 145.

[38] Thacher v. Chicago, etc., R. Co., 159 Ind. 82; 64 N. E. Rep. 605.

[39] Laughran v. Brewer, 113 Ala. 509; 21 So. Rep. 415.

§ 509. **Injuries due to negligence of superintendent.**— The English Employer's Liability Act,[40] and several of the statutes in the United States,[41] make the employer liable for an injury to his employee, due in whole or in part to the negligence of any agent, entrusted with superintendence, while in the exercise of such superintendence.

The foreman of a section gang, whose duty it was to give warning of the approach of trains, was held to be engaged in superintendence, within the meaning of the Massachusetts statute;[42] a yard master, directing the engineer of a loco-

In the absence of rules requiring section men to guard against the running of irregular trains, proof of the death of a section man, while going with a hand car on a special mission, by a collision with a wild train, creates a *prima facie* case of negligence on the part of the employer. Cincinnati, St. L. & C. R. Co. v. Lang, 118 Ind. 579; 21 N. E. Rep. 317.

A rule that meeting orders must not be sent to trains of superior right, at the place of execution of the order, but that at least one station should intervene, between the receipt and execution of the order, is not a peremptory command, but it is to be construed in a reasonable way and if the dispatcher, in view of his experience, as a reasonably prudent man, thinks it not unsafe to send the meeting order to the train at the place of meeting, this, of itself, will not be held such negligent violation of the rule, as to constitute negligence on the part of the dispatcher. Northern Pac. R. Co. v. Dixon, 139 Fed. Rep. 737.

In the absence of some rule or ordinance limiting the speed of trains, no rate of speed will be held negligence as toward an employee of the company on the track. Cincinnati & N. O., etc., Co., v. Hill's Admr., 89 S. W. Rep. 523; 28 Ky. L. R. 530.

[40] 43 and 44 Victoria, ch. 42, § 1.

[41] Alabama Code, 1897, §§ 1749, 1750; Digest Arkansas, 1904, § 6658 and Acts 1907, ch. 69; Acts California, 1907, ch. 97; Mill's Ann. St. Colo. 1891, and Supp. of 1905, §§ 1511a *et sub.;* Revised Laws Massachusetts, 1902, ch. 106, as amended by Laws 1906, ch. 370; Code Mississippi, 1906, §§ 1985, 4056; Acts New York, 1906, ch. 657; Pennsylvania Acts, 1907, Act No. 329; Code Virginia, 1904, § 1294k, *et sub.;* Acts Wisconsin, 1905, ch. 348.

[42] Davis v. New York, etc., R. Co., 159 Mass. 532; 34 N. E. Rep. 1070.

motive, as to its movements, was held to be so engaged, within the intention of the Alabama statute;[43] an employer was held liable for defective appliances furnished, by direction of his superintendent, in New York,[44] and, in Alabama, if the employee was engaged in giving directions or in the duties of superintendence, it is immaterial that he was not regularly so engaged,[45] or that he was assisting the labor being performed, when the employee was injured.[46]

But an engineer, not regularly endowed with power of supervision or control, who assumes such authority, in connection with the operation of his engine, in consequence of which an employee is injured, cannot bind the employer, within such statutes;[47] a section hand, injured by the act of his foreman, in running a hand car, is not entitled to claim the benefit of such statutes;[48] a car shifter, who starts cars, by his orders, thus injuring an employee thereon, is not entrusted with superintendence, within the meaning of such acts,[49] nor generally, can a recovery be had for any act of supervision by an ordinary employee not authorized to give orders or control other employees in the common service.[50]

§ 510. **Person controlling "car, train or locomotive."**— The negligence of any person controlling a "car, train, or locomotive," under some of the statutes, gives a right of action

[43] Louisville, etc., R. Co. v. Mothershead, 97 Ala. 261; 12 So. Rep. 714.

[44] Illinois Car Co. v. Walsh, 132 Ill. 490; 31 So. Rep. 470.

[45] Richmond, etc., R. Co. v. Hammond, 93 Ala. 181; 9 So. Rep. 577.

[46] Kansas City, etc., R. Co. v. Burton, 97 Ala. 240; 12 So. Rep. 88; 53 Am. & Eng. R. Cas. 115.

[47] Cashman v. Chase, 156 Mass. 342; 31 N. E. Rep. 4.

[48] Shepard v. Boston, etc., R. Co., 158 Mass. 174; 33 N. E. Rep. 508.

[49] Whelton v. West End R. Co., 172 Mass. 555; 52 N. E. Rep. 1072.

[50] McPhee v. Scully, 163 Mass. 216; 39 N. E. Rep. 1007; McCoy v. Westborough, 172 Mass. 504; 52 N. E. Rep. 1064.

for an injury resulting from such negligent control.[51] To constitute a cause of action, under such statutes, it is generally essential to allege and establish that the person causing the injury by the use of the car, engine, or train, was *in charge or control* of the car, train or engine occasioning the injury, for, if not, the protection of the statute does not apply.[52] It is accordingly held, in Massachusetts, that a brakeman in temporary charge of a train, under the general control of the conductor, while it is being switched onto a side track, is not in charge or control of the train, so as to render the employer liable to an employee injured as a result of such brakeman's negligence.[53]

But under many statutes a person, even though temporarily, who is in physical charge or control of an engine, car or train, and while so controlling it, causes an injury, is held to be in charge of the same, so as to render the employer responsible.[54] Under other decisions, the statute is held to include those employees only whose duties relate to the continuous charge or control of the train, or car, and an employee in temporary charge thereof was incapable of rendering the employer liable for his negligent acts.[55]

Under the Massachusetts act, a train is defined to be one or more cars in motion, whether attached to an engine or not.[56] A hand car is held to be a car, under the Alabama

[51] Alabama Code, 1897, §§ 1749, *et sub.;* Mill's Ann. Stat. Colo. 1891, and Supplement of 1905, 1511a, *et sub.;* General Stat. Florida, 1906, §§ 3148, 3149; Ann. Stat. Ind. 1894, Revision of 1901, and § 14, ch. 118, Acts 1907; Revised Laws Massachusetts, 902, ch. 106, as amended by Law, 1906, ch. 370; Acts Oregon, 1903, p. 20; Code Virginia, 1904, § 1294k.

[52] Central, etc., R. Co. v. Lamb, 124 Ala. 172; 26 So. Rep. 969.

[53] Caron v. Boston, etc., R. Co., 164 Mass. 523; 42 N. E. Rep. 112.

[54] Davis v. New York, etc., R. Co., 159 Mass. 532; 34 N. E. Rep. 1070.

[55] Thyng v. Fitchburg, etc., R. Co., 156 Mass. 13; 30 N. E. Rep. 169.

[56] Shea v. New York, etc., R. Co., 173 Mass. 177; 53 N. E. Rep. 396.

statute,[57] so as to render the railroad company liable for an injury received by an employee on account of the negligence of the person in charge thereof and different constructions of these various acts are adopted in the different States, both as regards the appliance named by the statute, and the person who will be considered *in charge* thereof, as will be seen by the cases cited in the footnote.[58]

§ 511. Negligence of employee controlling any "signal, point, switch."— Generally an employee whose duty it is to give signals, or to control or operate any switch, will be held to be in charge or control thereof, so as to charge the railroad company, in case of an injury to a coemployee, in States where the railroad is answerable for the neglect of any person in charge or control of any switch, signal, etc.

It is accordingly held, in Indiana,[59] that a brakeman whose duties require him to place a red light at the rear of the last car in a train, to warn trains or engines approaching from the rear, of the presence of the train, is a person in charge of a signal, so that in case of his neglect to perform this duty, devolved upon him by the rules and regulations of the employer, the railroad company will be responsible for an injury to an employee, from a resulting collision, under such a statute.

An employee whose duties require him to watch the switches on a given portion of a railroad from a tower and

[57] Richmond, etc., R. Co. v. Hammond, 93 Ala. 181; 9 So. Rep. 577; Kansas City, etc., R. Co. v. Crocker, 95 Ala. 412; 11 So. Rep. 262.

[58] A conductor was held to be "in charge" of a train, although temporarily absent, in Donahue v. Old Colony R. Co., 153 Mass. 356; 26 N. E. Rep. 868; an engineer, was held to be "in charge" under the Alabama act, in moving a train and injuring a brakeman. Hissong v. Richmond, etc., R. Co., 91 Ala. 514; 8 So. Rep. 776.

[59] Chicago, etc., Ry. Co. v. Wisker, 71 N. E. Rep. 223; 72 N. E. Rep. 614.

to throw the switches by means of a lever, on signals from the employees on the track, is in charge of the switches, so as to charge a railroad company that he is working for in case of an injury to an employee resulting from his throwing the wrong switch track.[60]

Conductors or other employees who carry switch keys and open and close them for the entry or exit of trains, are employees in charge of such switches, so as to charge the employer in case of a breach of duty on their part.[61]

But an employee in charge of a "switch," is not within the class of employees for whose neglect the railroad company would be responsible, under the Indiana statute,[62] as the act of that State refers to persons in charge of any "switch yard" and not to those who may be in control of the "switches" on the railroad.[63]

§ 512. **Liability for defects in the "Ways, works, machinery or plant."**— Under the Employer's Liability Acts of several States, the liability is predicated on an injury resulting from some defect in the "Ways, works, machinery, or plant," of the employer.[64]

[60] Welsh v. New York, etc., R. Co., 176 Mass. 393; 57 N. E. Rep. 668.

[61] Albrecht v. Milwaukee, etc., R. Co., 94 Wis. 397; 69 N. W. Rep. 63; Birmingham, etc., R. Co. v. Baylor, 101 Ala. 488; 13 So. Rep. 793.

[62] Annotated Statutes Indiana, 1894, Revision of 1901, § 7083.

[63] Baltimore, etc., R. Co. v. Little, 149 Ind. 167; 48 N. E. Rep. 862; 9 Am. & Eng. R. Cas. (N. S.) 427; Charman v. Lake Erie, etc., R. Co., 105 Fed. Rep. 449.

[64] Alabama Code, 1897, §§ 1749, *et sub.;* Mills Ann. Stat. Colorado, 1891 and Supplement of 1905, §§ 1511a *et sub.;* Annotated Stat. Indiana, 1894, Revision of 1901, § 7083; Revised Laws Massachusetts 1902, ch. 106, as amended by Laws 1906, ch. 370; Acts Nebraska, 1907, ch. 48; Acts Nevada, 1907, ch. 214; Acts New York, 1902, ch. 600; Acts 1906, ch. 657; Revised Laws North Carolina, 1905, § 2646; Pennsylvania Acts 1907, Act No. 329.

Foreign freight cars, used by a railroad company,[65] or trucks of a domestic car, used by employees, in a repair shop,[66] have been held to be part of the machinery of the employer, within the meaning of the Massachusetts statute.

But a defect in a common ordinary tool, such as a crowbar, used by an employee at work on aligning the track on a bridge, is held not to come within the definition of "machinery of the employer," for such a tool requires mere muscular strength to use it and if such an employee, while exerting his strength, falls from the bridge because of a defect in the bar, he is not within the protection of such a statute.[67] The defects in the place of work, which is undergoing a change to fit it for the use to be made of it by the employer, is not generally held to be "ways or works" of the employer, within the meaning of such statutes as they apply to "ways or works" as regularly conducted and not to works in the process of construction, which, in the very nature of things cannot be made safe.[68]

A railroad track used by a railroad under a license merely, for the delivery of freight to the owner, is not a part of the "ways" of the railroad company, so as to protect an employee of such company for an injury due to a defect in such a place, as it had no control thereover, hence would not be charged with a duty in regard to such a track.[69]

[65] Bowers v. Connecticut River R. Co., 162 Mass. 312; 38 N. E. Rep. 508.

[66] Gunn v. New York, etc., R. Co., 171 Mass. 417; 50 N. E. Rep. 1031.

[67] Clements v. Alabama, etc. R. Co., 127 Ala. 166; 28 So. Rep. 643. And for same reason an employee injured by the slipping of a hammer, is held to be injured by a defect in the employer's "works or machinery" within such a statute. Georgia, etc., R. Co. v. Brooks, 84 Ala. 138; 4 So. Rep. 289.

[68] This is the rule adopted under the English statute. Howe v. Finch, 17 Q. B. Div. 187.

[69] Engle v. New York, etc., R. Co., 160 Mass. 260; 35 N. E. Rep. 547; 22 L. R. A. 283.

§ 513. **Statute of Alabama.**— The Alabama Code [70] provides:

When a personal injury is received by an employee in the service or business of the employer, the employer is liable to answer in damages to such employee as if he was a stranger and not engaged in such service or employment, in the cases following:

Cotton, negligently piled, so as to fall and injure an employee in a railroad warehouse, is not a part of the employer's "ways, works or machinery," within the Massachusetts Employer's Liability Act. Cahill v. Boston & M. R. Co., 190 Mass. 421; 76 N. E. Rep. 911.

[70] Alabama Code, 1897, §§ 1749, 1750, 1751.

"The Employer's Liability Act (Code 1896, § 1749, subd. 5), making railway companies liable for injury to an employee caused by the negligence of any person in charge of any 'signal, points,' etc., is a literal copy of the English statute using the words 'signal points,' designating an apparatus for giving signals, called 'points.' In the original Alabama statute (Acts 1884–85, p. 116) the word 'signal' was used, without 'points.' *Held*, that the present statute covers cases of negligence of persons having charge of signals generally; 'points' referring to apparatus used in giving signals, and not merely localities." Cogbill v. Louisville & N. R. Co. (Ala. 1907), 44 So. Rep. 683.

"The Employer's Liability Act (Code 1896, § 1749, subd. 5), making an employer liable for injuries to an employee caused by the negligence of an employee having control of any engine or train, embraces only those employed in and about a railroad; and one seeking a recovery under the statute must plead and prove that at the time of the injury he was employed in and about the railroad, and it is not sufficient that he was employed at the plant of an employer who also owned a railroad operated in furtherance of the business of the plant." Alabama Steel & Wire Co. v. Griffin (Ala. 1907), 42 So. Rep. 1034.

Under the Alabama statute, it is held that the statute changed the rule of the common law, as to liability of railroad company, for injuries from the negligence of coemployees. Louisville, etc., R. Co. v. Allen, 78 Ala. 494; 28 Am. & Eng. R. Cas. 514.

The railroad company is not only liable for the negligence of superintendents, but also for the negligence of an employee having in charge signal points, cars, etc., although assisting in the work. Kansas City, etc., Ry. Co. v. Burton, 97 Ala. 240; 12 So. Rep. 88; 53 Am. & Eng. R. Cas. 115.

Action must be based on the statute, and not on common-law negli-

1. When the injury is caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with, or used in the business of, the employer.

2. When the injury is caused by reason of the negligence of any person in the service or employment of the employer who has any superintendence intrusted to him, whilst in the exercise of such superintendence.

3. When such injury is caused by reason of the negligence of any person in the service or employment of the employer, to whose orders or directions the employee at the time of the injury was bound to conform, and did conform, if such injuries resulted from his having so conformed.

4. When such injury is caused by reason of the act or omission of any person in the service or employment of the employer, done or made in obedience to the rules and regulations or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf.

5. When such injury is caused by reason of the negligence

gence, to give a right of action, for the negligence of a coemployee. Holland v. Tennessee, etc., R. Co., 91 Ala. 444; 8 So. Rep. 524.

Under statute employer liable for negligence of fireman in improperly transmitting signals of switchman to engineer. Richmond, etc., R. Co. v. Jones, 92 Ala. 218; 9 So. Rep. 276.

A hand car is such a car, as gives a right of action, for an injury for the negligent handling thereof. Kansas City, etc., Ry. Co. v. Crocker, 95 Ala. 412; 11 So. Rep. 262.

Proof of an intent to injure the injured employee is not essential, under the Alabama Code (1896, § 1749), but a conscious failure of an employee in chare of an engine to use reasonable care to avoid injuring the plaintiff, after discovery of his danger, is held to give a right of action. Alabama Great Southern R. Co. v. Williams, 37 So. Rep. 255.

A fireman, at the command of an engineer, who was under the engine, intending to move the reverse lever back three feet, moved the wrong lever and thus injured the engineer, but it was held that the fireman was not in charge of the engine so as to render the employer liable, under the statute. Louisville, etc., R. Co. v. Goss, 137 Ala. 319; 34 So. Rep. 1007.

of any person in the service or employment of the employer, who has the charge or control of any signal, points, locomotive, engine, switch, car, or train upon a railway, or of any part of the track of a railway.

But the employer is not liable under this section if the employee knew of the defect or negligence causing the injury and failed in a reasonable time to give information thereof to the employer, or to some person superior to himself engaged in the service or employment of the employer, unless he was aware that the employer or such superior already knew of such defect or negligence; nor is the employer liable under subdivision one, unless the defect therein mentioned arose from or had not been discovered or remedied owing to the negligence of the employer, or of some person in the service of the employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.

Damages recovered by the employee, of and from the employer, are not subject to the payment of debts, or any legal liabilities incurred by him.

If such injury results in the death of the employee, his personal representative is entitled to maintain an action therefor, and the damages recovered are not subject to the payment of debts, but must be distributed according to the statute of distributions.

§ 514. **The Statute of Arkansas.**— The most recent statutes of Arkansas[71] enact that,

[71] Digest of Arkansas statutes, 1904, §§ 6658, 6659, 6660, and acts of 1907, ch. 69, §1.

The Supreme Court of Arkansas has held that the practical effect of these sections is to limit the defense of assumed risk, as to negligent acts of other employees of railroad company, to the neglect of those alone who are coemployees within the meaning of the statute and to make the railroad company liable for the acts of all other co-

All persons engaged in the service of any railway corporation, foreign or domestic, doing business in this State, who are intrusted by such corporation with the authority of superintendence, control, or command of other persons in the employ or service of such corporation, or with the authority to direct any other employee in the performance of any duty of such employee, are vice-principals of such corporation and are not coemployees with such employee.

All persons who are engaged in the common service of such railway corporations, and who, while so engaged, are working together to a common purpose, of same grade, neither of such persons being intrusted by such corporations with any superintendence or control over their fellow employees, are coemployees with each other: *Provided,* Nothing herein contained shall be so construed as to make employees of such corporation in the service of such corporation fellow employees with other employees of such corporation engaged in any other department or service of such corporation. Employees who do not come within the provisions of this section shall not be considered coemployees.

No contract made between the employer and employee based upon the contingency of the injury or death of the employee limiting the liability of the employer under this

employees in the discharge of their several duties. Kansas City, etc., R. Co. v. Becker, 53 S. W. Rep. 406.

A car inspector and an engine foreman in charge of a switch engine, not working together for a common purpose, but engaged in different departments of the service, are not fellow workmen within Kirby's Dig. §§ 6658–6660, providing that all persons engaged in the common service of a railroad, and who are working together to a common purpose, are fellow employees, etc. St. Louis, I. M. & S. Ry. Co. v. Dupree (Ark. 1907), 105 S. W. Rep. 878.

Under the Arkansas statute (Sand. & H. Digest, § 6248), making all railroad companies responsible for the act of any employee entrusted with superintendence, a train dispatcher is held to be so intrusted and the conductor of a train is not a coemployee with such dispatcher. Choctow, etc., Ry. Co. v. Doughty, 91 S. W. Rep. 768.

act, or fixing damages to be recovered, shall be valid and binding.

All railroad companies operating within this State, whether incorporated or not, and all corporations of every kind and character, and every company whether incorporated or not, engaged in the mining of coal, who may employ agents, or employees, such agents, or employees being in the exercise of due care, shall be liable to respond in damages for injuries or death sustained by any such agent, or employee, resulting from the careless omission of duty or negligence of such employer, or which may result from the carelessness, omission of duty, or negligence of any other agent, or employee of the said employer, in the same manner and to the same extent as if the carelessness, omission of duty, or negligence causing the injury or death was that of the employer.

§ 515. **The Civil Code of California,**[72] provides that: An employer is not bound to indemnify his employee for losses suffered by the latter on account of the ordinary risks of

[72] Deering's Code and Statute of California, 1885, as amended by ch. 97, Acts 1907.

The California Code does not recognize any distinction growing out of the grade of the service of the negligent employee. Davis v. Southern Pacific Ry. Co., 98 Cal. 19; 32 Pac. Rep. 708.

A conductor and a brakeman are in the same common service, so that the latter assumed a risk on account of the negligence of the former, under Code of 1873, in the absence of negligence of the employer in selecting the culpable employee. Congrave v. Southern Pacific R. Co., 88 Cal. 360; 26 Pac. Rep. 175.

Under the California statute, exempting the employer from liability for injuries, except when the injury was sustained by the breach of one of the nonassignable duties of the employer, or his neglect in retaining an incompetent employee in his service, there can be no liability for an injury due to the act of a coemployee, regardless of the grade of the service or the different departments in which the employees are engaged in working. Leishman v. Union Iron Works, 83 Pac. Rep. 30.

the business, nor on account of the negligence of another person employed by the same employer, in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employee, or unless the employer has failed to use ordinary care in the selection of the culpable employee: *Provided,* That the employer shall be liable for such injury, when the same results from the wrongful act, neglect, or default of any agent or officer of such employer, superior to the employee injured, or of a person employed by the employer, having the right to control or direct the services of such employee injured, and also when such injury results from the wrongful act, neglect or default of a coemployee engaged in another department of labor from that of the employee injured, upon a machine, railroad train, switch, signal point, locomotive engine, or other appliance than that upon which the injured employee is employed, or who is charged with the dispatching of trains, or transmitting telegraphic or telephonic orders, upon any railroad, etc.

Knowledge by an employee injured, of the defective or unsafe character or condition of any machinery, ways, appliances or structures of such employer shall not be a bar to recovery for any injury or death caused thereby, unless it shall also appear that such employee fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, ways, appliances or structures and thereafter consented to use the same, or continued in the use thereof.

When death, whether instantaneous or otherwise, results from an injury to an employee received as aforesaid, the personal representative of such employee shall have a right of action therefor against such employer and may recover damages in respect therefor, for and on behalf and for the benefit of the widow, children, dependent parents and de-

pendent brothers and sisters, in order of precedence as herein stated, but no more than one action shall be brought for such recovery.

Any contract or agreement expressed or implied, made by any such employee to waive the benefits of this section, or any part thereof, shall be void and this act shall not be construed to deprive any such employee or his representative of any right or remedy to which he is entitled under the laws of the State.

The rules and principles of the law of contributory negligence which apply to other cases shall apply to cases arising under this statute except in so far as modified or changed by the statute.

An employer must, in all cases, indemnify his employees for losses caused by the former's want of ordinary care.

§ 516. **Colorado Laws.**— The Constitution [73] and statute [74] of Colorado, declare:

It shall be unlawful for any person, company, or corporation to require of its employees, as a condition of their employment or otherwise, any contract or agreement whereby such person, company, or corporation shall be released or discharged from liability or responsibility on account of personal injuries received by such employees while in the service of such person, company, or corporation by reason of the negligence of such person, company, or corporation, or the agents or employees thereof, and such contract shall be absolutely null and void.

Where, after the passage of this act, personal injury is caused to an employee, who is himself in the exercise of due care and diligence at the time —

[73] Constitution Colorado, art. 15.

[74] Mill's Ann. Stat., 1891, and Supplement of 1905, §§ 1511a, 1511b, 1511c, 1511d, 1511e, 1511f, 1511g.

(1) By reason of any defect in the condition of the ways, works or machinery connected with or used in the business of the employer, which arose from or had not been discovered or remedied owing to the negligence of the employer or of any person in the service of the employer, and intrusted by him with the duty of seeing that the ways, works, and machinery were in proper condition; or

(2) By reason of the negligence of any person in the service of the employer, intrusted with or exercising superintendence, whose sole or principal duty is that of superintendence;

(3) By reason of the negligence of any person in the service of the employer who has the charge or control of any switch, signal, locomotive engine, or train upon a railroad, the employee, or in case the injury results in death, the parties entitled by law to sue and recover for such damages, shall have the same right of compensation and remedy against the employer as if the employee had not been an employee of or in the service of the employer or engaged in his or its work.

The amount of compensation recoverable under this act, in case of a personal injury resulting solely from the negligence of a coemployee, shall not exceed the sum of five thousand dollars. No action for the recovery of compensation for injury or death under this act shall be maintained unless written notice of the time, place, and cause of the injury is given to the employer within sixty days, and the action is commenced within two years from the occurrence of the accident causing the injury or death. But no notice given under the provisions of this section shall be deemed invalid or insufficient solely by reason of any inaccuracy in stating the time, place, or cause of injury: *Provided,* It is shown that there was no intention to mislead, and that the party entitled to notice was not in fact misled thereby.

Whenever an employee enters into a contract, either written or verbal, with an independent contractor to do part of such employer's work, or whenever such contractor enters into a contract with a subcontractor to do all or a part of the work comprised in such contract or contracts with the employer, such contract or subcontract shall not bar the liability of the employer for injuries to the employees of such contractor or subcontractor by reason of any defect in the condition of the ways, works, machinery, or plant, if they are the property of the employer or furnished by him, and if such defect arose or had not been discovered or remedied through the negligence of the employer or of some person intrusted by him with the duty of seeing that they were in proper condition.

An employee or those entitled by law to sue and recover, under the provisions of this act, shall not be entitled under this act to any right of compensation or remedy against his employer in any case where such employee knew of the defect or negligence which caused the injury, and failed within a reasonable time to give or cause to be given information thereof to the employer or to some person superior to himself in the service of his employer, who had intrusted to him some general superintendence.

If injury sustained by the employee is clearly the result of the negligence, carelessness, or misconduct of a coemployee the coemployee shall be equally liable, under the provisions of this act, with the employer, and may be made a party defendant in all actions brought to recover damages for such injury. Upon the trial of such action, the court may submit to and require the jury to find a special verdict upon the question as to whether the employer or his vice-principal was or was not guilty of negligence proximately causing the injury complained of; or whether such injury resulted solely from the negligence of the coemployee, and in case the jury

by their special verdict find that the injury was solely the result of the negligence of the employer or vice-principal, then and in that case the jury shall assess the full amount of plaintiff's damages against the employer, and the suit shall be dismissed as against the employee; but in case the jury by their special verdict find that the injury resulted solely from the negligence of the coemployee, the jury may assess damages both against the employer and employee.

Every corporation, company, or individual who may employ agents or employees, such agents or employees being in the exercise of due care, shall be liable to respond in damages for injuries or death sustained by any such agent or employee, resulting from the carelessness, omission of duty, or negligence of such employer, or which may have resulted from the carelessness, omission of duty, or negligence of any other agent, or employee of the said employer, in the same manner and to the same extent as if the carelessness, omission of duty, or negligence causing the injury or death was that of the employer.

All acts and parts of acts in conflict herewith are hereby repealed: *Provided, however,* That this act shall not be construed to repeal or change the existing laws relating to the right of the person injured, or in case of death, the right of the husband or wife, or other relatives of a deceased person, to maintain an action against the employer.

The statute also requires railroad switch rails to be blocked and makes a failure to do so *prima facie* evidence of negligence, where employees or others are injured as a result of such failure.

§ 517. **Statute of Connecticut.**— The General Statutes of Connecticut [75] make it the duty of the employer to exer-

[75] General Statutes, Connecticut, 1902, § 4702. This statute is only

cise reasonable care to provide for his employee a reasonably safe place in which to work; to furnish reasonably safe appliances and instrumentalities for his work and fit and competent persons as his colaborers; to also exercise reasonable care in the appointment or designation of vice-principals and to appoint as vice-principals only fit and competent persons. The default of a vice-principal in the performance of any duty imposed by law on the employer shall be the default of the employer.

§ 518. **Florida Statute.**— The General Statutes of Florida [76] provide that a railroad company shall be liable for any damage done to persons, stock, or other property, by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person, in the employ or service of such company, unless the company shall make it appear that their agents have exercised all

declaratory of the common-law rule, which obtains in the absence of such a statute.

[76] General Statute of Florida for 1906, §§ 3148, 3149, 3150. This act changes the rule as to the burden of proof, in accident or negligence cases; establishes the rule of comparative negligence in a qualified form and abolishes the fellow-service rule of the common law. As the statute is not limited to the hazardous service only of railroad companies, but extends to all character of injuries, it is doubted if it could be upheld by those cases which regard such statutes as unconstitutional if they discriminate against the employer, rather than the character of the service.

The Florida statute of 1887, making railroad companies liable for the negligence of their employees, was taken from the Georgia statute, on same subject. Duval v. Hunt, 34 Fla. 85; 15 So. Rep. 876.

The Acts of Florida (1891, p. 114), in regard to employees on railroad work, is held to limit the rule that an employee cannot recover for an injury due to the negligence of a coemployee to cases where the injured person is guilty of contributory negligence and the term "employee" is as broad as the word "fellow-servant," at common law. Louisville, etc., R. Co. v. Wade, 35 So. Rep. 863.

ordinary and reasonable care and diligence, the presumption in all cases being against the company.

No person shall recover damages against a railroad company for injuries where the same is done by his consent or is caused by his negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished or increased by the jury, in proportion to the amount of default attributable to him.

If any person is injured by a railroad company by the running of the locomotives or cars, or other machinery, he being at the time of such injury an employee of the company, if the damage was caused by the negligence of another employee, and without fault or negligence on the part of the person injured, his employment by the company is no bar to his recovery. No contract which restricts such liability shall be binding or valid.

§ 519. **The Georgia Code,**[77] provides that railroad com-

[77] Code of Georgia of 1895, §§ 2297, 2321, 2322, 2324, as amended by Act No. 102, p. 63; Acts 1896, 2610, 2611, 2612, 2613, 3830

As it was originally enacted, the statute of Georgia did not give a right of action to an employee who was himself negligent in any way contributing to his injury, caused by the negligence of a coemployee, in part. East Tennessee, etc., R. Co. v. Duggan, 51 Ga. 212; 6 Am. Ry. Rep. 195; Baker v. Western R. Co., 68 Ga. 699; Central R. Co. v. Lanier, 83 Ga. 587; 10 S. E. Rep. 279.

An employee free from fault, was permitted a recovery, when injured by the negligence of a coemployee, whether in the operation of a train or not. Georgia R. Co. v. Ivey, 73 Ga. 499; 28 Am. & Eng. R. Co., 392; Central R. Co. v. Henderson, 69 Ga. 715; Central R. Co. v. DeBray, 71 Ga. 406.

A trackman, while being carried to his work, is within the protection of the act, if injured while free from fault, by the negligence of a coemployee. Atlanta, etc., R. Co. v. Ayers, 53 Ga. 12.

One employed by the receivers of a railroad is not in the employment of the railroad company, within the contemplation of the code. Henderson v. Walker, 55 Ga. 481.

panies are common carriers and are liable as such. As such companies necessarily have many employees who cannot possibly control those who should exercise care and diligence in the running of trains, such companies shall be liable to such employees the same as to passengers, for injuries arising from the want of such care and diligence.

A railroad company shall be liable for any damage done to persons, stock, or other property, by the running of locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company.

No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury, in proportion to the amount of default attributable to him.

If the person injured is himself an employee of the company, and the damage was caused by another employee, and without fault or negligence on the part of the person injured, his employment by the company is no bar to a recovery.

The liabilities of receivers, assignees, and other like officers operating railroads in this State, or partially in the State, for injuries and damages to persons in their employ, caused by the negligence of coemployees, shall be the same as the liability now fixed by law governing the operation of railroad

A street railroad company is held to be a railroad within the contemplation of the Georgia statute, changing the rule of the common law as to the employees of railroad companies. Savannah, etc., R. Co. v. Williams, 117 Ga. 414; 43 S. E. Rep. 751; 61 L. R. A. 249. 2

corporations in this State, for like injuries and damages, and a lien is hereby created on the gross income of any such railroad, while in the hands of any such receiver, assignee or trustee, in favor of such injured employee or plaintiff, superior to all other liens against the defendant under the laws of this State.

Except in case of railroad companies, the employer is not liable to one employee for injuries arising from the negligence or misconduct of other employees about the same business.

The employer is bound to exercise ordinary care in the selection of employees, and not to retain them after knowledge of incompetency; he must use like care in furnishing machinery equal in kind to that in general use, and reasonably safe for all persons who operate it with ordinary care and diligence. If there are latent defects in machinery, or dangers incident to an employment unknown to the employee, of which the employer knows, or ought to know, he must give the employee warning in respect thereto.

Employee assumes the ordinary risks of his employment, and is bound to exercise his own skill and diligence to protect himself. In suits for injuries arising from the negligence of the employer in failing to comply with the duties imposed by the preceding section, it must appear that the employer knew or ought to have known of the incompetency of the other employee, or of the defects or danger in the machinery supplied; and it must also appear that the employee injured did not know and had not equal means of knowing such fact, and by the exercise of ordinary care could not have known thereof.

All contracts between employer and employee, made in consideration of employment, whereby the employer is exempted from liability to the employee arising from the negligence of the employer or his employees, as such liability is now

fixed by law, shall be null and void, as against public policy.

If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. But in other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained.

§ 520. **The safety appliance act of Illinois.**— The railroad safety appliance law of Illinois takes away the defenses of assumed risk and contributory negligence, where an employee is injured because of the railroad company's noncompliance with the law, although the injured employee knew when he entered into the employment that the statute was not complied with.

The statute [78] provides that: Any employee of any such common carrier, who may be injured by any train, locomotive, tender, car, or similar vehicle in use, contrary to the provisions of this act, shall not be deemed to have assumed the risks thereby occasioned, nor to have been guilty of contributory negligence, because of continuing in the employment of such common carrier or in the performance of his duties as such employee after the unlawful use of such train, locomotive, tender, car or similar vehicle had been brought to his knowledge.

[78] Laws Illinois, 1905, § 9, p. 550. Violations of the Coal Mines statute, prescribing certain safeguards for the safety and lives of the miners, is construed by the courts of Illinois so as to take away the defenses of assumed risk and contributory negligences in actions for breach of this statutory duty, too. See Spring Valley Coal Co. v. Rowatt, 196 Ill. 156; 63 N. E. Rep. 649; Spring Valley Coal Co. v. Patting, 71 N. E. Rep. 371; Sunnyside Coal Co. v. Perry Center, 100 Ill. App. 546; Fulton v. Wilmington Star Mining Co., 133 Fed. Rep. 193; White, Personal Injuries in Mines, § 354, pp. 390, 391, and cases cited.

§ 521. **The Indiana statutes.**— The Indiana statutes [79] are as follows:

[79] Annotated Statutes of 1894, Revision of 1901, §§ 359a, 7082a, 7082b, 7082c, 7083, and § 14 ch. 118, Acts 1907.

Under the Indiana statute, giving a right of action for an injury due to the negligence of an employee entrusted with the control of any "signal, telegraph office, switch yard," etc., no liability is created for the negligence of an employee in charge of a "switch." Indianapolis, etc., Transit Co. v. Andis, 72 N. E. Rep. 145.

But a railroad company is liable for an injury to an inexperienced track hand, who, under the orders of a foreman, broke the bolt that held a buckled rail in place, when it flew back and struck him. Southern Ry. Co. v. Blevins, 130 Fed. Rep. 688.

And a member of a wrecking crew, while acting under the orders of a foreman and sustaining injuries, is held entitled to recover, in Baltimore, etc., R. Co. v. Hunsucker, 70 N. E. Rep. 556.

A brakeman required to place a red light at the rear of a train is an employee in charge of a signal, under the statute. Chicago, etc., Ry. Co. v. Wicker, 71 N. E. Rep. 223; 72 N. E. Rep. 614.

An idle bridge hand, who is struck by a stone being raised by a derrick, under the supervision of a superintendent, is not within the statute. Southern Indiana Ry. Co. v. Harrell, 161 Ind. 689; 68 N. E. Rep. 262; 63 L. R. A. 460.

A fireman, injured while taking on coal, by the engineer starting the engine, is entitled to recover under the statute. Cleveland, etc., Ry. Co. v. Bergschicker, 69 N. E. Rep. 1000.

"Employer's Liability Act (Burns' Ann. St. 1901, § 7083, subd. 2) makes an employer liable for injuries to its employee caused by the negligence of a person in its service to whose order or direction the injured employee was bound to and did conform. *Held*, that the words 'order or direction,' as used in the statute, apply to special orders as distinguished from general orders, and the protection of the statute does not extend to an employee injured from the negligence of the foreman while working under general directions." Indianapolis Street Ry. Co. v. Kane (Ind. 1907), 80 N. E. Rep. 841.

"Under Burns' Ann. St. 1901, § 7083 (employer's liability statute), making railroads liable for damages for personal injuries suffered by employees while in their service in certain cases, where the injured employee is in the exercise of due care, a liability may arise for an injury to the conductor of a railroad train through the negligence of the engineer of the train, notwithstanding a rule of the road makes the conductor in some respects the superior." Pittsburgh Ry. Co. v. Collins (Ind. 1907), 80 N. E. Rep. 415.

Hereafter in all actions for damages brought on account of the alleged negligence of any person, copartnership, or corporation for causing personal injuries, or the death of any person, it shall not be necessary for the plaintiff in such action to allege or prove the want of contributory negligence on the part of the plaintiff, or on the part of the person for whose injury or death the action may be brought. Contributory negligence on the part of the plaintiff or such other person shall be a matter of defense, and such defense may be proved under the answer or general denial. * * *

All contracts between employer and employee releasing the employer from liability for damages arising out of the negligence of the employer by which the employee is injured, or, in case of the employee's death, to his representatives, are against public policy, and hereby declared null and void.

All contracts between employer and employee releasing third persons, copartnerships or corporations from liability for damages arising out of the negligence of such third persons, copartnerships or corporations by which the employee of such employer is injured, or in case of the death of such employee, to his representatives, are against public policy and are hereby declared null and void.

All contracts between an employee and a third person, copartnership or corporation in which it is agreed that the employer of such employee shall be released from liability for

"Where a foreman ordered a railway employee to go upon a bridge pier and remove woodwork therefrom, directing the specific manner in which the removal should be made, and the foreman, in an attempt to further the work, without warning the employee, pried down a timber, breaking off the footing upon which the employee stood, causing his injury, there was an order, within Burns' Ann. St. 1901, § 7083, subd. 2, making corporations liable for injuries to employees from the negligence of persons in its service to whose order the employees are bound to and do conform." Toledo & W. R. Co. v. Pavey (Ind. App. 1906), 79 N. E. Rep. 529.

damages of such employee arising out of the negligence of the employer, or in case of the death of such employee, to his representatives, are against public policy and are hereby declared null and void: *Provided,* That nothing in this act shall apply to voluntary relief departments, or associations organized for the purpose of insuring employees. Nothing in this act shall be construed to revert back to contracts made prior to the passage of this act. Nor shall this act affect pending litigation: *Provided,* That nothing in any section of this act shall be so construed as to affect or apply to any contract or agreement that may be made between the employer and employee, or in case of death, his next of kin or his representative after an injury to the employee has occurred, but the provisions of this act shall apply solely to contracts made prior to any injury.

Every railroad or other corporation, except municipal, operating in this State, shall be liable for damages for personal injury suffered by any employee while in its service, the employee so injured being in the exercise of due care and diligence, in the following cases:

First. When such injury is suffered by reason of any defect in the condition of ways, works, plant, tools, and machinery, connected with or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person intrusted by it with the duty of keeping such ways, works, plant, tools, or machinery in proper condition.

Second. Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employee at the time of the injury was bound to conform, and did conform.

Third. Where such injury resulted from the act or omission of any person done or made in obedience to any rule,

regulation, or by-law of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf.

Fourth. Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, roundhouse, locomotive engine, or train upon a railway, or where such injury was caused by the negligence of any person, or coemployee, engaged in the same common service in any of the several departments of the service of any such corporation, the said person, or coemployee, at the time acting in the place, and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing laws.

Any employee of any such common carrier who may be killed or injured by any locomotive, tender, car, similar vehicle, or train in use contrary to the provisions of this act, or who shall be killed or injured on account of any structures forbidden by sections eleven and twelve of this act shall not be deemed thereby to have assumed the risk occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, tender, car, similar vehicle, or train, or the maintenance of such unlawful structures named in sections eleven and twelve of this act, had been brought to his knowledge, nor shall any such employee be held as having contributed to his injury in any case where the carrier shall have violated any of the provisions of this act when such violation contributed to the death or injury of any such employee.

§ 522. **The statute of Iowa.**— The Iowa Code [80] provides that,

Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of the agents, or by any mismanagement of the engineers or other employees thereof, and in consequence of the willful wrongs, whether of commission or omission, of such agents, engineers or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding.

Nor shall any contract of insurance, relief, benefit, or indemnity in case of injury or death, entered into prior to the injury, between the person so injured and such corporation, or any other person or association acting for such corporation, nor shall the acceptance of any such insurance, relief, benefit, or indemnity by the person injured, his widow, heirs, or legal representatives after the injury, from such corporation, person, or association, constitute any bar or defense to any cause of action brought under the provisions of this section, but nothing contained herein shall be construed to prevent or invalidate any settlement for damages between the parties subsequent to injuries received.

In all cases where the property, works, machinery, or appliances of an employer are defective or out of repair, and the employee has knowledge thereof, and has given written notice to the employer, or to any person authorized to receive and accept such notice, or to any person in the service of the employer and entrusted by him with the duty of seeing that the property, works, machinery, or appliances are in proper condition, of the particular defect or want of repair, or

[80] Code of Iowa of 1897 and Supplement of 1902, § 2071, and § 1, ch. 181, acts of 1907.

when the employer or such other person has been notified in writing of such defect or want of repair by any person whose duty it is under the rules of the employer or the laws of the State to inspect such works, machinery, or appliances,

The Iowa law of 1862 applies only to employees engaged in the hazardous duty of operating trains, yet it applies to one injured by a falling bank, while loading a dirt car. Deppe v. Chicago, etc., R. Co., 36 Iowa 52.

A section hand is within the protection of the statute. Frandsen v. Chicago, etc., R. Co., 36 Iowa 372.

All employees exposed to the hazards of moving trains, although not actually operating them, are protected by the law. Smith v. Humeston, etc., R. Co., 78 Iowa 583; 43 N. W. Rep. 545; 41 Am. & Eng. R. Cas. 278; Rayburn v. Central R. Co., 74 Iowa 637; 35 N. W. Rep. 606.

A vice-principal is held entitled to recover for an injury received by the negligence of men he employed, in Houser v. Chicago, etc., R. Co., 60 Iowa 230; 14 N. W. Rep. 778; 46 Am. Rep. 65; 8 Am. & Eng. R. Cas. 500.

The working of a ditching machine is held to be connected with the "use and operation" of the railroad, in Nelson v. Chicago, etc., R. Co., 73 Iowa 576; 35 N. W. Rep. 611.

An engine "wiper" operating an engine and injuring a brakeman, is such an employee as to render the company liable. Whalen v. Chicago, etc., R. Co., 75 Iowa 563; 39 N. W. Rep. 894; 38 Am. & Eng. R. Cas. 141.

A section hand injured by his foreman while operating a hand car, is entitled to an action under the statute. Chicago, etc., R. Co. v. Artery, 137 U. S. 507; 11 Sup. Ct. Rep. 129; 44 Am. & Eng. R. Cas. 573.

A bridge man, while riding a train, is protected by the law. Schroeder v. Chicago, etc., R. Co., 47 Iowa 375; 14 Am. Ry. Rep. 359.

A private detective, injured while walking the track, by the negligence of the engineer of an engine, is held to be engaged in the "use and operation" of a railroad, within the statute. Pyne v. Chicago, etc., R. Co., 54 Iowa 223; 6 N. W. Rep. 281; 37 Am. Rep. 198.

So is an employee shoveling gravel. McKnight v. Iowa, etc., R. Co., 43 Iowa 406; 14 Am. Ry. Rep. 465; Handelum v. Burlington etc., R. Co., 72 Iowa 709; 32 N. W. Rep. 4.

An employee riding a hand car and injured by a negligent collision with another hand car. Lombard v. Chicago, etc., R. Co., 47 Iowa 494.

An employee of car shops, removing screens from car windows,

or any person who is subject to the risk incident to such defect or want of repair, no employee after such notice shall, by reason of remaining in the employment with such knowledge, be deemed to have assumed the risk incident to the danger arising from such defect or want of repair.

injured by the sudden starting of the train. Pierce v. Central R. Co., 73 Iowa 140; 34 N. W. Rep. 783.

A "clinkerman," employed in a roundhouse, is also within the protection of the statute. Butler v. Chicago, etc., R. Co., 87 Iowa 206; 54 N. W. Rep. 208; Nijus v. Chicago, etc., R. Co., 47 Minn. 92; 49 N. W. Rep. 527.

And so is a snow shoveler, riding to work on a work train. Smith v. Humeston, etc., R. Co., 78 Iowa 583; 43 N. W. Rep. 545; 41 Am. & Eng. R. Cas. 278.

But the statute was held not to apply to employees engaged in other work than the operation of the railroad, such as car shop employees, in Potter v. Chicago, etc., R. Co., 46 Iowa 399; 16 Am. Ry. Rep. 57; Manning v. Burlington, etc., R. Co., 64 Iowa 240; 20 N. W. Rep. 169.

A section hand, engaged in loading a stationary car, was held not within the statute, in Smith v. Burlington, etc., R. Co., 59 Iowa 73; 12 N. W. Rep. 763; 6 Am. & Eng. R. Cas. 149.

Nor does the statute protect an employee, injured by his associates in an effort to close a door to the engine house. Malone v. Burlington, etc., R. Co., 61 Iowa 326; 16 N. W. Rep. 203; 47 Am. Rep. 813; 11 Am. & Eng. R. Cas. 165.

Nor to a sweeper, in a roundhouse, who fell in a hole negligently left open by a fellow workman. Manning v. Burlington, etc., R. Co., 64 Iowa 240; 20 N. W. Rep. 169.

Nor does the act protect the repairer of stationary cars, on a side track. Foley v. Chicago, etc., R. Co., 64 Iowa 644; 21 N. W. Rep. 124.

Nor to an employee of a construction gang, injured by a stone set in motion by a coemployee. Matson v. Chicago, etc., R. Co., 68 Iowa 22; 25 N. W. Rep. 911.

Nor can an employee claim to be "operating a railroad," in the act of elevating coal up to a platform, where it is to be hauled away by engines and trains of cars. Stroble v. Chicago, etc., R. Co., 70 Iowa 555; 31 N. W. Rep. 63; 28 Am. & Eng. R. Cas. 510.

Under the Iowa statute, the ordinary work of a section gang, along the railroad track, disconnected from any control of trains, does not

§ 523. **The General Statutes of Kansas,**[81] with reference to the liability of railroad companies for injuries to their employees, provide:

constitute such employees operators of the railroad, within the meaning of the law. Dunn v. Chicago, etc., Ry. Co., 107 N. W. Rep. 616.

The Iowa statute was held not to apply to street railroads, in McLeod v. Chicago, etc., Ry. Co., 125 Iowa 270; 101 N. W. Rep. 77.

But an employee engaged in unloading steel rails, was held to be operating a railroad, in Williams v. Iowa Central R. Co., 96 N. W. Rep. 774.

Railroad companies entering the State are not guaranteed that the common-law rule as to coemployees will not be changed, when it is found to the interest of the inhabitants of the State to change it and they cannot complain of such statutes. O'Brien v. Chicago, etc., R. Co., 116 Fed. Rep. 502.

[81] General Statutes Kansas 1901, § 5858, as amended by ch. 281, Acts of 1907.

"Laws Kan. 1874, p. 143, ch. 93, providing that a railroad company shall be liable for all damages done to an employee from any negligence of its agents or by any mismanagement of any employees, while restricted to hazards peculiar to railroading, applies to the case of a track repairer injured while being taken from his work in a caboose, and while still in the company's employ, by collision of that and another train of the company." Iarussi v. Missouri Pac. Ry. Co. (U. S. C. C., Ill., 1907), 155 Fed. Rep. 654.

"In an action for injuries to a railroad employee because another employee had negligently selected an insufficient block for the raising of an engine and had negligently adjusted it, the railroad company *held* liable under Laws 1903, p. 599, ch. 393, § 1, providing that every railroad company should be liable for damages to an employee caused by the negligence of its agents or other employees." Missouri, K. & T. Ry. Co. v. Green (Kan. 1907), 89 Pac. Rep. 1042.

The Kansas statute, of 1874, was held not to dispense with the strict proof of negligence on the part of the coemployees. Missouri Pacific Ry. Co. v. Haley, 25 Kansas 35; 5 Am. & Eng. R. Cas. 594.

Under this statute it was held a right of action only accrued for the neglect of some agent having authority or duty in or about the particular act causing the injury. Solomon R. Co. v. Jones, 30 Kansas 601; 2 Pac. Rep. 657; 15 Am. & Eng. R. Cas. 201.

This act was held not to affect the defense of contributory negligence. Kansas Pacific R. Co. v. Peavey, 34 Kansas 472; 8 Pac. Rep. 780.

A person employed to carry water on construction work, is held

Every railroad company organized or doing business in the State of Kansas shall be liable for all damages done to any employee of said company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damage: *Provided,* That notice in writing that an injury has been sustained, stating the time and place thereof, shall have been given by or on behalf of the person injured to such railroad company within eight months after the occurrence of the injury: *Provided, however,* That where an action is commenced by the injured person within said eight months, it shall not be necessary to give said notice: *And provided further,* That where any person injured is in the hospital of or under the charge of the railroad company causing the injury, or is prevented by the effects of said injury, the said eight months shall not begin to run until such injured person is discharged from said hospital or care of said railroad company or until such disability be removed: *Provided,*

entitled to the protection of the statute, in Missouri Pacific Ry. Co. v. Haley, 25 Kansas 35; 5 Am. & Eng. R. Cas. 594.

An employee injured while assisting to load steel rails, by his associates permitting a rail to fall upon him, was held entitled to recover, in Atchison, etc., R. Co. v. Koehler, 37 Kansas 463; 15 Pac. Rep. 567; 31 Am. & Eng. R. Cas. 312; Union Pacific R. Co. v. Harris 33.

A section man, riding a hand car and injured by another car running into him, is entitled to recover, under the statute. Union Trust Co. v. Thomason, 25 Kansas 1; 5 Am. & Eng. R. Cas. 589.

A fireman injured by the negligent collision of a switch engine, with his engine, was held entitled to recover, in Missouri Pacific R. Co. v. Mackey, 33 Kansas 298; 6 Pac. Rep. 291; 22 Am. & Eng. R. Cas. 306.

A brakeman throwing a switch, injured by falling under the train was held entitled to recover, in the absence of negligence on his part, in Kansas City, etc., R. Co. v. Kier, 41 Kansas 661; 21 Pac. Rep. 770; 38 Am. & Eng. R. Cas. 119.

Nor will the fact of a receivership, at the time of an injury to an employee, affect the right of recovery, under the statute. Hornsby v. Eddy, 56 Fed. Rep. 461.

further, That in case said injured person shall die, as a result of said injuries, within said eight months, it shall not be necessary to give said notice: *Provided further,* That said notice need not state whether or not suit is intended to be brought.

The service mentioned in section one hereof may be served by a written copy thereof, by the person injured or anyone on his behalf, upon any person designated by the railroad in any county in which the action might be brought, as provided by the General Statutes of Kansas of 1901, or if no such person has been designated or appointed, as in said section provided, then upon any local superintendent of affairs, freight agent, agent to sell tickets, or station keeper of such company or corporation in such county, or such service may be made by leaving a copy thereof at any depot or station of such company or corporation in such county with the person in charge thereof or in the employ of such company or corporation, and such service shall be held and deemed complete and effectual. Proof of such service shall be made by the affidavit of the party making the same, or other persons knowing the facts.

§ 524. **Kentucky statutes.**— The statutes of Kentucky [82] regulate the construction of railroad bridges and tunnels and direct the use of air brakes on railroad cars and trains and require railroad companies to block all frogs to switches. And for an injury resulting from a violation of the statute, the railroad company is rendered liable.

[82] Statutes Kentucky 1903, § 793.

Under the Kentucky statute, before a brakeman can recover for a personal injury, caused by the negligent moving of a train, he must be able to show that the employees engaged in operating the train, were his superiors in authority. Greer v. Louisville, etc., R. Co., 94 Ky. 169; 21 S. W. Rep. 649.

§ 525. **The Code of Louisiana**[83] enacts that every person is responsible for the damage he occasions, not merely by his act, but by his negligence, his imprudence or his want of skill.

That employers are responsible not only for the damages occasioned by their own acts, but for that caused by the acts of persons for whom they are answerable, or of the things in their custody, and that employers are responsible for the damages occasioned by their employees or overseers, in the exercise of the functions in which they are employed.

But responsibility only attaches to the employer when he might have anticipated or prevented the act and failed to do it.

§ 526. **The Revised Laws of Massachusetts,**[84] governing the

[83] Revised Civil Code, Louisiana 1887, art. 2316, 2317, 2320.

[84] Revised Laws, Massachusetts 1902, ch. 106, §§ 16, 71, 72, 73, 74, 75, 76, 77, 78 as amended by Laws 1906, ch. 370, and § 209, ch. 111.

Under the Massachusetts statute, as before, no action can be maintained, based upon the negligence of a coemployee of a railroad company, as the law of 1887 gives no such right. Dacey v. Old Colony R. Co., 153 Mass. 112; 26 N. E. Rep. 437.

An incompetent engineer operating an engine and causing an injury is not shown by the one act only of incompetency. Peaslee v. Fitchburg, etc., R. Co., 152 Mass. 155; 25 N. E. Rep. 71.

Under the statute of 1887, a railroad company is liable for an injury caused by any person operating any "signal, switch, locomotive engine, or train, upon a railroad," and this means some one having control or charge of such appliances. Steffe v. Old Colony R. Co., 156 Mass. 262; 30 N. E. Rep. 1137.

If the negligence of a superintendent is relied upon, under the statute, it must be alleged and proven, in the exercise of the duty of superintendence. Fitzgerald v. Boston, etc., R. Co., 156 Mass. 293; 31 N. E. Rep. 7.

A trackman, injured while stooping at his work, because of the negligence of his foreman in failing to warn him of an approaching train, is within the protection of the act of 1887, ch. 270. Davis v. New York, etc., R. Co., 159 Mass. 532; 34 N. E. Rep. 1070.

Under the Massachusetts statute a coemployee, although engaged

liability of employers for injuries to their employees, prescribe that:

No person shall, by a special contract with his employees, exempt himself from liability which he may be under to them for injuries suffered by them in their employment, and resulting from the negligence of the employer or of a person in his employ.

If personal injury is caused to an employee who, at the time of the injury, is in the exercise of due care by reason of—

First. A defect in the condition of the ways, works, or machinery connected with or used in the business of the employer, which arose from, or had not been discovered or remedied in consequence of, the negligence of the employer, or of a person in his service who had been entrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition; or,

Second. The negligence of a person in the service of the employer who was entrusted with and was exercising superintendence and whose sole or principal duty was that of superintendence, or, in the absence of such superintendent, of a person acting as superintendent with the authority or consent of such employer; or,

Third. The negligence of a person in the service of the

in superintendence, cannot subject the railroad company to a liability, as it was not intended to render the company liable for the acts of other than regular superintendents. Vecchioni v. New York, etc., Ry. Co., 191 Mass. 9; 77 N. E. Rep. 306; Piermerini v. New York, etc., Ry. Co., 191 Mass. 9; 77 N. E. Rep. 306.

A section foreman, in charge of men engaged in loading a car, was held to be an employee, entrusted with power of superintendence, in Murphy v. New York, etc., R. Co., 187 Mass. 18; 72 N. E. Rep. 330.

A railroad company is held liable for the act of a yard master in injuring a car inspector, by causing a car to be moved against the car he is inspecting, in Brady v. New York, etc., R. Co., 184 Mass. 225; 68 N. E. Rep. 227.

employer who was in charge or control of a signal, switch, locomotive engine or train upon a railroad;

The employee, or his legal representatives, shall, subject to the provisions of the eight following sections, have the same rights to compensation and of action against the employer as if he had not been an employee, nor in the service, nor engaged in the work, of the employer.

A car which is in use by, or which is in possession of, a railroad corporation shall be considered as a part of the ways, works, or machinery, of the corporation which uses or has it in possession, within the meaning of clause one of this section, whether it is owned by such corporation or by some other company or person. One or more cars which are in motion, whether attached to an engine or not, shall constitute a train within the meaning of clause three of this section, and whoever, as a part of his duty for the time being, physically controls or directs the movements of a signal, switch, locomotive engine, or train shall be deemed to be a person in charge or control of a signal, switch, locomotive engine, or train within the meaning of said clause.

If the injury described in the preceding section results in the death of the employee, and such death is not instantaneous or is preceded by conscious suffering, and if there is any person who is entitled to bring an action under the following section, the legal representatives of said employee may, in an action brought under the provisions of the preceding section, recover damages for the death, in addition to those for the injury; and in the same action, under a separate count, at common law, may recover damages for conscious suffering resulting from the same injury.

If, as a result of the negligence of an employer himself, or of a person for whose negligence the employer is liable, under the provision of section seventy-one an employee is instantly killed, or dies without conscious suffering, his widow,

or if he leaves no widow, his next of kin, who, at the time of his death, were dependent upon his wages for support, shall have a right of action for damages against the employer.

If, under the provisions of either of the two preceding sections, damages are awarded for the death, they shall be assessed with reference to the degree of culpability of the employer or of the person for whose negligence the employer is liable.

The amount of damages which may be awarded in an action under the provisions of section seventy-one for a personal injury to an employee, in which no damages for his death are awarded under the provisions of section seventy-two, shall not exceed four thousand dollars.

The amount of damages which may be awarded in such action, if damages for his death are awarded under the provisions of section seventy-two, shall not exceed five thousand dollars for both the injury and the death, and shall be apportioned by the jury between the legal representatives of the employee and the persons who would have been entitled, under the provisions of section seventy-three, to bring an action for his death if it had been instantaneous or without conscious suffering.

The amount of damages which may be awarded in an action brought under the provisions of section seventy-three shall not be less than five hundred nor more than five thousand dollars.

No action for recovery of damages for injury or death under the provisions of sections seventy-one to seventy-four, inclusive, shall be maintained unless notice of the time, place, and cause of the injury is given to the employer within sixty days, and the action is commenced within one year after the accident which caused the injury or death. Such notice shall be in writing, signed by the person injured or by a person in his behalf; but if from physical or mental inca-

pacity it is impossible for the person injured to give the notice within the time provided in this section, he may give it within ten days after such incapacity has been removed, and if he dies without having given the notice and without having been for ten days at any time after his injury of sufficient capacity to give it, his executor or administrator may give such notice within sixty days after his appointment. A notice given under the provisions of this section shall not be held invalid or insufficient solely by reason of an inaccuracy in stating the time, place, or cause of the injury, if it is shown that there was no intention to mislead, and that the employer was not in fact misled thereby. The provisions of section twenty-two of chapter fifty-one shall apply to notices under the provisions of this section.

If an employer enters into a contract, written or verbal, with an independent contractor to do part of such employer's work, or if such contractor enters into a contract with a subcontractor to do all or any part of the work comprised in such contractor's contract with the employer, such contract or subcontract shall not bar the liability of the employer for injuries to the employees of such contractor or subcontractor, caused by any defect in the condition of the ways, works, machinery, or plant, if they are the property of the employer or are furnished by him and if such defect arose, or had not been discovered or remedied, through the negligence of the employer or of some person entrusted by him with the duty of seeing that they were in proper condition.

An employee or his legal representative shall not be entitled to any right of action for damages against his employer, if such employee knew of the defect or negligence which caused the injury and failed within a reasonable time to give, or cause to give information to the employer, or to some person superior to himself, in the service of the employer, who was entrusted with general superintendence.

An employer who shall have contributed to an insurance fund created and maintained for the mutual purpose of indemnifying an employee for personal injuries for which compensation may be recovered, or to any relief society formed as provided by law, may prove in mitigation of the damages recovered by an employee, such proportion of the pecuniary benefit which has been received by such employee from any such fund or society, on account of such contribution, as the contribution of such employer to such fund or society bears to the whole contribution thereto.

The statute directing the installation and use of safety appliances on railroads takes away from the negligent railroad company the defense of assumed risk, where injury results from a violation of the act, even though the injured employee knew of the violation.

§ 527. **Laws of Minnesota.**— By statute in Minnesota,[85] every company, owning or operating, as common carrier, or

[85] Revised Laws Minnesota 1905, § 2042.

Under the Minnesota law of 1887, a railroad company is made liable for an injury to its employee, caused by the negligence of a coemployee. Northern Pacific R. Co. v. Behling, 57 Fed. Rep. 1037.

The law embraces only those employees exposed to the peculiar hazards of using or operating the railroad. Johnson v. St. Paul, etc., R. Co., 43 Minn. 222; 45 N. W. Rep. 156; Lavelle v. St. Paul, etc., R. Co., 40 Minn. 249; 41 N. W. Rep. 974; 38 Am. & Eng. R. Cas. 115.

A section man injured while at work on the road, by the negligence of an engineer, is entitled to the protection of the statute. Smith v. St. Paul, etc., R. Co., 44 Minn. 17; 46 N. W. Rep. 149.

A section hand, injured by an employee while operating a hand car, was entitled to recover, in Steffensen v. Chicago, etc., R. Co., 45 Minn. 355; 48 Minn. 285; 47 N. W. Rep. 1068, and 51 N. W. Rep. 610.

But a section man injured by the falling of an iron rail, which his coemployees let fall upon him, is not engaged in the operation of a railroad, within this statute. Pearson v. Chicago, etc., R. Co., 47 Minn. 9; 49 N. W. Rep. 302; 48 Am. & Eng. R. Cas. 364.

Under the Minnesota statute, an employee working in a gravel pit and injured by the act of the engineer, in swinging the bucket in a

otherwise, a railroad, is liable for all damages sustained, within the State, by any agent or employee thereof, without contributory negligence on his part, by reason of the negligence of any other employee thereof, and no contract or any rule or regulation of such company shall impair or limit such liability.

But this statute does not render any railroad company liable for damages sustained by any such agent or employee while engaged in the construction of a new road, or any part thereof, not open to public travel or use.

§ 528. **The laws of Mississippi.**— The Constitution [86] and Code of Mississippi,[87] with reference to the liability of the

negligent manner, from the ballast car, into the pit, was not engaged in the operation of the railroad, within the statute and not entitled to recover for such an injury. Jemming v. Great Northern Ry. Co., 96 Minn. 302; 104 N. W. Rep. 1079; 1 L. R. A. (N. S.) 696.

Contractors for the straightening of a railroad track, who are furnished work trains by the railroad company, to further the work, are within the protection of the statute, so that an employee injured by the negligent operation of the train, may recover. Roe v. Winston, 90 N. W. Rep. 122.

[86] Constitution of Mississippi, art. 7, § 193.

[87] Code of Mississippi, of 1906, §§ 1985, 4056, 4051.

The Mississippi Constitution and statute is held to apply only to the hazardous business of operating railroads, in Bradford Construction Co. v. Heflin, 88 Miss. 314; 42 So. Rep. 174.

The Constitution of Mississippi 1890, and Code of 1892, § 3559, were held to entitle a brakeman to recover, who was injured by the sudden backing of an engine, while coupling cars. Moore v. Illinois Central R. Co., 135 Fed. Rep. 67; 67 C. C. A. 541.

It is not necessary that an employee, to recover, must have been performing specific duties of the superior, at the exact time of his injury, but he may recover, if acting under the general control of the superior, although not specially performing specific orders. Southern Ry. Co. v. Cheaves, 36 So. Rep. 691.

Under the Mississippi Constitution of 1890, making the railroad company liable for an injury due to the negligence of an employee in a different department of the work, a fireman on an engine and

employer, for injuries to the employee, in that State, establish that every employee of any railroad corporation shall have the same right and remedies, for any injuries suffered by him, from the act or omission of said corporation or its employees, as are allowed by law to other persons, not employees, where the injury results from the negligence of a superior

a telegraph operator, are engaged in "different pieces of work," so as to render the railroad company liable for a collision resulting from the telegrapher's negligence. Illinois Central R. Co. v. Hunter, 70 Miss. 471; 12 So. Rep. 482.

But a railroad company under this provision is not liable for an injury to a brakeman, resulting from the negligence of the engineer, who after signaling for brakes, caused a sudden starting of the train, while the brakeman was obeying the signal, as the engineer is not in a different department of the work, nor is he a "superior agent or officer," within the meaning of the Constitution. Evans v. Louisville, etc., R. Co., 70 Miss. 527; 12 So. Rep. 581.

"A construction company, with the usual powers of a construction company, and authorized to own, but not to operate, a railroad, is not a 'railroad corporation' proper, so as to fall within the wording of Const. 1890, § 193, partially abrogating the fellow-servant rule as to employees of 'any railroad corporation.'" Bradford Construction Co. v. Heflin, 42 So. Rep. 174.

In Bradford Construction Co. v. Heflin (42 So. Rep. 174), the Mississippi Supreme Court holds that the provision of the State Constitution partly abrogating the fellow-service rule as to employees of "any railroad corporation," applies only to railroad corporations properly engaged in the business of common carriers, and not to a railroad owned and operated as an adjunct to the main business of its owner. Therefore an employee of a construction company operating a train in the building of a railroad cannot claim the benefit of such constitutional provision.

Under the Mississippi Constitution (1890, § 193), providing that railroad companies shall be liable to all employees injured as a result of the negligence of any employee having supervision or control of injured employees, a company is not liable for the loss of a fireman's eye, caused by sparks of steel flying from a steel pin, struck by the engineer, as it is a mere accident. Gulf, etc., R. Co. v. Blockman, 39 So. Rep. 479. See, also, Fasini v. N. Y. Cent., etc., R. Co., 96 N. Y. S. 415; 109 App. Div. 404.

agent or officer, or of a person having the right to control or direct the services of the party injured, and also when the injury results from the negligence of a coemployee engaged in another department of labor from that of the party injured, or of a coemployee on another train of cars, or one engaged about a different piece of work. Knowledge of any employee injured, of the unsafe or defective character or condition of any machinery, ways or appliances, shall be no defense to an action for an injury caused thereby, except as to conductors or engineers, in charge of dangerous or unsafe cars, or engines voluntarily operated by them. Where death ensues from any injury to employees, the legal or personal representative of the person injured shall have the same rights and remedies as are allowed by law to such representatives of other persons. Any contract or agreement express or implied, made by any employee, to waive the benefit of this section, shall be null and void; and this section shall not be construed to deprive any employee of a corporation or his legal or personal representative, of any right or remedy that he now has by the law of the land. The legislature may extend the remedies herein provided for to any other class of employees.

In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company shall be *prima facie* evidence of the want of reasonable skill and care on the part of the employees of the company in reference to such injury. This section shall also apply to passengers and employees of railroad companies.

Every employee of a railroad corporation shall have the same rights and remedies for an injury suffered by him from the act or omission of the corporation or its employees as are allowed by law to other persons not employees, where the injury results from the negligence of a superior agent or officer,

or of a person having the right to control or direct the services of the party injured, and also when the injury results from the negligence of a fellow workman engaged in another department of labor from that of the party injured, or of a fellow employee on another train of cars, or one engaged about a different piece of work. Knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, or appliances, or of the improper loading of cars, shall not be a defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them. When death ensues from an injury to an employee an action may be brought in the name of the widow of such employee for the death of the husband, or by the husband for the death of his wife, or for the death of a child, or in the name of the child for the death of an only parent, for such damages as may be suffered by them, respectively, by reason of such death, the damages to be for the use of such widow, husband, or child, except that in case the widow should have children, the damages shall be distributed as personal property of the husband. The legal or personal representative of the person injured shall have the same rights and remedies as are allowed by law to such representatives of other persons. In every such action the jury may give such damages as shall be fair and just, with reference to the injury resulting from such death to the person suing. Any contract or agreement, expressed or implied, made by an employee to waive the benefit of this section shall be null and void; and this section shall not deprive an employee of a person, natural or artificial, or the legal or personal representatives of such person, of any right or remedy they now have by law.

A statute that requires telltales or warning strings to be placed over railroad tracks at approaches to overhead bridges or other overhanging objects makes negligent companies liable

for the injury or death of a person caused by striking such bridge, etc., even though the person so killed or injured was guilty of contributory negligence.

§ 529. **The statutes of Missouri** [88] create a liability on the part of railroad companies, for injuries to their employees, as follows:

[88] Session Laws, Missouri 1897, p. 96; Revised Statutes of Missouri of 1899, §§ 2864, 2873, 2874, 2875, 2876, 2876a, as amended by Acts 1905, page 138.

There is strong reason to construe this statute as simply declaratory of the common-law rule, which with some inconsistencies and confusion, had been applied in Missouri, prior to the adoption of this statute. As pertinently asked, in a recent case before the Supreme Court:

"What business have §§ 2 and 3 in the act, unless it is to furnish a key for the interpretation of the other section? They relate to it and would seem to prescribe the conditions upon which that section is to become effective."

Again, if the first section of the act stood alone, it is clear that the doctrine of fellow service, in so far as persons engaged in the work of operating a railroad are concerned, would not be recognized in this State. Taken by itself, it would be construed as abolishing all distinctions as to the employees for whose acts a railroad company might be held liable.

If the purpose of the legislature was to make the first section a complete enactment, wholly independent of the other sections, there is no reason why "vice-principals" should be defined and no reason for declaring that they are not "fellow servants." They are described in order that they may not be confounded with "fellow servants" mentioned in the next section. For their acts towards other employees, the section, in effect, declares railroad corporations shall be responsible.

If all distinctions between employees are destroyed by the first section, the office of the third section is not apparent. It is not fair to conclude that the legislature meant to give to the people of the State simply some useless academic learning on the subject of coemployees. There could have been no purpose in describing the persons engaged in railroad service who are to be regarded as fellow workmen, if it intended that there should be no more "fellow servants" engaged in "operating a railroad in this State."

And this construction seems borne out by the silence of the act, with reference to the right of recovery by the representatives of a

Every railroad corporation owning or operating a railroad in this State shall be liable for all damages sustained by any agent thereof while engaged in the work of operating such railroad by reason of the negligence of any other agent or

deceased employee. It has been doubted whether the legislature intended to give an employee a right of action for injuries due to the negligence of his fellow workmen, for if so, why was not the right also extended to the representatives of employees who suffered injuries resulting in death by the act of their fellow employees?

Of course, in construing such an act, it is not what the legislature might or ought to have done, but what it actually did. See Strottman v. St. Louis, etc., Ry. Co. (Mo.), 109 S. W. Rep. 769, holding that the widow of an employee, who met his death because of the negligence of a coëmployee — a telegraph operator — could not recover from the employer.

The Missouri statute (Laws 1897, p. 96), making railroads liable for injuries due to the negligence of coemployees, was held not to apply to street railroads, in Sams v. St. Louis, etc., R. Co., 174 Mo. 53; 73 S. W. Rep. 686; 61 L. R. A. 475.

But it was held to apply to receivers of railroads, as well as to railroads, in Powell v. Sherwood, 162 Mo. 605; 63 S. W. Rep. 485.

The terms "operating a railroad" was held to include all work that is necessary for running trains over the track, hence including men engaged in repairing the track, roadbed, bridges, etc. Callahan v. St. Louis, etc., R. Co., 170 Mo. 473; 71 S. W. Rep. 208; 60 L. R. A. 249; 94 Am. St. Rep. 746; St. Louis, etc., R. Co. v. Callahan, 194 U. S. 628; 24 Sup. Ct. Rep. 857; 48 L. Ed. 1157; Stubbs v. Omaha, etc., R. Co., 85 Mo. App. 192; Thompson v. Chappel, 91 Mo. App. 297; Rice v. Wabash R. Co., 92 Mo, App. 35.

By the use of the word "agent or servant" in defining who must be the author of the injury, to give a cause of action, the legislature necessarily meant coemployees acting in the course of their employment. Bequette v. St. Louis, etc., R. Co., 86 Mo. App. 601.

An employee in a machine shop is not so engaged in the work of "operating a railroad" as to bring him within the protection of the statute. Stubbs v. Omaha, etc., R. Co., 85 Mo. App. 192.

An employee trucking freight from a freight car to a warehouse was held to be within the statute, in Orendorff v. Terminal R. Ass'n (Mo. App.), 92 S. W. Rep. 148.

A switchman, injured by the cornering of cars, due to the negligence of a switch tender, was also held within the statute, in Phippin v. Missouri Pacific Ry. Co. (Mo. Sup.), 93 S. W. Rep. 410.

employee thereof: *Provided,* That it may be shown in defense that the person injured was guilty of negligence contributing as a proximate cause to produce the injury.

All persons engaged in the service of any such railroad corporation doing business in this State, who are intrusted

The statute raises no presumption of negligence against the railroad company, by the mere happening of an accident. Caldwell v. Missouri Pacific Ry. Co., 181 Mo. 455; 80 S. W. Rep. 897.

Contributory negligence is a complete defense. Hammet v. Chicago, etc., R. Co., 89 Mo. App. 354.

But an employee in a collision, is held to have established a *prima facie* case, under the statute, in establishing the fact of an injury due to a collision, in Shuler v. Omaha, etc., R. Co., 87 Mo. App. 618.

The statute avoiding all contracts does not apply to a contract entered into between a Pullman car porter and his company, which provides that it may also be assigned to the railroad company, and constitute a defense to all actions based on negligence. McDermon v. Southern Pacific R. Co., 122 Fed. Rep. 669.

Nor is a contract between a railroad company and its employees, by which they agree to release all damages, if relief benefits are claimed, within the statute. Hamilton v. St. Louis, etc., R. Co., 118 Fed. Rep. 92.

Under the Missouri statute, a railroad switchman, injured by the cornering of cars, on account of the neglect of the switch tender, was held to be entitled to recover, as he was injured by the act of a co-employee, within the meaning of Revised Statutes 1899, § 2873, Laws 1897, p. 96. Phippin v. Missouri Pacific Ry. Co., 196 Mo. 321; 93 S. W. Rep. 410.

The Texas court held that a brakeman, in lighting lamps in his caboose, when he was injured by a collision, was engaged in operating a railroad, within the Missouri statute, in St. Louis, etc., R. Co. v. Smith, 90 S. W. Rep. 926.

The Missouri statute was held not to apply to street railroads, in Godfrey v. St. Louis Transit Co., 81 S. W. Rep. 1230.

The statute was held not to apply to a member of a bridge gang, in Williams v. Chicago, etc., R. Co., 106 Mo. App. 61; 79 S. W. Rep. 1167.

But it was held to apply to a member of a section gang, struck by a tie thrown by coemployees, while he was helping to remove a child from the street, in Callahan v. St. Louis, etc., Ry. Co., 170 Mo. 473; 71 S. W. Rep. 208; 60 L. R. A. 249; 94 Am. St. Rep. 746; 194 U. S. 628.

by such corporation with the authority of superintendence, control, or command of other persons in the employ or service of such corporation, or with the authority to direct any other employee in the performance of any duty of such employee, or with the duty of inspection or other duty owing by the employer to the employee, are vice-principals of such corporation, and are not fellow workmen with such employees.

All persons who are engaged in the common service of such railroad corporation, and who, while so engaged, are working together at the same time and place, to a common purpose of same grade, neither of such persons being intrusted by such corporation with any superintendence or control over their fellow employees, are fellow employees with each other: *Provided,* That nothing herein contained shall be construed as to make any agent of such corporation in the service of such corporation a fellow workman with any other agent of such corporation engaged in any other department or service of such corporation.

No contract made between any railroad corporation and any of its agents based upon the contingency of the injury or death of any agent or employee, limiting the liability of such railroad corporation for any damages under the provisions of this act, shall be valid or binding, but all such contracts or agreements shall be null and void.

Whenever the words "railroad companies" or "railroad corporations" shall be found in any section of this chapter it shall be taken and construed to include all companies, corporations, person or persons operating any railroad in this State, and wherever the word "railroad" occurs in any section of this chapter it shall be taken and construed to include all railroads operated in this State by whatever motive or power propelled, and shall include all railroads or railways commonly known as street railways, and all railroads operated by terminal companies or associations known as "ter-

minal railroads" or "railways" as well as all railways or railroads operated anywhere in the State commonly known as electric railroads, whether they be wholly or in part in the city or country districts. Also all railroads within the country or city operated by what is commonly known as cable or motor power, or by horse power.

§ 530. **The Montana Code and Constitution.**— Under the Code [89] and Constitution [90] of Montana, it is made unlawful for any person, company or corporation, to require of its employees, as a condition of their employment, or otherwise, any contract or agreement, whereby such persons, company or corporation shall be released or discharged from liability or re-

[89] Code and Statutes of 1895, §§ 2242, 905, 2660, 2661, 2662, and Acts of 1905, ch. 1, §§ 1, 2.

[90] Constitution of Montana, art. 15, § 16.

Under the Montana statute, a conductor on one train is held to be the "superior" of a fireman on another train, so as to give a right of action under the statute. Ragsdale v. Northern Pacific R. Co., 42 Fed. Rep. 383.

The Montana statute (Laws 1903, p. 156), making the railroad company liable for the negligence of an engineer, while in charge of an engine, applies only to a movable locomotive and not to a stationary engine, used to draw a plow along the floor of flat cars, to unload gravel with. Reinke v. Northern Pacific R. Co., 145 Fed. Rep. 988.

"Act Mont. March 5, 1903 (Laws 1903, p. 156, ch. 83), provides that every railroad corporation within the State shall be liable for all damages sustained by an employee thereof within the State, without contributory negligence on his part, when such damage is caused by the negligence of any train dispatcher, telegraph operator, superintendent, engineer, or any other employee who has superintendence of any stationary or hand signal. *Held*, that the word "engineer," as used in such section, had reference only to employees in charge of locomotives, and that the statute did not cover an injury sustained by an employee of a railroad caused by the negligence of the operator of a stationary engine used to draw a plow along the floor of flat cars for the unloading of gravel." Reinke v. Northern Pac. Ry. Co., 145 Fed. Rep. 988.

sponsibility on account of personal injuries received by such employees by reason of the negligence of such person, company or corporation, or the agents or employees thereof and all such contracts are null and void.

In every case, the liability of a corporation to an employee, acting under the orders of a superior, shall be the same, in case of injury, sustained by the default or wrongful act of his superior, or to an employee not appointed or controlled by him, as if such employee were a passenger.

An employer must indemnify his employees for all that they expend in direct consequence of the discharge of their duties, or of obedience to the direction of the employer, even though unlawful, unless the employee at the time of obeying the direction, believed it to be unlawful.

An employer is not bound to indemnify his employee for loss suffered by the latter, in consequence of the ordinary risks of the business, in which he is employed, but an employer must, in all cases, indemnify his employee for losses sustained by the former's want of ordinary care.

Every person or corporation operating a railroad in the State is liable for all damages sustained by any employee of such person or corporation, in consequence of the neglect of any other employee or employees, or by the mismanagement of any other employee or employees, and in consequence of the willful wrongs, whether of commission or omission, or any other employee or employees, when such neglect, mismanagement or wrongs, are in any manner connected with the use and operation of a railway on or about which they shall be employed. And in case of the death of any such employee, in consequence of any injury or damages so sustained, the right of action shall survive and may be prosecuted and maintained by his heirs or personal representatives.

§ 531. **By statute of Nebraska** [91] every railway company operating a railway engine, car, or train in the State of Nebraska shall be liable to any of its employees who at the time of injury are engaged in construction or repair work or in the use and operation of any engine, car, or train for said company, or in the case of his death to his personal representative for the benefit of his widow and children, if any; if none, then to his parents; if none, then to his next of kin dependent upon him, for all damages which may result from negligence of any of its officers, agents, or employees, or by reason of any defects or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works.

In all actions hereafter brought against any railway company to recover damages for personal injuries to an employee, or when such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery when his contributory negligence was slight and that of the employer was gross in comparison, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury.

No contract of employment, insurance, relief benefit, or indemnity for injury or death hereafter entered into by or on behalf of any employee nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employees: *Provided, however,* That upon the trial of such action against any railway company the defendant may set off any sum it has contributed toward any such in-

[91] Acts Nebraska 1907, ch. 48, §§ 1, 2, 3, and Compiled Statutes 1881, 10th ed., § 1799.

surance, relief benefit, or indemnity that may have been paid to the injured employee or, in case of his death, to his personal representative.

The statute directing the use of automatic couplers and power brakes on railroad trains provides that employees injured because of violation of the law shall not be considered as waiving the right to recover damages by continuing in the service of the company.

§ 532. **The legislature of Nevada,** by a recent act,[92] made Every common carrier engaged in trade or commerce in the State of Nevada, liable to any of its employees, or in case of death of such employee, to his personal representative, for the benefit of his widow and children, if any, and if none, then for his next of kin, for all damages which may result from the negligence of the officers, agents or employees, of said common carrier * * * or by reason of any defect or insufficiency, due to their negligence, in its cars, engines, appliances, machinery, track, roadbed, ways or work, or to their negligent handling or storing of explosives.

In all actions brought against any common carrier * * * to recover damages for personal injuries or death of an employee, the fact that an employee may have been guilty of contributory negligence shall not bar a recovery, where his contributory negligence was slight, and the negligence of the employer or its officers, agents or employees, was gross in comparison. All questions of negligence or contributory negligence shall be for the jury.

No contract of employment, insurance, relief benefit or indemnity for injury or death, entered into by or on behalf of any employee, nor the acceptance of any insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to re-

[92] Acts Nevada 1907, ch. 214, §§ 1, 2, 3.

cover damages for personal injuries to or for the death of such employee, but upon the trial of such action, the defendant is permitted to set off any sum paid for any such insurance, relief benefit, or indemnity, that may have been paid to the person entitled thereto.

§ 533. **The Laws of New Mexico,**[93] with reference to the liability of railroad companies, for injuries to their employees, enact that every corporation operating a railroad shall be liable in a sum sufficient to compensate its employees for all damages sustained by any such employee, if the person injured or damaged is without fault on his part, where the injury is sustained or occurs in consequence of the mismanagement, carelessness, neglect, default, or wrongful act, of any agent or employee of such corporation, while in the exercise of their several duties, when such mismanagement, carelessness, neglect, default, or wrongful act of such employee or agent could have been avoided by such corporation through the exercise of reasonable care or diligence in the selection of competent employees or agents, or by not overworking said employees or requiring or allowing them to work an unusual or unreasonable number of hours; and any contract restricting such liability shall be deemed to be contrary to public policy and therefore void.

It shall be unlawful for any such corporation knowingly and willfully to use or operate any car or locomotive that is defective, or any car or locomotive upon which the machinery or attachments thereto belonging are in any manner defective, or shops or machinery and attachments thereof which are in any manner defective, which defects might have been previously ascertained by ordinary care and diligence by said corporation.

If the employee of any such corporation shall receive any

[93] Compiled Laws New Mexico 1897, §§ 3216, 3217, 3218.

injury by reason of such defect in any car or locomotive or machinery or attachments thereto belonging, or shops or machinery and attachments thereof, owned and operated, or being run and operated by such corporation, through no fault of his own, such corporation shall be liable for such injury, and upon proof of the same in an action brought by such employee or his legal representatives, in any court of proper jurisdiction, against such railroad corporation for damages on account of such injury so received, shall be entitled to recover against such corporation any sum commensurate with the injuries sustained: *Provided,* That it shall be the duty of all the employees of railroad corporations to promptly report all defects coming to their knowledge in any such car or locomotive or shops or machinery and attachments thereof to the proper officer or agent of such corporation and after such report the doctrine of contributory negligence shall not apply to such employees.

Whenever the death of an employee shall be caused under circumstances from which a cause of action would have accrued under the provisions of the two preceding sections, if death had not ensued, an action therefor shall be brought in the manner provided by section three thousand, two hundred and fifteen, and any sum recovered therein shall be subject to all the provisions of said section three thousand, two hundred and fifteen.

§ 534. **The New York Statutes,**[94] with reference to the liability of railroad companies for injuries to their employees, are as follows:

[94] Acts New York 1902, ch. 600, §§ 1, 2, 3 and Acts 1906, ch. 657, § 42a.

Under the New York statute (Laws 1902, p. 1748), giving an employee, injured as a result of the negligence of one entrusted with superintendence, whose sole duty is superintendence, a right of action,

Where, after this act takes effect, personal injury is caused to an employee who is himself in the exercise of due care and diligence at the time:

1. By reason of any defect in the condition of the ways, works, or machinery connected with or used in the business of the employer which arose from or had not been discovered or remedied owing to the negligence of the employer or of any person in the service of the employer and entrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition.

a foreman of a roundhouse, although under a superintendent, is held to be an employe entrusted with superintendence, within the meaning of the law, so as to render a railroad company liable for an injury due to the negligence of such foreman while directing boiler repairing. Faith v. New York Central, etc., R. Co., 185 N. Y. 556; 77 N. E. Rep. 1186; 95 N. Y. S. 774; 109 App. Div. 222. But, see in same State, apparently opposed to this rule, Bannon v. New York, etc., R. Co., 98 N. Y. S. 770; 112 App. Div. 552; Abrahamson v. General Supply, etc., Co., 98 N. Y. S. 596; 112 App. Div. 318.

A train dispatcher, or one who had acted in this capacity for a period of three years, was held to be entrusted with authority of superintendence, in McHugh v. Manhattan R. Co., 179 N. Y. 378; 72 N. E. Rep. 312.

The statute does not apply if the injured employee was himself guilty of contributory negligence. Sievers v. Eyre, 122 Fed. Rep. 734.

"Labor Law (Laws 1897, p. 467, ch. 415, § 18), making the employer liable for unsafe scaffolds, hoists, stays, ladders, or other mechanical contrivances, even though they be negligently put up by fellow workmen of the plaintiff as part of their work, does not give a new cause of action, but only makes evidence competent to show an employer's negligence which before was not competent." Haggblad v. Brooklyn Heights R. Co. (N. Y. Supp. 1907), 102 N. Y. S. 1039.

"One employed by a railroad, and having charge of the work of cleaning ashes from locomotives in the absence of the regular superintendent or foreman, and who had control of the men and directed them in the work of handling the engines, was acting as a superintendent, within Employer's Liability Act, Laws 1902, p. 1748, ch. 600, making the employer liable for injuries to an employee arising from the negligence of any person exercising superintendence." Mikos v. New York. Cent, etc., R. Co., 102 N. Y. S. 995.

2. By reason of the negligence of any person in the service of the employer entrusted with and exercising superintendence whose sole or principal duty is that of superintendence, or in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer; the employee, or in case the injury results in death, the executor or administrator of a deceased employee who has left him surviving a husband, wife, or next of kin, shall have the same right of compensation and remedies against the employer as if the employee had not been an employee of nor in the service of the employer nor engaged in his work. The provisions of law relating to actions for causing death by negligence, so far as the same are consistent with this act, shall apply to an action brought by an executor or administrator of a deceased employee suing under the provisions of this act.

All rights of action are limited to one year and notice of the injury must be given within one hundred and twenty days after the injury, in the manner prescribed by the statute.

The employee does not assume the risk of injury for failure to comply with the statute, but his failure to report any defects or failures to the employer, or a vice-principal, may amount to an assumption of the risk.

In all actions against a railroad corporation, foreign or domestic, doing business in this State, or against a receiver thereof, for personal injury to, or death resulting from personal injury of any person, while in the employment of such corporation or receiver, arising from the negligence of such corporation or receiver or of any of its or his officers or employees, every employee, or his legal representatives, shall have the same rights and remedies for an injury, or for death, suffered by him from the act or omission of such corporation or receiver or of its or his officers or employees, as are now allowed by law, and in addition to the liability now existing

by law, it shall be held in such actions that persons engaged in the service of any railroad corporation, foreign or domestic, doing business in this State, or in the service of a receiver thereof, who are intrusted by such corporation or receiver, with the authority of superintendence, control or command of other persons in the employment of such corporation or receiver, or with the authority to direct or control any other employee in the performance of the duty of such employee, or who have, as a part of their duty, for the time being, physical control or direction of the movement of a signal, switch, locomotive engine, car, train or telegraph office, are vice-principals of such corporation or receiver, and are not fellow workmen of such injured or deceased employee. If an employee, engaged in the service of any such railroad corporation, or of a receiver thereof, shall receive any injury by reason of any defect in the condition of the ways, works, machinery, plant, tools or implements, or of any car, train, locomotive or attachment thereto belonging, owned, or operated, or being run and operated by such corporation or receiver, when such defect could have been discovered by such corporation or receiver, by reasonable and proper care, tests or inspection, such corporation or receiver shall be deemed to have had knowledge of such defect before and at the time such injury is sustained; and when the fact of such defect shall be proved upon the trial of any action in the courts of this State, brought by such employee or his legal representatives, against any such railroad corporation or receiver, on account of such injuries so received, the same shall be *prima facie* evidence of negligence on the part of such corporation or receiver. This section shall not affect actions or causes of action now existing; and no contract, receipt, rule, or regulation, between an employee and a railroad corporation or receiver, shall exempt or limit the liability of such corporation or receiver from the provisions of this section.

§ 535. **The North Carolina law.**— The legislature of North Carolina [95] has provided that any employee of any railroad company operating in the State, who shall suffer injury to his person, or the personal representative of any employee who shall have suffered death, in the course of his services or employment with such company, by the negligence, carelessness or incompetency of any other employee or agent of the employer, or by any defect in the machinery, ways or appliances, of the company, shall be entitled to maintain an action against the employer therefor.

Any contract or agreement, expressed or implied, made by any employee of such company to waive the benefit of this law, shall be null and void.

§ 536. **The North Dakota Revised Code,**[96] renders every

[95] Laws North Carolina, Revisal of 1905, § 2646.

"Under the express provisions of Revisal 1905, § 2646, any servant of a railroad company suffering injury by the negligence of any other employee of the company is entitled to maintain his action against the company." Britt v. Carolina Northern R. Co. (N. C. 1907), 56 S. E. Rep. 910.

Under Const. art. 9, § 15, providing that an employee of a railroad company shall have the same right to recover for injuries received from the negligence of employees as is allowed to persons not employees when the injury results from the negligence of a fellow workman engaged in another department of labor, a watchman at a railroad crossing is engaged in another department of labor from his fellow employee running a train across the crossing. Betchman v. Seaboard Air Line Ry., 55 S. E. Rep. 140.

The common-law rule as to coemployees is held to be abolished in North Carolina, as to railroads, in Mabry v. North Carolina R. Co., 139 N. C. 388; 52 S. E. Rep. 124.

But the statute does not apply to an employee injured at a place several miles from the completed portion of a railroad. Nicholson v. Transylvania R. Co., 138 N. C. 516; 51 S. E. Rep. 40.

A workman injured while repairing a bridge, is held to be within the protection of the statute, in Sigman v. Southern Ry. Co., 135 N. C. 181; 47 S. E. Rep. 420.

[96] North Dakota Revised Code, 1905, §§ 4400, 5392, 5544, 5545, and Acts 1907, ch. 203, §§ 1, 2, 3, 4.

railroad company doing business in the State liable for all damages done to any employee of such company, in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damage; and no contract which restricts such liability shall be legal or binding.

Every one is responsible not only for the result of his willful acts, but also for injury occasioned to another by his want of ordinary care or skill in the management of his property, or person, except so far as the latter has by willful act or want of ordinary care, brought the injury on himself.

An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of employees employed by the same employer, in the same general business, unless he has neglected to use ordinary care in selecting the culpable employee.

An employer must, in all cases, indemnify his employee for losses caused by the former's want of ordinary care.

Every common carrier shall be liable to any of its employees or in case of the death of an employee to his personal representatives, for the benefit of his widow, children, or next of kin, for all damages which may result from the negligence of any of its officers or agents or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works.

In all actions hereinafter brought against any common carrier to recover damages for personal injuries to an em-

"Laws 1903, p. 178, ch. 131, making railroad companies liable to an employee for injuries caused by the negligence of a coemployee applies only to those employees engaged in operating the railroad and so exposed to the peculiar dangers attending their business." Beleal v. Northern Pac. Ry. Co. (N. D. 1906), 108 N. W. Rep. 33.

ployee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence, shall not bar a recovery, where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury.

No contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute a bar or defense to any action brought to recover damages for personal injuries to or death of such employee: *Provided, however,* That upon the trial of said action against any common carrier, the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been made to the injured employee, or, in case of his death, to his personal representative.

No action shall be maintained under this act unless commenced within one year from the time the cause of action accrued.

§ 537. **The Annotated Statutes of Ohio**[97] and subsequent acts,[98] render railroad companies liable for injuries to their

[97] Bates' Annotated Statutes of Ohio, Third Section, §§ 3365-20, 3365-21.

[98] Acts Ohio 1902, p. 114; Acts 1904, p. 547; Acts 1908, entitled "An act to qualify the liability of railroad companies for injuries to their employees," approved February 28, 1908.

Under the Ohio statute, making railroad companies responsible for the acts of employees in other departments of the business, a company is held liable for the injury of a fireman due to the neglect of an engineer and fireman of another train, although they were subject

employees in the following cases, i. e., for injuries resulting from the known or negligent use of any car or locomotive that is defective or any car or locomotive upon which the machinery or attachments are defective.

It is unlawful for any railroad or railway corporation or company owning and operating * * * a railroad in whole or in part in this State, to adopt or promulgate any rule or regulation for the government of its employees, to make or enter into any contract or agreement with any person engaged in or about to engage in its service, in which, or by the terms of which, such employee in any manner, directly or indirectly, promises or agrees to hold such corporation or company harmless, on account of any injury he may receive by reason of an accident to, breakage, defect, or insufficiency in the cars or machinery and attachments thereto belonging, upon any cars so owned and operated, or being run and operated by such corporation or company, being defective, and any such rule, regulation, contract, or agreement shall be of no effect. It shall be unlawful for any corporation to compel or require directly or indirectly an employee to join any company or association whatsoever, or to withhold any part of an employee's wages or his salary for the payment of dues or assessments in any society or organization whatsoever, or demand or require either as a condition precedent to securing employment or being employed, and said railroad or railway company shall not discharge any employee because he refuses or neglects to become a member of any society or

to the orders of the conductor, in the operation of the train. Kane v. Erie R. Co., 142 Fed. Rep. 682; 73 C. C. A. 672.

"The Ohio Act of April 2, 1890 (87 Ohio Laws, p. 150), providing that, in an action for injuries to a railroad employee, it shall be no defense that the injury was caused by the negligence or default of a fellow employee, is a valid law under the Constitution of Ohio, and is not repugnant to the 14th Amendment of the Federal Constitution." Erie R. Co. v. Kane (U. S. C. C. A., Ohio, 1907), 155 Fed. Rep. 118.

organization. And if any employee is discharged he may, at any time within ten days after receiving a notice of his discharge, demand the reason of said discharge, and said railway or railroad company thereupon shall furnish said reason to said discharged employee in writing. And no railroad company, insurance society or association, or other person shall demand, accept, require, or enter into any contract, agreement, stipulation with any person about to enter, or in the employ of any railroad company whereby such person stipulates or agrees to surrender or waive any right to damages against any railroad company, thereafter arising for personal injury or death, or whereby he agrees to surrender or waive in case he asserts the same, any other right whatsoever, and all such stipulations and agreements shall be void, and every corporation, association, or person violating or aiding or abetting in the violation of this section shall for each offense forfeit and pay to the person wronged or deprived of his rights hereunder the sum not less than fifty dollars nor more than five hundred dollars to be recovered in a civil action.

Every railroad company operating any railroad which is in whole or in part within this State is liable for all damages sustained by any of its employees by reason of personal injury or death of such employee:

1. When such injury or death is caused by a defect in any locomotive, engine, car, hand car, rail, track, machinery or appliance required by such company to be used by its employees in and about the business of their employment, if such defect could have been discovered by reasonable and proper care, tests or inspection; and proof of such defect shall be presumptive evidence of knowledge thereof on the part of such company; and any such employee of such railroad company who may be injured or killed as a result of any such defect shall not be deemed to have assumed the risk occa-

sioned by such defect, although continuing in the employment of such railroad company after knowledge of such defect; nor shall continuance in employment after such knowledge by any employee be deemed an act of contributory negligence.

2. While any such employee is engaged in operating, running, riding upon or switching passenger, freight or other trains, engines or cars, and while engaged in the performance of his duties as such employee, and when such injury or death shall have been caused by the carelessness or negligence of any other employee, officer or agent of such company, in the discharge of or for failure to discharge his duties as such.

In all actions hereafter brought against any railroad company operating any railroad in whole or in part within this State, for personal injury to an employee or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was greater in comparison. But the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury.

§ 538. **The Constitution of Oklahoma,**[99] among the other subjects extensively covered, contains a provision that:

The common-law doctrine of fellow employees, so far as it affects the liability of the employer for injuries to his employee resulting from the acts or omissions of any other employee of the common employer is abrogated as to every employee of every railroad company and every street railway company or interurban railway company, and of every person, firm, or corporation engaged in mining in this State;

[99] Oklahoma Constitution of 1907, art. 9, § 36.

and every such employee shall have the same right to recover for every injury suffered by him for the acts or omissions of any other employee or employees of the common employer that an employee would have if such acts or omissions were those of the employer himself in the performance of a non-assignable duty; and when death, whether instantaneous or not, results to such employee from any injury for which he could have recovered under the above provisions, had not death occurred, then his legal or personal representative, surviving consort or relatives, or any trustee, curator, committee, or guardian of such consort or relatives, shall have the same rights and remedies with respect thereto as if death had been caused by the negligence of the employer. And every railroad company and every street railway company or interurban railway company and every person, firm, or corporation engaged in underground mining is liable under this section for the acts of his or its receivers.

Nothing contained in this section shall restrict the power of the legislature to extend to the employees of any person, firm, or corporation the rights and remedies herein provided for.

§ 539. **The legislature of Oregon,**[1] upon the subject of the liability of railroad companies for injuries to employees, enacted that:

Every corporation operating a railroad in this State, whether such corporation be created under the laws of this State, or otherwise, shall be liable in damages for any and all injury sustained by any employee of such corporation as follows: When such injury results from the wrongful act, neglect, or default of an agent or officer of such corporation, superior to the employee injured, or of a person employed by such corporation having the right

[1] Acts Oregon 1903, p. 20.

to control or direct the services of such employee injured, or the services of the employee by whom he is injured; and also when such injury results from the wrongful act, neglect, or default of a coemployee engaged in another department of labor from that of the employee injured, or of a coemployee on another train of cars, or of a coemployee who has charge of any switch, signal point, or locomotive engine, or who is charged with dispatching trains or transmitting telegraphic or telephonic orders. Knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, appliances, or structures of such corporation shall not of itself be a bar to recovery for any injury or death caused thereby. When death, whether instantaneous or otherwise, results from an injury to any employee of such corporation received as aforesaid, the personal representative of such employee shall have a right of action therefor against such corporation, and may recover damages in respect thereof. Any contract or agreement, express or implied, made by any such employee to waive the benefit of this section, or any part thereof, shall be null and void, and this section shall not be construed to deprive any such employee, or his personal representative, of any right or remedy to which he is now entitled under the laws of this State.

The rules and principles of law as to contributory negligence which apply to other cases shall apply to cases arising under this act, except in so far as the same are herein modified or changed.

§ 540. **The legislature of Pennsylvania,** by a recent act,[2] provided that in all actions brought to recover damages from

[2] Pennsylvania Acts 1907, Act No. 329, §§ 1, 2.

Under the Pennsylvania statute of 1868, if the place of an accident is clearly used for general purposes as the "roads, works, depots or

an employer for injury suffered by his employee, the negligence of a coemployee of the injured employee shall not be a defense, where the injury was caused, or it was contributed to, by any of the following causes, *viz:*

Any defect in the works, plant, or machinery of which the employer could have had knowledge, by the exercise of ordinary care; the neglect of any person engaged as superintendent, manager, foreman, or any other person in charge or control of the works, plant, or machinery; the negligence of any person in charge of or directing the particular work in which the employee was engaged, at the time of the injury or death; the negligence of any person to whose orders the employee was bound to conform, and did conform, and, by reason of his having conformed thereto, the injury or death resulted; the act of any coemployee, done in obedience to the rules, instructions or orders given by the employer or any other person who had authority to direct the doing of the act causing the injury.

The manager, superintendent, foreman, or other person, in charge or control of the works, or any part of the works, shall, under this act, be held as the agent of the employer, in all suits for damages for death or injury suffered by employees.

§ 541. **The Constitution of South Carolina**[3] regulates the

premises" of the railroad company, the injured person is a coemployee of the persons working at such a place, where he is also working near them and he is not a passenger. Spisak v. Baltimore, etc., R. Co., 152 Pa. St. 281; 25 Atl. Rep. 497.

A person who is employed by the owner of a side track to switch cars on a private siding is not in the employment of the railroad company so as to recover under this statute, for an injury sustained while engaged in such duties. Stone v. Pennsylvania R. Co., 132 Pa. St. 206; 19 Atl. Rep. 67; 41 Am. & Eng. R. Cas. 522.

[3] Constitution South Carolina, art. 9, § 15.

liability of railroad companies for injuries to employees, as follows:

Every employee of any railroad corporation shall have the same rights and remedies for any injury suffered by him from the acts or omissions of said corporations or its employees as are allowed by law to other persons not employees, when the injury results from the negligence of a superior agent or officer, or of a person having a right to control or direct the services of a party injured, and also when the injury results from the negligence of a fellow employee engaged in another department of labor from that of the party injured, or of a fellow workman on another train of cars, or one engaged about a different piece of work. Knowledge by any employee injured of the defective or unsafe character or condition of any machinery, ways, or appliances shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them. When death ensues from any injury to employees, the legal or personal representatives of the person injured shall have the same right and remedies as are allowed by law to such representatives of other persons. Any contract or agreement, expressed or implied, made by any employee to waive the benefit of this section shall be null and void; and this section shall not be construed to deprive any employee of a corporation, or his legal or personal representative, of any remedy or right that he now has by the law of the land. The General Assembly may extend the remedies herein provided for to any other class of employees.

And by Civil Code,[4] every employee of a street railroad

[4] Civil Code, South Carolina 1902, § 2848.

" Const. art. 9, § 15, provides that every employee of a railroad company shall have the same right of action against an employer for an injury suffered by the negligence of a railroad corporation or its

company, is given the same rights and remedies for an injury suffered by the acts or omissions of the employer or its employees, as are provided by the above section of the Constitution for employees of railroad companies.

§ 542. **The South Dakota legislature,** by a recent statute,[5] enacted that every common carrier, engaged in trade or commerce in the State shall be liable to any of its employees, or in case of their death, to the personal representative of such employee, for the benefit of his widow and children, if any; if none, then for his parents; if none, then for the next of kin dependent upon him, for all damages which may result from the negligence of any of its officers or agents or by reason of any defect or insufficiency due to its negligence in its

employees as is allowed other persons not employees, when the injury results from the negligence of a superior officer or a person having a right to control the party injured. *Held* that, where an injury to an employee of a railroad was the result of negligence on the part of the conductor, the legal representative of the person injured was entitled to the same remedies as are allowed to other persons not employees." Reed v. Southern Ry., 55 S. E. Rep. 218; 75 S. C. 162.

"An engineer is a vice-principal and not a fellow employee of his fireman, within Const. 1895, art. 9, § 15, giving to railroad employees the right to recover for injuries sustained by the negligence of a superior having the right to control or direct the services of the party injured." Pagan v. Southern Ry. Co. (S. C. 1907), 59 S. E. Rep. 32.

"Prior to the adoption of Const. 1895 the fellow-service rule was applicable to railroads." Pagan v. Southern Ry. Co. (S. C. 1907), 59 S. E. Rep. 32.

"Under Civ. Code Ga. 1895, § 2610, providing that, except in case of railroad companies, the employer is not liable to one employee for injuries from the negligence of other employees about the same business, a railroad company is liable for injury to an employee from negligence of his fellow employees." Bussey v. Charleston & W. C. Ry. Co. (S. C. 1907), 58 S. E. Rep. 1015.

"The change in the fellow-servant law made by the Constitution of 1895 affects only the employees of railroad corporations." Wilson v. Virginia-Carolina Chemical Co., 58 S. E. Rep. 1019.

[5] Acts South Dakota 1907, ch. 219, §§ 1, 2, 3, 4.

cars, engines, appliances, machinery, track, roadbed, ways, or works.

In all actions hereafter brought against any common carrier to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, where his contributory negligence was less than the negligence of the employer, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury.

No contract of employment, insurance, relief benefit or indemnity for injury or death entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee: *Provided, however,* That upon the trial of such action against any common carrier the defendant may set off therein any sum it has contributed toward any insurance, relief benefit or indemnity that may have been paid to the injured employee, or in case of his death, to his personal representative.

No action shall be maintained under this act, unless commenced within two years from the time the cause of action accrued.

§ 543. **The laws of Texas,**[6] governing the liability of railroad companies for injuries to their employees, are as follows:

[6] Acts Texas 1897, Special Session, ch. 6, §§ 1, 2, 3, 4, 5 and Acts 1905, ch. 163, § 1; Sayles' Civ. St., § 4560h.

Hand cars are cars within the meaning of this statute and a member

Every person, receiver, or corporation operating a railroad or street railway the line of which shall be situated in whole or in part in this State, shall be liable for all damages sustained by any employee thereof while engaged in the work of operating the cars, locomotives, or trains of such person, receiver, or corporation by reason of the negligence of any other employee of such person, receiver, or corporation, and the fact that such employees were fellow workmen with each other shall not impair or destroy such liability.

of a section gang, carrying tools on foot and others using a hand car, for same purpose, were held not to be coemployees, in Long v. Chicago, etc., Ry. Co., 57 S. W. Rep. 802.

"Sayles' Ann. Civ. St. 1897, art. 4560f, provides that every person or corporation operating a railroad shall be liable for all damages sustained by any employee thereof while engaged in the work of operating cars of such railroad by reason of the negligence of a fellow workman. *Held*, that where plaintiff, a workman of a railroad company, was injured while unloading ties from a box car in a train used for distributing the ties along the track, by the negligence of a fellow workman, he was engaged in work proximately and necessarily connected with the operation of the cars at the time of his injury, and was entitled to the protection of the statute." St. Louis Southwestern Ry. Co. v. Thornton (Tex. Civ. App. 1907), 103 S. W. Rep. 437.

"An employee of a railroad, assisting in replacing on a tram railroad track, constructed as an ordinary railroad track, a derailed tram car used in the transportation of cross-ties from the main line to the railroad's creosote plant, is engaged in the operation of a car within the statutes, and the railroad cannot escape liability for injuries to him occasioned through the negligence of fellow workman." Missouri, K. & T. Ry. Co. v. Smith, 99 S. W. Rep. 743.

"An engineer in charge of a switching engine and a fireman are, while the engineer is engaged in oiling the parts of the engine and the fireman in filling the tank with water after the engine has been stopped for the purpose of taking water, engaged in operating the engine, within Rev. St. 1895, art. 4560g, exempting the operatives of a railroad engine from the coemployee rule while engaged in their work." Texas & N. O. R. Co. v. Walton, 104 S. W. Rep. 415.

The Texas statute (Sayles' Ann. Civ. Code 1897, art. 4560f), giving a right of action for an injury to an employee, received while operating cars, covers the case of an employee of a private railroad, helping to string telephone poles along the railroad track, as he is then engaged

All persons engaged in the service of any person, receiver, or corporation controlling or operating a railroad or street railway the line of which shall be situated in whole or in part in this State, who are intrusted by such person, receiver, or corporation with the authority of superintendence, control, or command of other employees of such person, receiver, or corporation or with the authority to direct any other em-

in operating a car, within the meaning of the statute, as held by the court, in Mounce v. Lodwick Lumber Co., 91 S. W. Rep. 240.

Men operating a hand car are held to be within the protection of the statute, in Texas, etc., Ry. Co. v. McCraw, 95 S. W. Rep. 82; Texas, etc., Ry. Co. v. Hervey, 89 S. W. Rep. 1095.

A fireman, walking on the track, when he was struck by projecting lumber was even held to be "operating a railroad," within the meaning of the Texas statute, in St. Louis, etc., R. Co. v. Bussong, 90 S. W. Rep. 73.

An employee engaged in loading a car was held to be operating a railroad, in Texas Central R. Co. v. Pelfrey, 80 S. W. Rep. 1036.

The employer was held liable for the failure of the engineer to keep a lookout for obstructions on the track, as a result of which a fireman was injured, in Missouri, etc., R. Co. v. Keaveney, 80 S. W. Rep. 387.

A section foreman was held to be as much within the protection of the statute, as one of his men would be, in Texas, etc., Ry. Co. v. Smith, 114 Fed. Rep. 728; 52 C. C. A. 360.

A foreman of men in a railway yard who, under the Texas statute (Sayles' Ann. Civ. St. 1897, art. 4560g), is a vice-principal, because endowed with power of control, does not become a coemployee by the mere act of assisting to move a tool box. Missouri, K. & T. R. Co. v. Dean, 89 S. W. Rep. 797.

The Texas court holds that a fireman, standing by the side of the track, after lighting the headlight in his engine, is so far engaged in the "operation of a railroad," as to enable him to recover for an injury from being struck by projecting lumber on a flat car. St. Louis & S. F. R. Co. v. Bussong, 90 S. W. Rep. 73.

Removing a hand car from the track was held to be the operation of a car, within the Texas fellow-service law (Rev. St. 1895, art. 4560f.) Texas & Pac. R. Co. v. Hervey, 89 S. W. Rep. 1095.

A brakeman, lighting a lamp in a caboose, on a side track, when injured by a collision with another car, was held to be engaged in "operating a railroad," within the Missouri fellow-service law, in St. Louis & S. F. R. Co. v. Smith, 90 S. W. Rep. 926.

ployee in the performance of any duty of such employee, are vice-principals of such person, receiver, or corporation and are not fellow workmen with their coemployees.

All persons who are engaged in the common service of such person, receiver, or corporation, controlling or operating a railroad or street railway, and who while so employed are in the same grade of employment and are doing the same character of work or service and are working together at the same time and place and at the same piece of work and to a common purpose, are coemployees with each other. Employees who do not come within the provisions of this section shall not be considered coemployees.

No contract made between the employer and employee based upon the contingency of death or injury of the employee and limiting the liability of the employer under this act of fixing damages to be recovered shall be valid or binding.

Nothing in this act shall be held to impair or diminish the defense of contributory negligence when the injury of the employee is caused proximately by his own contributory negligence.

The plea of assumed risk will not obtain, if the injured employee had an opportunity for knowledge of the defect in the machinery or appliances, and notified the employer thereof, or if a person of ordinary care would have continued the use of the appliance or machinery, after notice of the defect or imperfection therein.

§ 544. **The Federal Employer's Liability Act.**— After the Federal Employer's Liability Act, of 1906, was held to be unconstitutional, by the Supreme Court,[7] the Congress of the United States, in 1908, passed the following act, upon

[7] Howard v. Illinois Central R. Co., 28 U. S. Sup. Ct. Rep. 411; 207 U. S. 463.

the same subject, to meet the objections sustained against the similar law of 1906.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appli-

ances, machinery, track, roadbed, works, boats, wharves, or other equipment.

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

In any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall, to that exent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein, any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto, on account of the injury or death for which said action was brought.

No action shall be maintained under this act unless com-

menced within two years from the day the cause of action accrued.

The term common carrier as used in this act shall include the receiver or receivers or other person or corporation charged with the duty of the management and operation of the business of a common carrier.

Nothing in this act shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the Act of Congress approved June 11, 1906.[8]

[8] This act was approved April 22, 1908. The minority report of the Committee on the Judiciary, on the report of this bill, recommended that the act be amended by inserting the words, "in service directly connected with the operation of the road," in order to make the law apply only to the extra hazardous duties of the employment and take the proposed law out of the rule announced by the various State tribunals that such legislation, to withstand the charge of unjust discrimination, must be leveled at the hazardous nature of the business, rather than at the character of the employer, but this suggestion was not adopted by the majority of the committee. On this interesting phase of the present act, the minority of the Committee of the Judiciary said:

"The 5th Amendment is well understood to be applicable only to the Federal Government. That the proposed legislation, unless confined either by legislative language or judicial construction to the extra hazardous part of the commerce, would be a denial of the equal protection of the law, is clear. Whether, at the same time, the carrier would, by reason of such denial of equal protection of the law, be deprived of "property without due process of law," it must be admitted is not so clear. Does the citizen get the benefit of due process of law under the 5th Amendment when he is deprived of the equal protection of the law? The most obvious suggestion that occurs with reference to these two constitutional provisions is that inasmuch as the language of the 5th and the 14th Amendments is identical in this respect, until the equal protection clause is reached, that evidently the authors of the 14th Amendment, believing that under the 'due process of law' clause equal protection was not guaranteed, found it necessary to add the specific clause guaranteeing it so far as the States are concerned. It is clear that if this clause was necessary to guarantee that result, then 'due process of law' does not include

the equal protection of the law, and if it was not necessary, the addition of the clause relative to due protection of law would be entirely unnecessary and mere rhetoric — a conclusion that would not be hastily assumed."

See Report No. 1386, April 4, 1908, 60th Congress of U. S. accompanying H. R. 20310, p. 88.

Commenting on the effects the different sections of this act would have in attaining the objects had in view by the Congress of the United States, in adopting the bill, Mr. T. Megaarden, in Law Notes, for June, 1908 (12 Law Notes, p. 45), observed:

"The first section of this act, like the first section of the former act, does away with the fellow-servant doctrine, but unlike that act, which applied to all common carriers, the new statute applies only to common carriers by railroad. And to meet the constitutional objection which was successfully urged against the first enactment, which applied to every common carrier engaged in interstate commerce without being restricted in its application to such carriers while actually engaged in interstate commerce, the new statute applies only to every common carrier by railroad while engaged in interstate commerce, and makes them liable only to persons suffering injury while employed by the carriers in such commerce.

"This undoubtedly makes the act constitutional within the decisions in the Employer's Liability Cases. But, obviously, the act will be prolific of litigation, for it will often be no easy matter to determine whether at the time of an injury to an employee the railroad company was engaged and the servant was employed in interstate commerce. Some light may occasionally be thrown upon these questions by the decisions under the Safety Appliance Act. For example, if the question should arise whether an employee who was engaged at the time of the injury in making up a train for the purpose of moving interstate commerce is within the application of the act, an answer in the affirmative may be deduced by analogy from the case of Mobile, etc., R. Co. v. Bromberg, 141 Ala. 258, construing the federal statute relating to safety appliances. But for the most part questions relating to when a railroad is engaged and a servant employed in interstate commerce will have to be decided without the aid of previously expressed judicial opinions, and the courts will have a pretty time deciding them. It will be far from an enviable task for a court to have to decide whether a yard switchman who is engaged in attaching a car which is to go to a place within the State, to other cars which are to go into another State, is employed in interstate trade or commerce. And is a railroad company, whose road is wholly within the boundaries of one State, engaged in interstate commerce when it hauls to the State border a train of cars which are billed to a distant

§ 545. **The United States Safety Appliance Act.**— By act of Congress,[9] all cars and engines used by railroads in interstate commerce, are required to be equipped with couplers, coupling automatically, by impact, so that they can be uncoupled without the necessity of men going between the cars.

State? Similar questions might be multiplied indefinitely, but it is hardly worth while, for we shall soon have real cases enough. It is a curious circumstance, that while the able statesmen at Washington discoursed at length on the difficulty of apportioning damages under the comparative negligence rule, they did not once, so far as the *Congressional Record* shows, advert to the equally perplexing question as to when an interstate carrier is, and when it is not, engaged in interstate commerce.

"The third section of the new statute contains, with other matter, a provision recognizing the comparative negligence doctrine. It provides that contributory negligence on the part of the injured employee 'shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.' The corresponding provision of the former act provided that contributory negligence on the part of the employee 'shall not bar a recovery *where his contributory negligence was slight and that of the employer was gross in comparison*, but the damages shall be diminished,' etc. The elimination of the words in italic makes it clear that by the present statute the comparative negligence rule for the assessment of damages is to be followed in all cases, and not only in cases in which it appears that the employee's negligence was slight and that of the defendant gross in comparison. Since the comparative negligence feature of the statute has been discussed by the writer in a former article in this magazine (10 Law Notes, p. 145), no further attention need be given it here. It should, however, be noted in this connection that the present act goes farther than the former one by providing that the employee shall not be held to have been guilty of contributory negligence in any case where the violation by the carrier of any statute enacted for the safety of employees contributed to the injury or death of the employees."

[9] Act Congress, March 2, 1893, § 2, ch. 196; 27 Stat. 531; U. S. Comp. St. 1901, p. 3174; *id.*, § 8.

This statute is highly penal and is strictly construed, and a mere failure of the company's inspector to notice that a chain was broken, attached to the lever of the coupler, before delivery of the car to a connecting carrier, was not a violation of the act. United States v. Atchison, etc., R. Co., 150 Fed. Rep. 442.

This act also provides that employees injured by the use of any locomotive, car or train, in violation of the act, shall not be deemed to have assumed the risk of injury from the use of such car, locomotive or train, even though they knew of the unlawful use.

§ 546. **The law of Vermont,**[10] has so far modified the common-law right of the employer, to use the kind of appliances or machinery that he may see fit, so long as he is not negligent, by providing, as to railroad companies, for the installation of safety appliances and such railroad companies as may fail to comply with the statute, are rendered liable for all injuries to their employees, arising from violations of the law.

§ 547. **The Virginia constitution**[11] **and code**[12] abolishes the common-law fellow service doctrine, as to all employees of railroad companies engaged in the physical construction, repair or maintenance of the roadway, track, or any of its struc-

But the receipt of a defective car by an interstate connecting carrier, is a violation of the law. United States v. Chicago, etc., R. Co., 149 Fed. Rep. 486.

It is no defense to a violation of the law that the automatic coupler was simply out of repair. United States v. Great Northern R. Co., 150 Fed. Rep. 229.

The law requires the use of couplers which can be coupled as well as uncoupled, without men going between the ends of cars, etc. Southern Railway Company v. Simmons, 105 Va. 651; 55 S. E. Rep. 459.

[10] Statutes Vermont, 1894, §§ 3887, 3911.

[11] Constitution Virginia, art. I2, § 162.

[12] Code 1904, § 1294k, 1294d, subsec. 36.

The Virginia Constitution relaxing the stringency of the common-law rule as to coemployees, in the interests of those employed by railroads, is not to be strictly construed, but so as to carry out the intent of the framers of the Constitution. Virginia, etc., R. Co. v. Clower's Admr., 102 Va. 867; 47 S. E. Rep. 1003.

tures connected therewith, or in any work connected with a car or engine standing on the track, or in the physical operation of a train, car, engine or switch, or in any service requiring the presence of such employee upon a train, car or engine, and such employees are given the same right of recovery for injuries so received, as if received by the nonperformance of the employer himself, provided that the injured employee receives his injuries by the neglect of an officer, or agent of the railroad company of a higher grade of service than the injured employee, or of a person charged with the duty of controlling him, or that his injury result from the negligence of a coemployee in another department of the business, or engaged upon a car, or train, on which the injured employee is not engaged, or by an employee who is at the time in charge of a switch, signal point, or locomotive, or is charged with dispatching trains or transmitting telegraphic or telephonic orders therefor; and whether such negligence be in the performance of an assignable or nonassignable duty. The physical construction, repair, or maintenance of the roadway, track, or any of the structures connected therewith, and the physical construction, repair, maintenance, cleaning, or operation of trains, cars, or engines shall be regarded as different departments of labor within the meaning of this section. Knowledge, by any such railroad employee injured, of the defective or unsafe character or condition of any machinery, ways, appliances, or structures shall be no defense to an action for injury caused thereby. When death, whether instantaneous or not, results to such an employee from any injury for which he could have recovered, under the above provisions, had death not occurred, then his legal or personal representative, surviving consort, and relatives (and any trustee, curator, committee, or guardian of such consort or relatives) shall, respectively, have the same rights and remedies with respect thereto as if his death had been caused by the

negligence of a coemployee while in the performance as vice-principal of a nonassignable duty of the employer. Every contract or agreement, express or implied, made by an employee to waive the benefit of this section shall be null and void. This section shall not be construed to deprive any employee, or his legal or personal representative, surviving consort, or relatives (or any trustee, curator, committee, or guardian of such consort or relatives) of any rights or remedies that he or they may have by the law of the land, at the time this constitution goes into effect. Nothing contained in this section shall restrict the power of the general assembly to further enlarge, for the above-named class of employees, the rights and remedies hereinbefore provided for, or to extend such rights and remedies to, or otherwise enlarge the present rights and remedies of, any other class of employees of railroads or of employees of any person, firm or corporation.

Every corporation operating a railroad in this State, whether such corporation be created under the laws of this State or otherwise, shall be liable in damages for any and all injury sustained by any employee of such corporation as follows: When such injury results from the wrongful act, neglect, or default of an agent or officer of such corporation superior to the employee injured, or of a person employed by such corporation having the right to control or direct the services of such employee injured, or the services of the employee by whom he is injured; and also when such injury results from the wrongful act, neglect, or default of a coemployee engaged in another department of labor from that of the employee injured, or of a coemployee on another train of cars, or of a coemployee who has charge of any switch, signal point, or locomotive engine, or who is charged with dispatching trains or transmitting telegraphic or telephonic orders. Knowledge by any employee injured, of the defec-

tive or unsafe character or condition of any machinery, ways, appliances, or structures of such corporation shall not of itself be a bar to recovery for any injury or death caused thereby. When death, whether instantaneous or otherwise, results from any injury to any employee of such corporation received as aforesaid, the personal representative of such employee shall have a right of action therefor against such corporation, and may recover damages in respect thereof. Any contract or agreement, express or implied, made by any such employee to waive the benefit of this section or any part thereof shall be null and void, and this section shall not be construed to deprive any such employee, or his personal representative, of any right or remedy to which he is now entitled under the laws of this State. The rules and principles of law as to contributory negligence, which apply to other cases, shall apply to cases arising under this act, except in so far as the same are herein modified or changed.

An act directing the erection of telltales or danger signals at the approaches to bridges over railroads, tunnels, etc., makes failure to provide such devices ground for a right of action where injury or death results from such failure.

§ 548. **The Statute of Washington** [13] requires all railroad companies operating railroads in the State to block and guard all frogs, switches and guard rails, and for an injury to an employee for a failure to comply with this statute, the railroad company so failing to comply with the law is liable to a suit for damages by the person injured as a result of such negligence.

§ 549. **The Statutes of Wisconsin.**— With reference to the liability of railroad companies for injuries to their employees, the legislature of Wisconsin [14] has enacted that:

[13] Acts Washington, 1899, ch. 35, § 2.

[14] Annotated Statutes Wisconsin, 1898, §§ 1816, §§ 1 to 9, as amended

Every railroad company shall be liable for damages for all injuries whether resulting in death or not, sustained by any of its employees, subject to the provisions hereinafter contained regarding contributory negligence on the part of the injured employee.

1. When such injury is caused by a defect in any locomotive, engine, car, rail, track, roadbed, machinery, or appliance used by its employees in and about the business of their employment.

2. When such injury shall have been sustained by any officer, agent, or employee of such company, while engaged in the line of his duty as such, and which such injury shall have been caused in whole or in greater part by the negligence of any other officer, agent, or employee of such company, in the discharge of, or by reason of failure to discharge his duties as such.

3. In every action to recover for such injury the court shall submit to the jury the following questions: First, whether the company, or any officer, agent, or employee other than the person injured was guilty of negligence directly contributing to the injury; second, if that question is an-

by ch. 245, Acts 1907. Also § 1809b, and Acts 1905, ch. 348, § 5.

Under the Wisconsin statute, a railroad company is liable for an injury to an employee caused by the negligence of another employee, while the injured person was in the performance of his duty. Gumz v. Chicago, etc., R. Co., 52 Wis. 672; 10 N. W. Rep. 11; 5 Am. & Eng. R. Cas. 583.

Nor is this statute (1875) unconstitutional, because it does not impose a similar liability upon all other employers. Ditberner v. Chicago, etc., R. Co., 47 Wis. 138; 2 N. W. Rep. 69.

The Wisconsin statute (R. S. 1898, § 1816) does not apply to a private railroad, operated in connection with a logging and lumber business, but applies only to railroads engaged in a general railroad business. McKivergan v. Alexander, etc., Lumber Co., 102 N. W. Rep. 332.

An employee working on a warehouse and injured, while standing by the warehouse, near a railroad track, by a moving train, was held to be subjected to the hazard of the operation of the railroad and within the protection of the statute, in Bain v. Northern Pacific Ry. Co., 98 N. W. Rep. 241.

swered in the affirmative, whether the person injured was guilty of any negligence which contributed directly to the injury; third, if that question is answered in the affirmative, whether the negligence of the party so injured was slighter or greater as a contributing cause to the injury than that of the company, or any officer, agent, or employee other than the person injured; and such other questions as may be necessary.

4. In all cases where the jury shall find that the negligence of the company, or any officer, agent, or employee of such company, was greater than the negligence of the employee so injured, and contributing in a greater degree to such injury, then the plaintiff shall be entitled to recover, and the negligence, if any, of the employee so injured shall be no bar to such recovery.

5. In all cases under this act the question of negligence and contributory negligence shall be for the jury.

6. No contract or receipts between any employee and a railroad company; no rule or regulation promulgated or adopted by such company, and no contract, rule, or regulation in regard to any notice to be given by such employee shall exempt such corporation from the full liability imposed by this act.

7. The phrase "railroad company," as used in this act, shall be taken to embrace any company, association, corporation, or person managing, maintaining, operating, or in possession of a railroad in whole or in part within this State, whether as owner, contractor, lessee, mortgagee, trustee, assignee, or receiver.

8. In any action brought in the courts of this State by a resident thereof, or the representative of a deceased resident, to recover damages in accordance with this act, where the employee of any railroad company owning or operating a railroad extending into or through this State and into or through any other State or States shall have received his injuries in

any other State where such railroad is owned or operated, and the contract of employment shall have been made in this State, it shall not be competent for such railroad company to plead or prove the decisions or statutes of the State where such person shall have been injured as a defense to the action brought in this State.

But the provisions of this statute do not apply to employees working in shops or offices.

There is also a section requiring all railroad companies to block all frogs and guard rails in their tracks and a failure to comply with the law, in this respect, is a ground for an action for damages, in all cases where injury to an employee results from such failure, even though the failure or violation results from the negligence of some other agent or employee.

Railroad companies are also required to erect telltales to the approaches of bridges over railroad tracks and an employee does not assume the risk by continuing in the service with notice of the absence of such telltales.

§ 550. **The constitution of Wyoming.**— By organic law, in Wyoming, [15] it is provided that no law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person. Any contract or agreement with any employee, waiving any right to recover damages, for causing the death or injury of any employee, is made void and of no effect.

It is also made unlawful for any company or corporation to require of its employees as a condition of their employment, or otherwise, a contract or agreement whereby such employer shall be released or discharged from liability on account of personal injuries received by its employees, while in the service of the employer, by reason of the negligence of the employer or the agents or employees thereof and all such contracts are made null and void.

[15] Constitution Wyoming, art. 10, § 4; art. 19, § 1.

KF 2375 W58 1

Author: White, Edward Joseph

Vol.

Title: The law of personal injuries on railroads.

Copy

Date	Borrower's Name